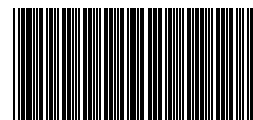




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Statement of Facts and Contentions

COURT DETAILS

Court	Land and Environment Court of NSW
Division	Class 1
Registry	Land and Environment Court Sydney
Case number	2025/00232954

TITLE OF PROCEEDINGS

First Applicant	Castle 38 Pty Ltd ABN 56622160196
First Respondent	Ku-ring-gai Council ABN 86408856411

FILING DETAILS

Filed for	Ku-ring-gai Council, Respondent 1
Legal representative	CATHERINE LOUISE MORTON
Legal representative reference	
Telephone	02 9373 3555

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Statement of Facts and Contentions (Council's SOFAC.pdf)

[attach.]

STATEMENT OF FACTS AND CONTENTIONS

COURT DETAILS

Court	Land and Environment Court of New South Wales
Class	1
Case number	2025/232954

TITLE OF PROCEEDINGS

Applicant	CASTLE 38 PTY LTD
Respondent	KU-RING-GAI COUNCIL

FILING DETAILS

Filed for	Ku-ring-gai Council, Respondent
Legal representative	Catherine Morton, Sparke Helmore Lawyers
Legal representative reference	KUR955-00222
Contact name and telephone	Catherine Morton, (02) 9260 1447
Contact email	Catherine.Morton@sparke.com.au

PART A – FACTS

The Respondent (**Council**) says that the facts relevant to the determination of development application number eDA0182/25 (**Development Application**) are as follows:

THE PROPOSAL

1. This is an appeal against the deemed refusal of the Development Application which seeks development consent for the demolition of existing structures, amalgamation of lots and construction of a residential flat building with basement parking and associated works at 5-7 Middle Harbour Road, Lindfield (the **Site**).
2. The Development Application, seeks consent for the following (**Proposed Development**):
 - a) lot amalgamation
 - i. consolidate Lot 4 and 5 in DP 4665
 - ii. total site area: 2,600m²
 - b) demolition works, including:
 - i. existing residential dwellings and ancillary structures as shown on the demolition plan.
 - ii. 16 trees including 1 street tree
 - c) construction of a residential flat building over basement, as detailed below:
 - i. 61 units comprising of:
 - 1 bedroom: 2 units
 - 2 bedrooms: 53 units
 - 3 bedrooms: 6 units

- Affordable housing: 12.75% (GFA) as affordable for 15 years and .12% (GFA) as affordable in perpetuity.
- ii. building height and form:
 - 1 building of 8 storeys
 - 3 levels of basement parking
 - flat roof
 - materials and finishes consist of glass, facebrick, masonry screen
- iii. car spaces:
 - 81 x Residents (includes 11 accessible)
 - 11 x Visitors
 - 68 bicycles (including 7 for visitors)
- iv. plant located on the lower ground/ uppermost basement level and roof
- v. garbage rooms, storage for resident use, services and communal gym are located within the basement levels
- vi. access and parking
 - carparking located in basement levels 1, 2 and lower ground level
 - pedestrian access is from the Middle Harbour Road frontage
 - a 5.6 – 6m wide two-way driveway to Middle Harbour Road
 - loading bay adjoining the waste collection point on the lower ground level
- d) landscaping works
 - i. communal open space is located within the north-eastern and south-western setbacks
 - ii. removal of 16 trees
 - iii. landscape works include built landscape structures and planting.
- e) stormwater works
 - i. The stormwater plans show all roof areas to be collected and conveyed to a detention and retention tank of 106.2m³ and 60kL respectively located within the building envelope, on two separate levels. The overflow from the detention system is directed to the boundary pit prior to connection into kerb and gutter in Middle Harbour Road.

THE SITE

3. The Site is legally described as the following –
 - (a) Lot 4 DP 4665, 5 Middle Harbour Road, Lindfield NSW 2070
 - (b) Lot 5 in DP 4665, 7 Middle Harbour Road, Lindfield NSW 2070
4. The Site, will have a combined area of 2,600m² (based on the current survey)
5. The Site is a rectangular shaped allotment with a north-western frontage of 36.58m to Middle Harbour Road; a south-eastern (rear) boundary of 36.58m; a north-eastern (side) boundary of 71.04m; and a south-western (side) boundary of 71.12m. The Site has a total area of 2,600m².
6. The Site has a topographical slope of approximately 5m from the north-western (front) boundary to the south-western (rear) boundary. Dense vegetation lines the perimeters of the Site, with a large portion within the rear setback.

7. No. 5 Middle Harbour Road currently accommodates a 1 and 2 storey cement rendered dwelling house with a tiled roof. The rear yard accommodates an inground swimming pool and a detached studio.
8. No. 7 Middle Harbour Road currently accommodates a two-storey brick dwelling house with a slate roof. An inground swimming pool is located in the rear yard.
9. Vehicular and pedestrian access to each dwelling is via Middle Harbour Road.
10. An aerial image of the Site is provided in **Figure 1** below.

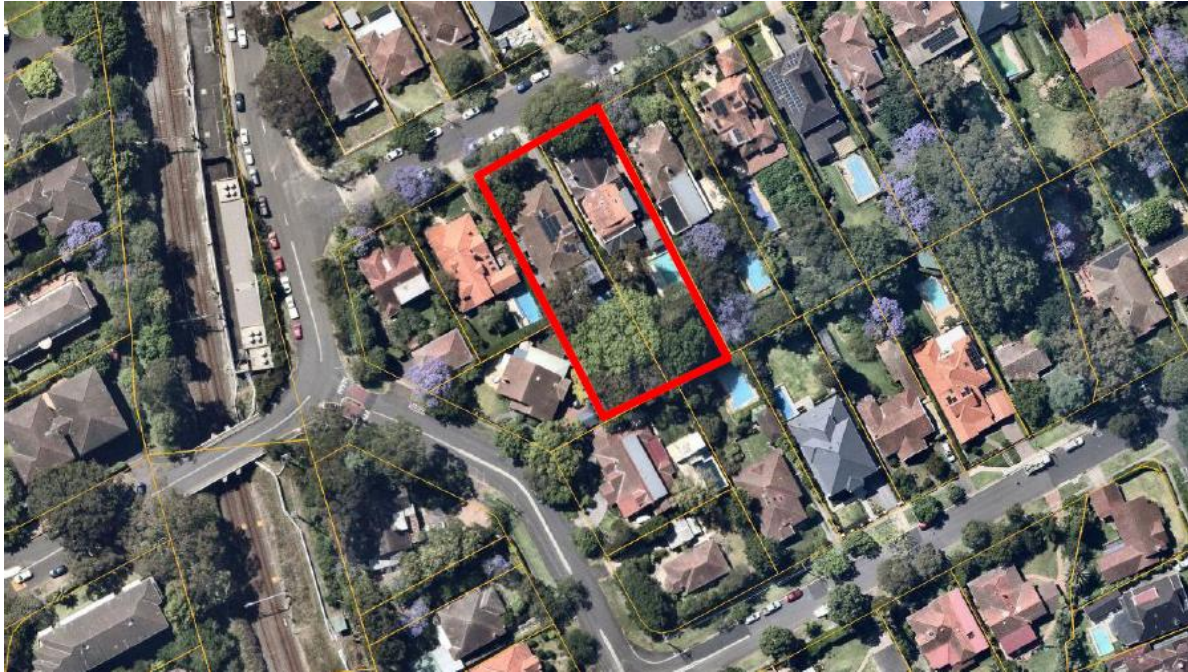


Figure 1 – Aerial Map of the Site highlighted and surrounding development

11. The Site is zoned R2 Low Density Residential under the *Ku-ring-gai Local Environmental Plan 2015 (KLEP 2015)*. The Site is identified on the “Transport Orientated Development Sites Map as per *Ku-ring-gai Local Environmental Plan (Housing) (Map Amendment No.1)* (see **Figure 2**) and residential flat buildings are permissible with development consent pursuant to s154 of *State Environmental Planning Policy (Housing) 2021 (SEPP Housing)*.

