

AUSTRALIA / JUDGMENT

BWSLD Killara II Pty Ltd v Ku-ring-gai Council

[2026] NSWLEC 1573**COURT**

Land and Environment Court

DECIDED

03 September 2026

BEFORE

Walsh C

CASE / FILE NUMBER

2025/215807

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Land and Environment Court New South Wales

Medium Neutral Citation: BWSLD Killara II Pty Ltd v Ku-ring-gai Council [2026] NSWLEC 1573**Hearing dates:** 8-14 and 16 April 2026**Date of orders:** 03 September 2026**Decision date:** 03 September 2026**Jurisdiction:** Class 1**Before:** Walsh C**Decision:**

The Court orders that:

- (1) The appeal is dismissed.
- (2) Development application No eDA0157/25, seeking consent for a residential flat building and associated development at 23-25 Lorne Avenue, Killara is refused.
- (3) The exhibits are returned, with the exception of exhibits A, C and D which are retained.

Catchwords: APPEAL — development application — residential flat building — transport oriented development — uplift in density and floor space ratio standards associated with affordable housing provision — compliance with development standards — interpreting varying aims of State Environmental Planning Policy (Housing) 2021— interpreting circumstances where ADG prevails over local development control plan — design response to deep soil and side setback controls under development control plan — visual impact — character compatibility — balancing impacts and benefits

Legislation Cited:	Environmental Planning and Assessment Act 1979 (NSW), ss 3, 3.34, 3.41, 3.42, 3.43, 4.15, 8.7 Land and Environment Court 1979 (NSW) Ku-ring-gai Local Environmental Plan 2015, cll 6.6, Sch 5 State Environmental Planning Policy (Housing) 2021, Chs 2, 4, 5 Pt 2 Div 1 ss 3, 8, 19, 20, 142, 149, 150, 153, 159, 161 Schs 9, 10
Cases Cited:	New Century Developments Pty limited v Baulkham Hills Shire Council (2003) 127 LGERA 303 [2003] NSWLEC 154 Project Venture Developments Pty Ltd v Pittwater Council (2005) 141 LGERA 80 [2005] NSWLEC 191
Texts Cited:	Apartment Design guide, July 2015 Ku-ring-gai Development Control Plan, August 2026
Category:	Principal judgment
Parties:	BWSLD Killara II Pty Ltd (Applicant) Ku-ring-gai Council (Respondent)
Representation:	
Counsel:	I Hemmings SC (Applicant) A Stafford (Respondent)
Solicitors:	Mills Oakley (Applicant) Sparke Helmore Lawyers (Respondent)
File Number(s):	2025/215807
Publication restriction:	Nil

JUDGMENT

COMMISSIONER: This judgement relates to an appeal under s 8.7 of the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act) lodged by BWSLD Killara II Pty Ltd (applicant) against the deemed refusal by Ku-ring-gai Council (Council) of development application No eDA0157/25 (DA).

The DA seeks development consent for the demolition of existing structures, lot amalgamation and construction of a residential flat building with basement parking, and associated development, at 23-25 Lorne Avenue, Killara, legally identified as Lot 4 in DP 547371 and Lot 103 in DP 1135940 (site).

Site and surrounds

The site is occupied by two dwellings and has considerable existing vegetation. The site's frontage is to Lorne Avenue, which forms its southern boundary. The total site area is some 2150.6m². The site slopes significantly to the rear.

Lorne Avenue is well vegetated along its verges and within building setback areas, generally, with a mixture of evergreen and deciduous trees. More arises in relation to the streetscape setting later. Abutting the site on either side, and generally along this northern side of Lorne Avenue, residential flat buildings are located for the most part. The immediately adjoining residential flat buildings are substantial and of fairly recent construction. The eye of the sun diagrams (Ex C starting at DA 700) indicate these buildings are mostly five storeys, with setbacks to top levels.

Single dwellings, albeit quite large, are located along the southern side of Lorne Avenue, opposite the site and downhill to the east. The large and elevated Regimental Park is diagonally opposite to the south-west of the site. Along this southern boundary of Lorne Avenue, Regimental Park and the four dwellings east of it, including those nearest the site, are all heritage listed under Schedule 5 of Ku-ring-gai Local Environmental Plan 2015 (KLEP). These areas south of Lorne Avenue all also fall within Marian Street Heritage Conservation Area under KLEP. There is also a zoning change, with the site and land to the north of Lorne Avenue zoned R4 High Density Residential under KLEP. The residential area to the south of Lorne Avenue is zoned R2 Low Density Residential. Regimental Park is zoned SP2 Water Supply System.

A particular notable characteristic is that Killara Station is located at the eastern termination of Lorne Avenue, less than 400m from the site.