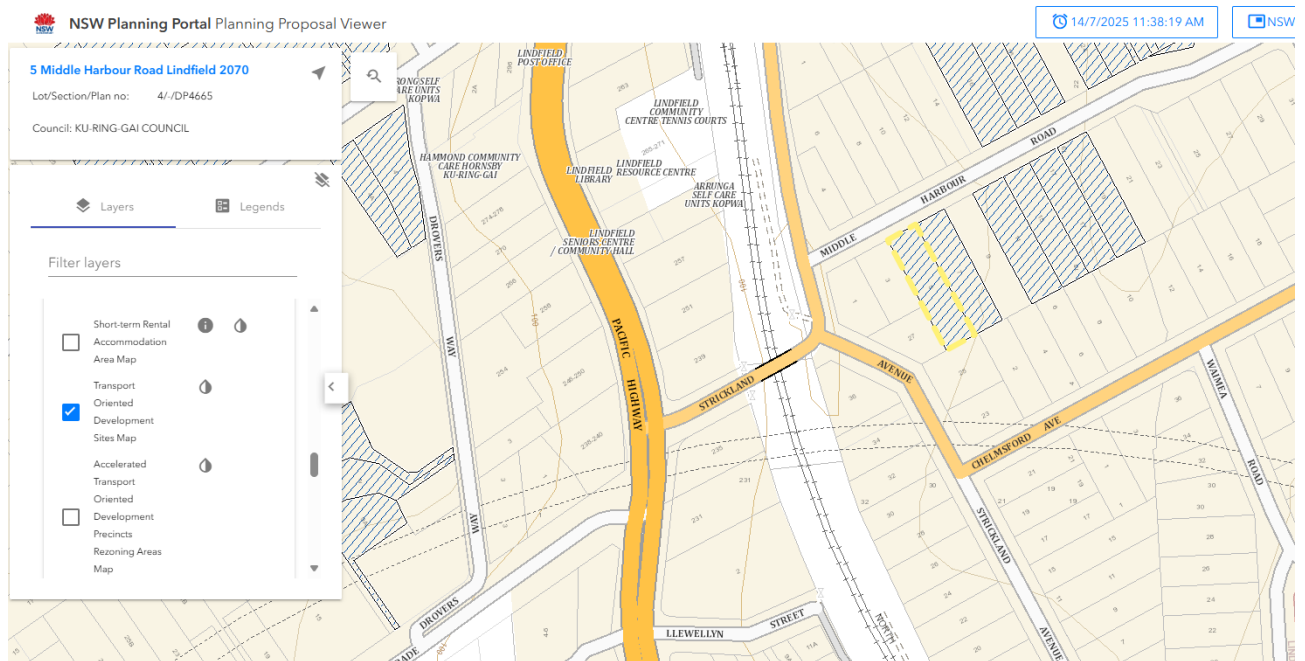


Figure 2 – Extract from Transport Orientated Development Sites Map (part of the Site is represented by the yellow dashed line. The balance of the Site is also hatched).

12. An extract of the Council's Land Zoning Map showing the zoning of the Site and immediate surrounds is provided at **Figure 3** below.

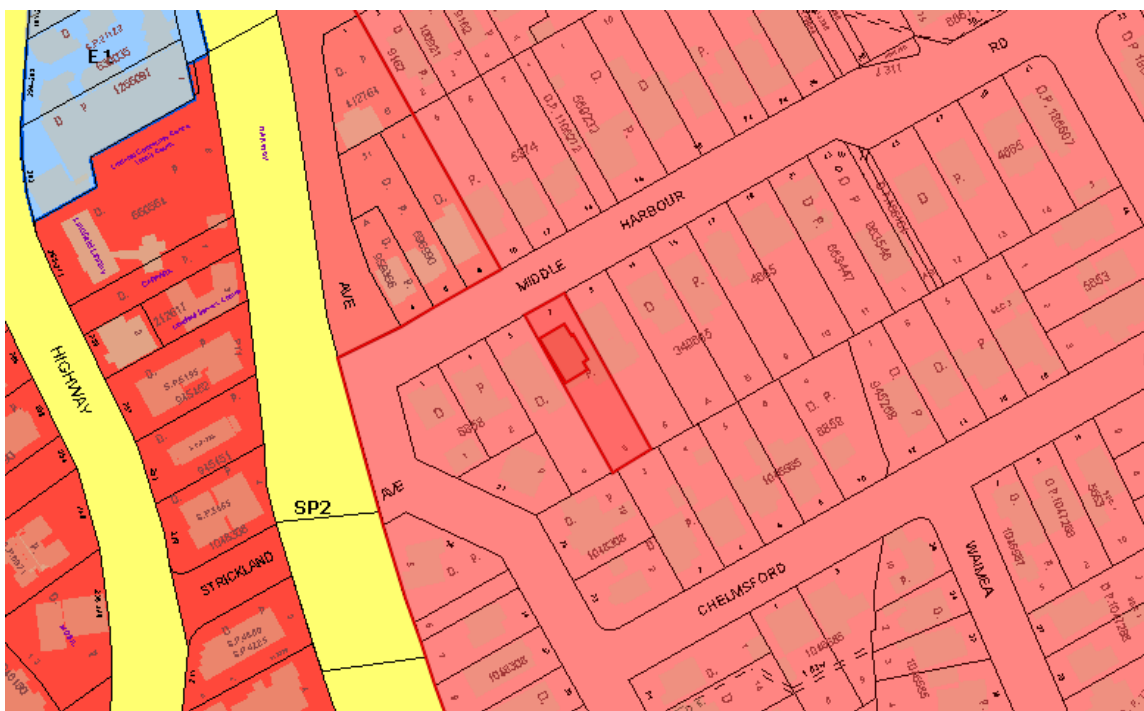


Figure 3 – Extract from the land use zoning map (Source: KLEP 2015)

THE LOCALITY

13. Surrounding development comprises of single and two storey residential dwelling houses on landscaped allotments. The surrounding zoning is predominantly R2 Low Density Residential. R3 Medium Density zoning is located to the north of the Site, SP2 Infrastructure and R4 High Density Residential zoned properties are located towards the west of the Site.
14. No. 9 Middle Harbour Road is a local heritage item known as “Laurabada”, located to the

north-east of the Site. The heritage item is a single storey detached dwelling house with a tiled roof with vehicular access provided along the eastern boundary as accessed from Middle Harbour Road.

15. To the side (south-western) boundary is No. 3 Middle Harbour Road, which contains a single storey detached brick and tile dwelling house with manicured gardens. No. 27 Strickland Avenue is also located to the side (south-western) boundary, which accommodates a single storey detached dwelling.
16. No. 25 Strickland Avenue and No. 2 Chelmsford Avenue are located adjacent to the rear (south-eastern) boundary. Both properties accommodate a single storey brick and tiled dwelling house, located within landscaped gardens.
17. Development located to the north-west of the Site consists of low density, single storey dwelling houses with vehicular access to Middle Harbour Road.
18. On 19 June 2025, the Department of Planning, Housing and Infrastructure (**DPHI**) published updated maps under the *Ku-ring-gai Local Environmental Plan (Housing) (Map Amendment No 1)* (see **Figure 2**). These maps identify the locations where local development applications and state significant development applications have been 'saved' and the TOD controls still apply, see **Figure 2** above.
19. Council's adopted TOD Alternative Planning Controls (yet to be gazetted by the DPHI) would affect the Site (if it had not been 'saved') and surrounding sites as follows:
 - Building height: 18.5 metres (a decrease from the current maximum TOD building height of 22 metres)
 - Floor Space Ratio (FSR): 1.3:1 (a decrease from the current TOD FSR of 2:5:1)
 - Zoning: R4 High Density Residential (an up zone from the current R2 Low Density Residential)

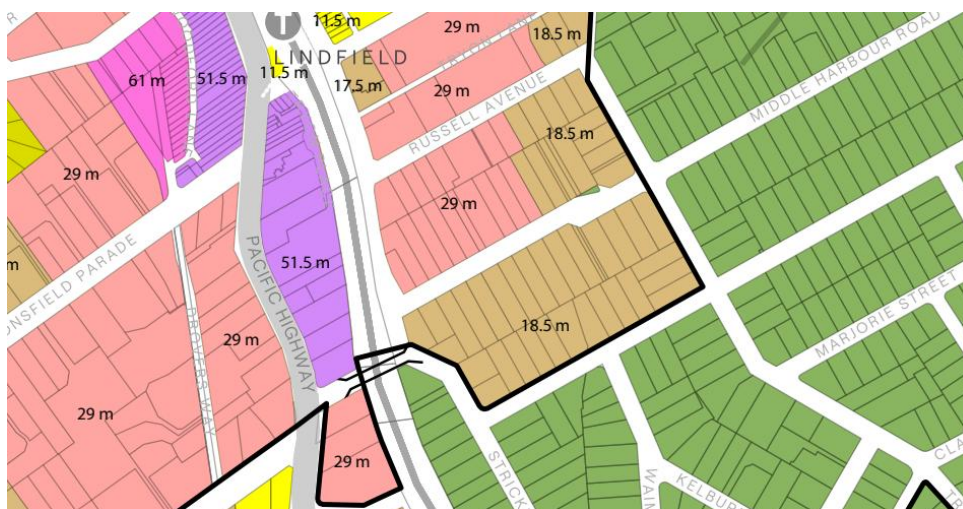


Figure 4: Extract of adopted TOD alternative building height map

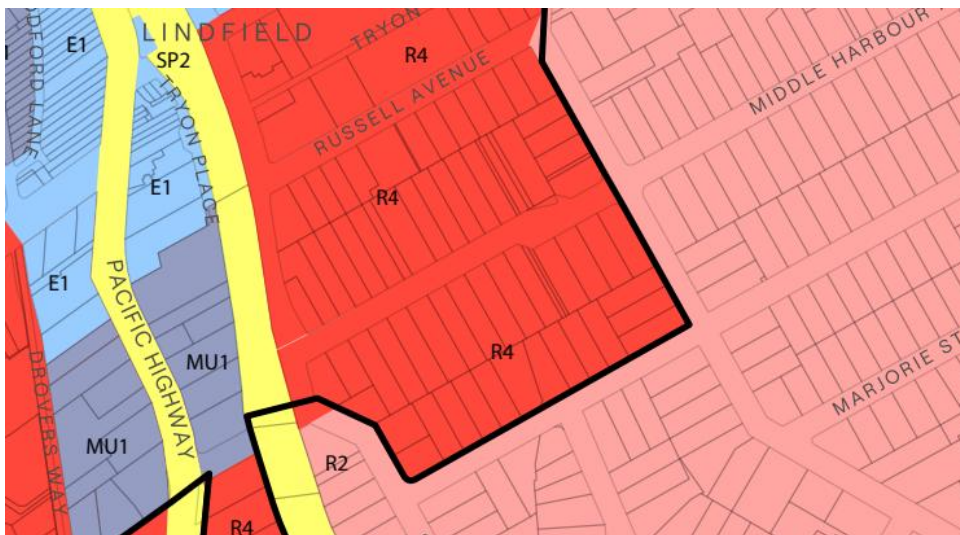


Figure 5: Extract of adopted TOD alternative zoning map

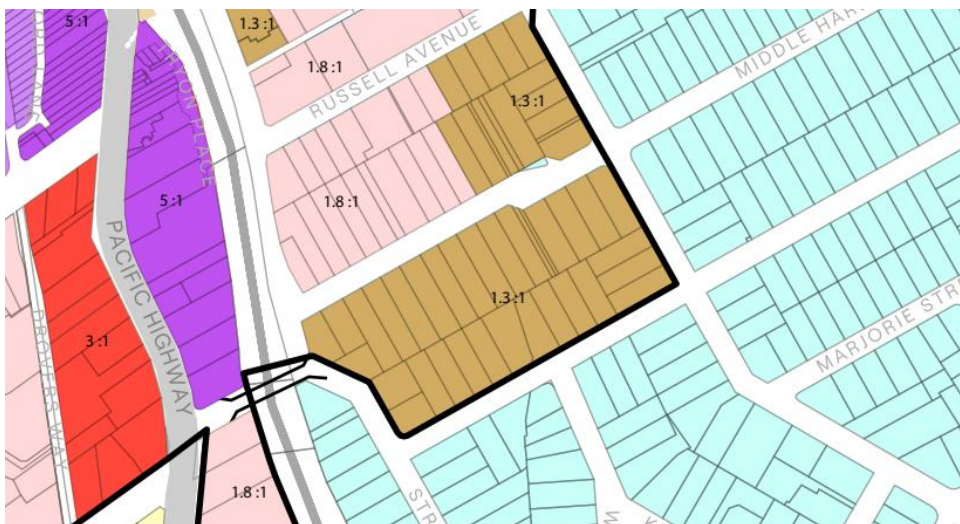


Figure 6: Extract of adopted TOD alternative FSR map

THE STATUTORY CONTROLS

20. The statutory controls and policies that apply to the assessment of the Development Application are as follows:
 - (a) *Environmental Planning and Assessment Act 1979 (EPA Act)*
 - (b) *Environmental Planning and Assessment Regulation 2021 (EPA Regulation)*
 - (c) *State Environmental Planning Policy (Housing) 2021 (SEPP Housing)*
 - (d) *State Environmental Planning Policy (Biodiversity and Conservation) 2021*
 - (e) *State Environmental Planning Policy (Sustainable Buildings) 2022*
 - (f) *State Environmental Planning Policy (Resilience and Hazards) 2021*
 - (g) *Ku-ring-gai Local Environmental Plan 2015 (KLEP 2015)*
 - (h) *Ku-ring-gai Development Control Plan (KDCP)*
 - (i) *Ku-ring-gai Community Participation Plan*
 - (j) *Apartment Design Guide*, published by NSW Department of Planning and Environment dated July 2015 (**ADG**)
 - (k) *Ku-ring-gai Contributions Plan 2010*
 - (l) *Housing Productivity Contribution Ministerial Planning Order*
 - (m) *Ku-ring-gai Council TOD Alternative Planning Controls*

ACTIONS OF THE RESPONDENT CONSENT AUTHORITY

21. The Development Application was accepted by Council and lodged on 24 April 2025 (PAN-526284).
22. The Development Application was notified in accordance with the Ku-ring-gai Community Participation Plan for a period of 30 days, between 15 May 2025 and 16 June 2025. In response 27 submissions were received. The objections to the Proposed Development raised the following key issues:
 - a) Proposal is not in keeping with the character of the low-density local area
 - b) Excessive bulk and scale
 - c) Excessive height, inconsistent with the surrounding low-density dwellings
 - d) Inadequate articulation
 - e) Height and setbacks result in adverse privacy and amenity impacts to the heritage item at No.
 - f) The proposed development and the SSD at No. 11-19 Middle Harbour Road will result in No. 9 Middle Harbour Road becoming an isolated site
 - g) Setback non-compliances
 - h) Solar access impacts to adjoining dwellings
 - i) Applicant states that the proposal reflects the future character of the area, which is contrary to the community's desire for lower density development
 - j) Existing water and sewerage systems may lack the capacity to accommodate the anticipated population increase
 - k) Removal of 16 trees result in adverse streetscape impacts, loss of canopy, shade, biodiversity and habitat loss
 - l) Excessive hardstand/ site coverage, inconsistent with the landscape setting of Lindfield
 - m) Exacerbation of existing traffic and parking issues and may result in safety issues
 - n) Inconsistent with the provisions of the ADG, KLEP 2015, KDCP and the Ku-ring-gai Preferred Scenario
 - o) Adverse visual and acoustic privacy impacts to surrounding development
 - p) Noise and vibration impact during construction phase
 - q) The development fails as a net zero building
 - r) Adverse social impact to surrounding residents
 - s) Increase in non-permeable surface will have cumulative impact on existing stormwater systems
 - t) Additional stormwater into the drains at Trafalgar Avenue may result in flooding at the roundabout and damage to Gordon Creek and its Riparian zone
 - u) Location of basement footprint to the side (south-western) does not allow deep soil planting within setback
 - v) Affordable housing units do not have allocated car parking spaces
 - w) Several proposed apartments do not satisfy the minimum floor area and private open space requirements of the ADG
 - x) 2-tiered bicycle storage is impractical
 - y) structural impact of the basement level excavation to the swimming pool at No.2 Chelmsford Avenue
23. The deemed refusal Class 1 Appeal was filed with the Land and Environment Court (**Court**) on 18 June 2025.
24. Given that the Development Application met the regionally significant capital investment value threshold of > \$30 million, the Sydney North Planning Panel (**SNPP**) was the determining authority for the Application. The SNPP briefing was undertaken on 2 July 2025 (PPSSNH-632).

PART B - CONTENTIONS

The Respondent contends that the following facts, matters and circumstances require or should cause the Court, in exercising the functions of the consent authority, to refuse the Development Application.

B1 – CONTENTIONS THAT CONSENT MUST BE REFUSED

1. Excessive building bulk

The non-compliances with the applicable building setback controls results in the Proposed Development having excessive bulk when viewed from Middle Harbour Road and adjoining properties, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) and (iii) (KDCP) of the EPA Act.

Particulars:

- a) Control 1 ii) in Part 7A.3 in KDCP requires a street setback of 10 metres. The minimum front setback to Middle Harbour Road is 6m at the ground floor to the seventh floor, which is non-compliant. The Lower Ground Floor sprinkler tank, located below the site boundary ground line, further impacts on deep soil landscaping within the front setback.
- b) The proposed development does not comply with the side and rear setbacks detailed in Part 7A.3 of the KDCP and Part 3F.1 of the ADG:

Building height	ADG requirement (Part 3F-1)	KDCP (Part 7A.3)	Proposal (Minimum)
Basement		Basements are not to encroach into the street, side and rear setbacks	South-western (side): Basement nil setback
up to 25m (5-8 storeys)	9m (habitable rooms/balconies) 4.5m (non-habitable)	9m (5 th storey and above)	North-eastern (Side): Levels 4-7: 6m (min) South-eastern (rear): Levels 4-7: 6m (min) South-western (side): Levels 4-7: 6m (min)

- c) The non-compliances with the applicable building setback controls demonstrates that the Proposed Development has excessive building mass and bulk particularly when viewed from the adjoining properties at No. 3 and 9 Middle Harbour Road (heritage item), 25 and 27 Strickland Avenue and 2 Chelmsford Avenue. The excessive building mass and bulk are further accentuated by the blank walls, lack of deep soil and canopy trees.
- d) The proposed non-compliant front setback accentuates the built form adjoining the zone interface. The proposed setbacks and structures within the front setback do not provide adequate space between the landscaping and the building to achieve a landscape setting which is characteristic of the area, which is inconsistent with Part 7A.3, objectives 1, 2, 3, 4, 7, 9, 14 and 15 of KDCP.

- e) The proposal results in unacceptable building setbacks with the lack of meaningful deep soil landscaping around the perimeters of the site.
- f) An Aim of Chapter 5 of SEPP Housing is to deliver residential apartment buildings that “*are of an appropriate bulk and scale*”. Objectives 1, 2, 3, 4, 7, 11, 12, 13, 14, 15 and 16 of Part 7A.3 ‘Building Setbacks’ in KDCP seek to ensure that suitable setbacks are provided to enable suitable massing and spaces between buildings, protect trees and allow for deep soil landscaping including tall and medium trees to maintain the character and minimise impacts to neighbouring development, in particular:
 - i. The above referenced aim and objectives are not achieved by the Proposed Development because the building bulk is excessive and not appropriate for this Site.
 - ii. The proposed arrangement of the building form on the site is inefficient and contributes to setback non compliances. For instance, the nil setback of the basement to the side (south-western) setback fails to allow the provision of deep soil zone along the perimeter of the site.
 - iii. Building footprints of Level 5 and above are not stepped back from the lower levels to achieve a compliant setback of 9m from the side (north-eastern and south-western) and rear (south-eastern) boundaries, which contributes to excessive bulk and scale.
 - iv. The top storey does not step in 2.4m from the outer face of the floors below inconsistent with control 2 of Part 7C.8 of KDCP and objectives 1 and 4.
 - v. The large expanse of light coloured facebrick along the front portion of the side (north-eastern and south-western) and rear (south-eastern) façade add to the visual dominance of the built form, inconsistent with Part 23 of the KDCP.
 - vi. The building is not situated within a garden setting that is dominated by tall trees. The garden character is not preserved. There are insufficient building setbacks in conjunction with basement encroachments and ancillary structures within the side (north-eastern and south-western) setbacks of the Proposed Development for viable deep soil landscaping to create the required garden setting. This therefore increases the perception of building bulk when viewed from the public domain and neighbouring properties.
- g) Inadequate justification has been provided for the proposed variation to the ADG and KDCP building separation requirements.
- h) The basement wall along the side (south-western) boundary is not supported. The car parking needs to be located wholly under the building footprint to achieve a more acceptable long-term deep soil and landscape interface character.
- i) The Proposed Development fails to achieve a bulk that is appropriate to the existing or future character of Middle Harbour Road. The bulk is excessive, and this is evident by the building setback non-compliances and building depth resulting in compromised internal amenity. This bulk reduces opportunities for the establishment of an appropriate garden setting which is inconsistent with the context and character of Middle Harbour Road. The Proposed Development is therefore inconsistent with design principles 1, 2, 5 and 6 in Schedule 9 (Design principles for residential apartment development) of SEPP Housing.

2. Adverse heritage impacts

The proposed development is a dominant structure with proportions and materials which adversely impact on the heritage significance of the adjoining heritage item and C32 Heritage Conservation

Area within the vicinity of the site, a matter for consideration under section 4.15(1)(a)(i) (KLEP 2025) and (iii) (KDCP) of the EPA Act.

Particulars:

- a) The Site adjoins the heritage listed item at No. 9 Middle Harbour Road, listed under Schedule 5 of the KLEP 2015 and is within proximity of the C32 Heritage Conservation Area.
- b) The Proposed Development is 8 storeys i.e. 27.4m in height. The Proposed Development will dominate the single storey heritage item at No. 9 Middle Harbour Road and how it presents within the streetscape. The proposal is inconsistent with Objective 3 of Part 19F.1 of the KDCP which seeks to *ensure that the scale of new development does not dominate, detract from or compete with Heritage Item in the vicinity.*
- c) The C32 Heritage Conservation Area is approximately 38m from the development. The uppermost levels of the Proposed Development will be visibly intrusive elements on the horizon when viewed from the Heritage Conservation Area. The proposal is inconsistent with Objectives 5 and 7 of Part 19F.1 of the KDCP which seeks to *ensure that new development does not visually dominant the adjoining heritage item and protect significant views and vistas to and from the Heritage Item or HCA.*
- d) The design of the Proposed Development utilises materials, colours, fenestration patterns and proportions which are uncharacteristic in the locality and significantly different from the heritage item and its historic architecture. The proposal is inconsistent with the following Objectives of Part 19F.1 of the KDCP:
 - I. Objective 1 – *consider the impact on the historic curtilage and setting of the Heritage Item or HCA and related heritage features such as views.*
 - II. Objective 6 – *retain the significance of Heritage Item and Heritage Conservation Area in its setting.*
 - III. Objective 7 - *protect significant views and vistas to and from the Heritage Item.*
- e) The Proposed Development results in adverse bulk and scale impacts due to insufficient setbacks and separation to the Heritage Item, which is contrary to Objectives 1 and 2 of Part 19F.2 which aims to *respect and contribute to the established streetscape patterns through careful siting of new buildings and provide an interface of scale and bulk to preserve the amenity to the adjacent Heritage Item.* Details are as follows:
 - i. The non-compliant 6m front setback of the Proposed Development is inconsistent with the front setback pattern of the street and forward of the Heritage Item. The front setback dominates the streetscape presentation of the Heritage Item.
 - ii. The north-eastern façade, which addresses the Heritage Item, has not been stepped back above an 8m height from the natural ground level, contrary to Control 1, Part 19F.2 of the KDCP.
 - iii. The Proposed Development does not have a 12m building separation from the Heritage Item; has a façade height greater than 8m from existing ground level; and has not been stepped back an additional 6m from the Heritage Item, as required by Control 3, Part 19F.2 of the KDCP.

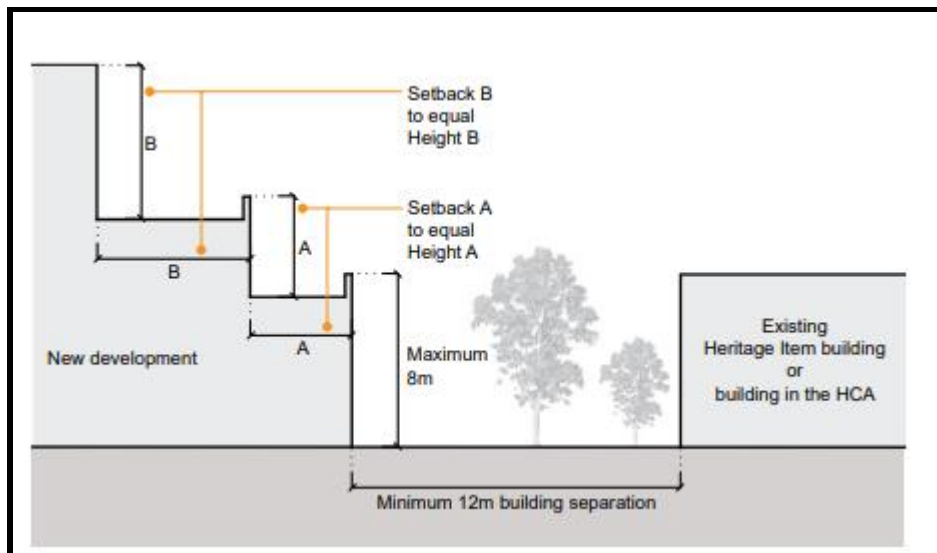


Figure 9: Extract from Part 19D.2-1 of the KDCP “Setbacks and building separation”

- f) The side (north-eastern) communal open space and landscape requires further consideration to better manage the scale differential and streetscape character for Middle Harbour Road.
- g) The proposed amalgamation of Lots 4 and 5 of the historic DP 4665 (registered in 1906) is inconsistent with the streetscape context and historical subdivisions of the locality. The amalgamation is inconsistent with Objective 1 of Part 19F.1 of the KDCP which aims to *consider the impact on the historic curtilage and setting of the Heritage Item or HCA and related views* and Objective 7.

3. The proposal is inconsistent with the desired future character

SEPP Housing Section 20(3) states that ‘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... for precincts undergoing transition, the desired future character of the area’, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) of the EPA Act.

Particulars:

- a) The TOD alternative planning controls which have been adopted by Council and forwarded to the DPHI for endorsement envisage a future character similar to the existing character which permits a maximum building height of 18.5m and FSR of 1.3:1. Currently, under SEPP Housing, a TOD maximum building height for a residential flat building of 22m and TOD FSR for a residential flat building of 2.5:1 are permitted on the Site.
- b) The future context analysis prepared by Cortese (**Figure 8**) describes the proposed development in the context of existing and future development. Future developments are extrapolated based on the TOD controls pursuant to SEPP Housing which have been turned off.



Figure 8: Extract of 'Future context in Lindfield' prepared by the applicant based on TOD policies (not the proposed TOD Alternative Scheme).

- c) The proposal fails to achieve consistency with the desired future character because:
- i) The site is surrounded by R4 High Density, R2 low density zones and a heritage conservation area. Under the proposed TOD Alternative Scheme, sites located approximately 75m to the south-east retain their R2 zoning. The adjoining heritage item at No. 9 Middle Harbour Road and the C32 Heritage Conservation Area to the south-west of the development site remain as existing.
 - ii) The Statement of Significance for C32 Heritage Conservation Area HCA includes: *"The area has aesthetic significance for the highly intact and quality Federation and inter-war houses, with some examples of mid to late twentieth century development. Architectural styles present from the Federation period include Federation and transitional Bungalows, Queen Anne, and Arts and Crafts, and present from the Inter-war period mostly Californian Bungalows but also Old English, Art Deco and Spanish Mission."* The Heritage Item is an Interwar Bungalow-style cottage of distinctive aesthetics and exceptional representative of its style and date of construction. Therefore, the Item makes a substantially important contribution of the aesthetic values of the streetscape.
 - iii) While a higher-density and larger-scale development is permitted on the Site via the TOD, due to its interface with the adjoining Heritage Item and proximity to the HCA/ R2 Low Density Residential zoned land, the maximum potential indicated by the applicable development standards may not be achievable without increased building separation, setbacks and deep soil landscaping.
 - iv) The proposed 8 storey residential flat building, which has insufficient landscaping and setbacks would be juxtaposed with the existing residential character and the future desired character as espoused by the TOD Alternative Scheme.

- v) Deep soil landscaping is significantly less than the character of existing and future development in the locality with limited landscaping and insufficient space for canopy tree planting in scale with the development.

4. Insufficient deep soil

The proposal fails to satisfy the relevant deep soil Objectives under the ADG Objective 3E-1 and KDCP Parts 7A.6, 19C.3 and 19F.3, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) and (iii) (KDCP) of the EPA Act.

Particulars:

- a) The Proposed Development provides limited deep soil to retain existing significant trees to the frontage and to the side (south-western) boundary to allow for additional tree and shrub planting. An increased front setback will allow for retention of significant trees, Trees 8, 12, 12a and 13.
- b) Insufficient deep soil of 26% (677.5m²), with a minimum dimension of 2m is provided, contrary to Control 1, Part 7A.6 of the KDCP which requires a minimum of 50% (1300m²) deep soil.
- c) Insufficient deep soil zones are provided to all boundaries to allow for tree and screen planting, contrary to Control 3, Part 7A.6 of the KDCP.
- d) The basement driveway details a nil setback to the side (south-western) boundary, which fails to allow the provision of deep soil zones on the subject boundary. A narrow planter proposed between the communal open space and south-western boundary will not provide a sufficient landscape buffer to soften the built form of the Proposed Development and provide landscape amenity. The proposal is contrary to Controls 4, 8 and 9, Part 7A.6 of the KDCP.

5. Unacceptable tree impacts

The proposal results in unacceptable impacts on existing trees, contrary to Parts 7A.1, 7A.6 and 13 of the KDCP and AS4970-2009, a matter for consideration under section 4.15(1)(a)(iii) (KDCP) of the EPA Act.

Particulars:

Amended architectural, landscape and stormwater plans are required to address the following unacceptable impacts on existing trees:

- a) The removal of Tree 8 Liquidambar styraciflua (Liquidambar) is not acceptable. The tree can be retained with an increased front setback.
- b) Removal of Tree 12 Melaleuca quinquenervia (Broad Leafed paperbark), Tree 13 Melia azedarach (White Cedar) and impact to Tree 12a Trachycarpus fortunei (Chinese Windmill Palm) is not acceptable. The trees can be retained with the basement, driveway and south-western pedestrian path being set back from the side (south-western) boundary. The driveway location within the layout of the existing driveway of No. 5 Middle Harbour Road

could potentially allow for the retention of Trees 9, 10 and 11.

- c) The major encroachment from excavation works for the driveway and pedestrian path, 200mm from Tree 12A *Trachycarpus fortunei* (Chinese Windmill Palm) within the neighbouring property, is not acceptable. A greater setback from boundary and retention of existing levels is required to retain Tree 12A.
- d) Clearly indicate front fence as pier and balustrade only to reduce impact on Tree 3 and 4 *Lophostemon confertus* (Brush Box) to verge and trees to be retained. Piers to be located outside of Structural Root Zones (SRZ) of trees to be retained.
- e) A pruning plan is to be provided for Tree 21 *Waterhousia floribunda* (Weeping Lillypilly) to the rear as the Arborist report states 15-20% canopy pruning is required.
- f) The stormwater line to rear is to be located along line of the building/ basement to reduce the major encroachment on Trees 20 *Sapium sebiferum* (Chinese Tallow Tree) and 21 *Waterhousia floribunda* (Weeping Lillypilly) and to allow for adequate space for new tree planting.
- g) The stormwater line to the side (north-eastern) boundary is a major encroachment on Tree 6 and 7 *Jacaranda mimosifolia* (Jacaranda) which is not acceptable. The line and pits are to be located closer to the building, outside of the SRZ.

6. Inadequate site analysis.

The site analysis has not been prepared in accordance with Part 3A of the ADG or Part 2.1 of KDCP, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) and (iii) (KDCP) of the EPA Act.

Particulars:

- a) The site analysis fails to encourage good site planning informed by an understanding of the sites context, fails to adequately consider the amenity of users of the site and adjoining sites and fails to adequately ensure that the design response is well founded and responsive to the context of the site (KDCP Part 2.1, Objectives 2, 5, 7 and 8).
- b) The proposed site layout fails to provide a clear and appropriate design strategy and arrangement of building mass in response to opportunities and constraints identified in the site analysis. Adequate drawings have not been provided to demonstrate how the proposed buildings and site layout have applied and responded to the site analysis (KDCP Part 7A.2, Control 1 and 2 and Objectives 1, 3, 6, 7 8)
 - I. The site analysis does not include an understanding of connected natural systems – water and canopy with topography
 - II. The proposal does not include studies of the streetscape including setbacks and deep soil more widely within the local context.
 - III. The site analysis is silent on the wider streetscape implications expected to demonstrate a sensitive design approach and heritage response.
 - IV. The site analysis is required to justify the proposed variations to setbacks generally and with regards to the adjoining heritage item.

- c) For the reasons set out above, the proposal fails to identify and respond to the attributes and constraints of the site and the surrounding area. This results in a proposed development which has a poor relationship with neighbouring sites, the heritage conservation area, and adjoining heritage item and does not satisfactorily address the perceived bulk of the proposed development and its visual impact. The proposal thus fails to satisfy aims i, ii, iii, iv, v of Part 7 of KDCP.

7. Amenity impacts

The proposal provides inadequate ventilation, natural daylight and functionality to the proposed units, contrary to the ADG, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) of the EPA Act.

Particulars:

- a) All habitable rooms or spaces including studies are to have direct access to natural daylight pursuant to part 4A of the ADG and ventilation pursuant to 4B of the ADG. Internalised studies are not supported. 8 unit types affected (units 105 and 106 typical units on levels 1 to 4).
- b) Two (2) subterranean units are indicative of excessive yield and density for the site conditions. Subterranean units are not supported in Ku-ring-gai due to long-term performance for waterproofing, and general daylight and outlook amenity. Units LG01 and LG02 should be reconsidered to be consistent with KDCP Part 7C.3 objectives 1 and 5 and controls 4, 5, 6, 7, 9 and 10.
- c) Further solar modelling detail is required to determine overshadowing impacts to adjoining properties. This should include updated modelling consistent with the endorsed TOD alternative scenario and KLEP 2015.
- d) Properties to the rear (south-east) appear to be significantly impacted with implications for the resolution of the building form and ADG building separations above 4 storeys along the south-eastern interface.
- e) Some layouts are effective single aspect types that will not achieve natural cross ventilation under part 4B of the ADG. Shallow corner air flow paths improve the room's amenity but does not deliver the required minimum cross ventilation amenity through the unit. Ground Floor units G05 and G07 are single aspect and should be deleted from the performance table. G07 could become dual aspect with windows along its western wall at the kitchen to achieve an air-flow path deep into the unit these amendments will still achieve the minimum of 60% natural cross-ventilation for the development, under objective 4B-3 of the ADG.
- f) Full-height floor-to-ceiling glazing is not supported due to increased heat loads, privacy issues to-and-from habitable rooms, and the resulting ad-hoc internal privacy screening each resident will use to manage their comfort levels. External operable directional screens and potentially in combination with introducing some solid brickwork spandrels is required and inconsistent with ADG Part 4A-3. As proposed:
- I. It is unclear how the glazing can be maintained (cleaned)

- II. the proposed screening or screening strategy does not extend to the building more generally, and
- III. there is inadequate screening evident in the architectural design package.
- IV. Use of darker tinted glazing is inconsistent with achieving an appropriate streetscape and site character and impacts on resident amenity. The glazing type has not been included on BASIX stamped plans or NatHERs certificates.

- g) Lower level balustrading could include metal blades that provide some localised directional views to mitigate direct overlooking to the neighbouring properties and the street, noting also the heritage item and its rear garden.
- h) A window to kitchen for Unit G07 is required.

8. Solar access

Insufficient solar amenity has been demonstrated, contrary to part 7C.2 KDCP, a matter for consideration under the EPA Act.

Particulars:

- a) Solar access amenity for both communal open spaces (COS) need to demonstrate 50% of the area(s) receive a minimum of 2hrs solar amenity, pursuant to control 8 of part 7C.2 of the KDCP. Views-from-the-sun (sun-eye) modelling of the site needs to include future permitted development on neighbouring sites including those to the north, which may impact the proposed ground level COS locations. The rooftop could be considered for provision of high amenity spaces for residents and visitors – to be well-considered and designed for solar access and protection, gatherings and quieter spaces if needed.
- b) 3-d sun-eye (views-from-the-sun) is required. The modelling is to include indicative massing for permitted compliant development on adjacent properties noting surrounding properties to the north-east, south-east, south-west and north-west. It is foreseeable that this modelling may result in a change to claimed solar access amenity. This may also result in further design consideration to avoid and/or mitigate over-shadowing impacts for other properties and consider higher quality rooftop COS should any deficits be significant.

9. Unacceptable privacy impacts to the adjoining properties

The proposed development will result in unreasonable privacy impacts for the adjoining development, contrary to part 3F of the ADG and part 23.8 of KDCP, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) and (iii) (KDCP) of the EPA Act.

Particulars:

- i) Full-height floor-to-ceiling glazing results in unsatisfactory privacy impacts to-and-from habitable rooms towards No. 3 and 9 Middle Harbour Road and the north-west facing rooms of the development site addressing Middle Harbour Road.
- j) Inadequate setbacks and the lack of deep soil landscaping and tall canopy trees around the perimeter of the site results in no landscape screening of the built form contrary to objective 1 and control 1 of Part 23.8 of KDCP.

10. Inadequate building depth

Excessive building depth is proposed, contrary to Part 4B-1 and Part 4D of the ADG, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) of the EPA Act.

Particulars:

- a) Internal layouts resulting in rooms/ habitable spaces including studies of 8 units (units 105, 106, 205, 206, 305, 306, 405 and 406) with no direct access to natural daylight or ventilation are indicative of excessive building depth and/ or internal layouts inadequately addressing the depth.

11. Inadequate floor-to-ceiling height

Inadequate floor-to-ceiling height is proposed, contrary to the requirements of *Design and Building Practitioners Act 2020* (NSW) (**DPB Act**), 2025 amendments to the National Construction Code and the ADG, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) of the EPA Act.

Particulars:

- a) The ADG requires a minimum of 2.7m FL-CL heights for habitable rooms plus requirements for the *DPB Act* in combination with new 2025 NCC waterproofing provisions is now being reflected in industry practice accommodating 3.2m FL-FL heights as a minimum.
- b) The proposal should demonstrate compliance with known applicable legislation. The building height may need to be increased approximately 0.8m to 1m to achieve compliance.

12. Inadequate landscape design

The proposal fails to satisfy the relevant objectives and controls under Parts 7A.1, 7A.C, 7C.5, 19C.3, 19F.3, 21.1, 21.2 and 23.5 of the KDCP, a matter for consideration under section 4.15(1)(a)(iii) (KDCP) of the EPA Act.

Particulars:

- a) The existing ground level has not been maintained for 2m from any boundary. The basement and retaining walls detail a nil setback to the side (south-western) boundary, contrary to Control 5 of Part 21.1 of KDCP.
- b) Additional screen shrub planting to boundaries is required, but not provided, to supplement proposed planting of mainly trees. Groundcovers are to provide privacy and maintain landscape amenity, but also not provided.
- c) Use of exotic shrubs to the frontage (north-western) and side (north-eastern) boundary, adjacent Heritage Item, is not provided, but is to be incorporated into the planting schedule to maintain the existing landscape character.
- d) The planters adjacent to unit 503, 507, 607 and 701 will not be maintained due to lack of access as no balcony or doors are provided. These planters should be deleted.

- e) An additional internal planter wall is required adjacent to G06 and G07 to ensure planter soil is not located against unit walls.
- f) Top of wall levels are not provided for all planters to confirm that the required depths, as specified in the Landscape Soil Depth plan, are achievable and to enable an assessment as to whether the levels are suitable for retaining any planting on the upper-level units.
- g) The basement, driveway and path are not setback from the side (south-western) boundary and therefore do not allow for adequate tree and shrub planting within the setback area.
- h) Insufficient setback and screening of the communal open space is provided within the side (south-western) setback. The minimal landscaping area provided between the boundary and communal open space does not allow for adequate privacy between neighbouring properties or enhance landscape amenity. The communal open space seating area is only 1m away from unit G05 private balcony and bedroom, reducing privacy and amenity to this unit.
- i) Insufficient facilities are provided to the communal open space, with only bench seating provided.
- j) Landscape plans are to indicate BASIX requirements.
- k) The Environmental Site Management Plan is inadequate in that it fails to include tree protection fencing.

13. Privatised ground floor landscape

The privatised ground floor landscape is inconsistent with KDCP 7A.3 objective 12 and control 12, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) of the EPA Act.

Particulars:

- a) The south-western side appears to include private open space. All ground level setbacks areas should be in common ownership to best deliver long-term landscape character outcomes and achieve high quality interface conditions between properties.

14. Parking provisions and access

There is insufficient information regarding the proposed parking provisions and vehicular access.

Particulars:

- b) The parking provision should be reduced to the lower end of the range in the KDCP, given the site's proximity to transport, shops and amenities, and supplemented with at least 2 car share vehicles to provide access to additional travel options and reduce reliance on on-street parking.
- c) The 2m x 2.5m sight triangle at the access point as per AS2890.1:2009 is to be provided.
- d) Provision is to be made for an on-site loading area, noting a separate hardstand area is not permitted. The position of the loading area must not prevent access to and from the basement level car park, with at least one travel lane to be maintained at all times while loading/unloading

takes place on the driveway. At least one on-site loading space is to be provided to cater for a minimum 6.7 m long service vehicle. The loading space/s should be line marked and/or signposted as a designated loading area. This may require the entry driveway to be redesigned to accommodate the on-site loading area.

- e) The basement plans are to show that EV readiness is to be provided for all car parking spaces within the development.
- f) The visitor bicycle parking is to be relocated to near the pedestrian entry area shown on the Level 1 plan.
- g) The lifts and lobbies are to be of a suitable size such that residents can transport their bicycles between their storage area and ground/road level without using the internal car park ramps.

15. Entry sequence beyond building entries

The entry sequence beyond the entry foyer is inconsistent with Part 3C of the ADG, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) of the EPA Act.

Particulars:

- a) The internal arrangement beyond the main entry to the lift lobbies is doglegged with no clear sightlines beyond the foyer. A more direct relationship to the lift core(s) should be considered.

16. Housing diversity and apartment mix

Contrary to part 4K of the ADG and part 7C.4 of the KDCP, the proposal does not provide adequate housing diversity or apartment mix, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) and (iii) (KDCP) of the EPA Act.

Particulars:

- a) The minimum provisions under control 3 of part 7C.4 of the KDCP for 15% Platinum Level housing is to be accommodated. Proposed Platinum Level units should be representative of the unit mix being offered and their location should achieve equitable access to high amenity. Units LG 01 and LG 02 are significantly subterranean and single aspect sitting low in the site.
- b) Platinum Level clearances should be demonstrated on plans.
- c) KDCP requirement is for 100% Silver Level be demonstrated.
- d) Yield and/ or apartment require further consideration to address amenity issues.
- e) Inadequate information has been provided which identifies the affordable units or housing providers.

17. Inadequate energy efficiency

The proposal does not adequately manage thermal performance and will increase energy costs, contrary to parts 4A and 4U of the ADG and part 7C.9 of the KDCP, a matter for consideration under section 4.15(1)(a)(i) (SEPP Housing) of the EPA Act.

Particulars:

- a) External clothes drying facilities are to be provided in accordance with objective 4A-2 of the ADG and Part 7C.9 control 1 of the KDCP.
- b) Insufficient information has been provided in relation to sun shading to demonstrate compliance with ADG Objective 4U-2.
- c) Floor-to-ceiling glazing unprotected by external shading devices or deep balcony recesses is unacceptable. Introducing additional brickwork to a consistent height datum will reduce the window-to-wall ratio and reduce heat loads on the building. This is also needed to avoid the use of tinted glass types due to their impacts to streetscape character and amenity for outlook and beneficial solar amenity in cooler months.

18. Public interest

As matter for consideration under section 4.15(1)(e) of the EPA Act, the Development Application is not in the public interest and should be refused.

Particulars:

- a) The Development Application is not in the public interest as detailed within these Contentions.
- b) The cumulative adverse impacts outweigh any public or private benefits associated with the Development Application.
- c) The Development Application is also unsatisfactory pursuant to section 1.3(g) of the EPA Act, as it does not promote good design and amenity of the built environment.

B2 – CONTENTION THAT COULD BE RESOLVED BY CONDITION OF CONSENT

19. Construction Management

The Construction Traffic Management Plan is inadequate.

Particular:

- a) An inadequate construction traffic management plan (CTMP) has been submitted (required under Council's DA Guide). The CTMP is to show the construction vehicle routes for the southbound and northbound directions, largest vehicle to be used entering and exiting the site for the demolition, excavation and construction stages, stockpiles and all necessary tree protection fencing. A Works Zone will be required along the site frontage and a condition will be recommended to that effect, including the need for approval by Councils Traffic Committee and the payment of the necessary fees.

B3 - CONTENTIONS THAT THERE IS INSUFFICIENT INFORMATION TO ENABLE ASSESSMENT

20. The gross floor area of the development is unclear.

Particulars:

- a) The maximum floor space ratio is 2.5:1 as specified in Chapter 5, Section 155 (4) of SEPP Housing (Maximum building height and maximum floor space ratio). Section 16 of the SEPP Housing (Affordable housing requirements for additional floor space ratio) specifies that 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 section 16(2). In this case the maximum FSR is 3.25:1.
- b) The applicant has stated on DA21.101, Rev G, that the GFA/ FSR is 7,358m²/ 2.83:1. 12.75% In-fill Affordable housing (Chapter 2) and 2.1% Affordable Housing (Chapter 5) are nominated as being provided.
- c) A plan has not been provided which clearly delineates what portion of each floor of the building is allocated to the affordable housing component under Chapter 2 and Chapter 5 of the SEPP Housing to confirm the figures on the Site Calculation plan. GFA breakdown and supporting diagrams in accordance with the GFA definition pursuant to the Standard Instrument are required which:
 - I. Clearly delineate what portion of each floor of the building is allocated to market rate housing and affordable housing component under Chapter 2 and Chapter 5 of the SEPP Housing to confirm the figures provided on the GFA diagram.
 - II. The thickness of walls to common vertical circulation such as lifts and stairs (where not external) and the thickness of walls to risers should not be excluded from the calculation of the GFA.
 - III. Survey is to be overlayed onto the floor plans to demonstrate that areas excluded from the GFA calculation are genuine basement and where the ground floor level is 1m or more above existing ground level. For example, a portion of the side (north-eastern) of the LGF appears to exceed 1m above existing ground level.

21. The building height of the development is unclear.

Particulars:

- d) The maximum building height is 22m as specified in Chapter 5, Section 155 (2) of SEPP Housing (Maximum building height and maximum floor space ratio). Section 16 of the SEPP Housing (Affordable housing requirements for additional floor space ratio) specifies that 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 section 16(1) (the GFA/FSR calculations).
- e) The applicant has stated on DA10.101, Rev G, and DA10.101, Rev G, that with the 24.6% In-fill Affordable housing (Chapter 2) uplift, a building height of 27.4m is permissible.
- f) A plan has not been provided which clearly delineates what portion of each floor of the building is allocated to the affordable housing component under Chapter 2 and Chapter 5

of the SEPP Housing to confirm the permissible building height. GFA breakdown and supporting diagrams in accordance with the GFA definition pursuant to the Standard Instrument are required which:

- I. Clearly delineate what portion of each floor of the building is allocated to market rate housing and affordable housing component under Chapter 2 and Chapter 5 of the SEPP Housing to confirm the figures provided on the GFA diagram.
- II. The thickness of walls to common vertical circulation such as lifts and stairs (where not external) and the thickness of walls to risers should not be excluded from the calculation of the GFA.
- III. Survey is to be overlayed onto the floor plans to demonstrate that areas excluded from the GFA calculation are genuine basement and where the ground floor level is 1m or more above existing ground level. For example, a portion of the side (north-eastern) of the LGF appears to exceed 1m above existing ground level.

- g) No clause 4.6 variation request has been submitted with the Development Application if there is non-compliance with building height standards.

22. Water Management

Particulars:

- a) Detailed design and longitudinal section of the OSD and OSR chamber tank must be provided.
- b) The location of access pits for the detention and retention system must be easily accessible from outside the building.
- c) Rainwater retention and re-use will be required to meet the 50% reduction in runoff days required under Part 24C.3-4 of the KDCP. A water balance model will need to be submitted.
- d) The pump-out tank is to be designed based on the 100-year 2-hour storm as required under Part 24B.5 of the KDCP. Design details of the tank and supporting calculations must be shown on the stormwater plan.
- e) Water quality measures are to be indicated on the drawings.
- f) The DRAINS analysis file has not been submitted. Council's Engineers require the file to check model results.

23. Waste Management

Particulars:

- a) Provide a longitudinal section through the driveway and into the basement carpark to clearly demonstrate that there will be 2.6 metres clear headroom along the whole of the travel path required for the small waste collection vehicle. The section must include realistic slab/beam depths, stormwater pipelines and other overhead services.

24. BASIX Certificate

Particulars:

- a) The area of indigenous or low water use planting indicated in the BASIX Certificate has not been defined on the Landscape Plans as required by the BASIX Certificate.
- b) Additional exotic species are to be incorporated, which requires an amended BASIX Certificate.

25. Storage

Particulars:

- a) Objective 4G.1 of the ADG specifies storage requirements for apartments in excess of storage in kitchens, bathrooms and bedrooms.
- b) ADG minimum storage needs to be demonstrated in every unit. Locating storage will need to demonstrate the Council's requirement for the development to demonstrate 100% Liveable Housing Silver Level needs is satisfied.
- c) An ADG compliance diagram is required that demonstrates minimum storage within each unit is accommodated.

26. Sustainability measures

Particulars:

- a) The Proposed Development should incorporate the following measures to address its carbon footprint:
 - i. Decarbonise energy supply
 - No gas connections – stranded assets for redundant pipework has long term impacts of whole life-cycle resource wastage, which is a consideration for all new development.
 - Heat pumps for units or alternative electric means for hot water
 - Induction cooktops
 - Consider hot water storage as a type of 'battery' when heated by solar/PVs.
 - ii. Accommodate on-site power generation and storage
 - Rooftop PVs and battery storage (desirability for back-up storage as whole energy supply transitions)
 - Green roofs help cool roofs for improved PV performance
 - Potential for feed-in
 - iii. EV charging capacity
 - Ensure reasonably rapid charge capacity – or better -for all car spaces, and consider several common rapid charge 3-Phase charging points.
 - Consider allowing for bi-directional (2-way) charging of EV battery for powering the building.
 - iv. Passive design and thermal performance of the building fabric.
 - Note new BASIX performance - <https://pp.planningportal.nsw.gov.au/BASIX-standards>
 - Higher BASIX thermal performance standards will require 7 stars based on NatHERS rating system plus flags other changes.

- Visible Light Transmittance through glazing should not be excessively dark or tinted for internal amenity and external appearance reasons. Transmittance through glazing should not be reduced by more than 30% by tinting, (ie 0.7 VLT)
- Operable external shading should be provided in preference to any glazed tinting.

27. General Insufficient information

Particulars:

- A Design Response to Country has not been included that expands on the general recognition in the *DA Architectural Design Report* prepared by Cortese.
- The substation is not identified in accordance with Part 23.6 of KDCP.
- The location of the clothes drying area for the apartments have not been identified.
- All documentation must be consistent.

SIGNATURE

Signature of authorised officer of
respondent consent authority



Name of authorised officer

Shanika Kappagoda

Capacity

Executive Assessment Officer, Ku-ring-gai Council

Date of signature

22 July 2025