Proposal

After agreement was reached on certain matters between design-related experts, leave was granted to the applicant, on the first day of the proceedings, to amend the proposal to accord with a set of revised plans ("Revision D" plan set, marked Ex C in the proceedings). The Revision D plans indicate a total of 46 units are proposed (2 x 1 bedroom, 20 x 2 bedroom, 23 x 3 bedroom and 1 x 4 bedroom). The proposed building is of varying height, for the most part there is eight levels of accommodation, with the building presenting as eight storeys to the street. There is a significant area of six levels towards the centre of the building massing. There is also an area where the building seems to present as nine storeys (Ex C DA 203), as it negotiates the site gradient. There would be three levels of basement parking. Other notable numerical aspects, relating to applicable development standards include:

Total gross floor area (GFA) of 5494 m² with an associated floor space ratio (FSR) of 2.55:1 (Ex C DA002) well under the FSR control, which as will be explained later is 3.25:1.

Maximum building height which is very close to, but just under, the height limit of 28.6m (see Ex C DA300), although most of the building is well under this height control.

In relation to affordable housing, there is no dispute between the parties that the proposed GFA to be used for affordable housing exceeds 15% of the development's total GFA. As will be explained, this means the maximum height and FSR uplift is available under State Environmental Planning Policy (Housing) 2021 (SEPP Housing). Two apartments would be, in-perpetuity, restricted for use for affordable housing and managed by a registered community housing provider. Ten additional apartments would be restricted for use for affordable housing and

managed by a registered community housing provider for 15 years (reference: conditions provided to the Court on 5 May 2026 – noting agreed Condition 116).

The building would be set back from boundaries to varying extents. Of considerable importance to the remaining issues in dispute between the parties, deep soil areas would be generally defined by the basement parking (except in certain areas towards the rear). The deep soil particulars will be considered in the examination of the evidence.

The landscape scheme for the proposal is indicated in a set of drawings marked Ex D (behind Tab 14), including annotation of trees to be removed and proposed considerable future landscaping works.

Proceedings

The proceedings commenced with a site inspection, which included the hearing of lay submissions from a number of objectors. There was also an opportunity to take a view from a number of apartments on either side of the subject site. The lay objections included but were not limited to the key issues in dispute between the actual parties to the dispute which I introduce below. Particular points raised included the visual impact of the building massing, visual and acoustic privacy and loss of solar access.

During the site inspection, the parties, along with certain of the experts (especially those concerned with visual impact) and myself, also had the chance to do a walk along Lorne Avenue, which was helpful in relation to issues arising in the proceedings.

Issues in dispute

While there were wider differences, in my opinion, the contentions raised by the Council which are sitting at the centre of the dispute between the parties in this matter, can be thought of as:

Contention 3 – centred on the proposal’s suggested “inconsistency” with desired future character, although submissions and evidence also raised concern about “compatibility” with character

Contention 7 – centred on contended excessive building bulk

Contentions 20 and 21– centred on contended deep soil and (resultant) landscape design deficiencies

Contention 24a – which called up SEPP Housing’s Schedule 9 design principles; relevantly: Design Principle 1 Context and Neighbourhood Character, Design Principle 2 Built form and Scale, Design Principle 5-Landscape.

These various contentions inter-relate. The Council submits that because of the proposal’s suggested deficiencies in deep soil there is an incapacity to provide sufficient taller canopy landscaping to effect a softening of the building mass, such that it can fit in reasonably with its setting. The Council submits that the relevant policy provisions support their position. According to the Council, SEPP Housing provisions open the door to the DA’s evaluation factoring in certain

setback, deep soil and landscaping provisions of the Ku-ring-gai Development Control Plan (KDCP). It is argued the proposal before the Court insufficiently responds to this policy. As mentioned, there have been amendments to the proposal, including in the immediate lead-up to the hearing which experts, called by Council, indicate have responded to an extent to the Council contentions. However, it is claimed these amendments are insufficient.

The applicant highlights the gravity of current housing supply problems in NSW and Sydney and suggests SEPP Housing as a significant factor in the State government's response; including ambitions to provide more and denser housing close to transport. It is argued that the proposal is a "very significantly compliant development" (Tcpt, 14 April 2026, p 322 (3)), including with regard to all specific controls under SEPP Housing's own provisions (including relevant non-discretionary development standards). Among other points here, the applicant refers to s 4.15(3A) of the EPA Act and argues that any relevant development control plan provisions should be applied with flexibility (Tcpt, 14 April 2026, p 321 (32-38)):

"The Act sets out a deliberately structured regime for the consideration of mandatory considerations. If one goes through the task of, this is a step that we say the Court goes through, so you consider the State Policy documents, you consider how the development is to present by reference to those State Policies and the ADG, for example, in the way we've described it, the inconsistency if there is one in the DCP or if there are provisions which have mere tension, there is to be the flexible application of those policies."

The experts called by either side generally provided evidence in support of the argued position by each party, as introduced above.

As might be gleaned from the above, the specifics of the applicable policy are important. The submissions and expert evidence in this case, take different understandings from the policy setting. There is a need to examine the relevant policy content quite closely. A longer than usual overview of policy follows.

Setting the policy scene

The statutory obligations upon the Court here, in exercising the function of the consent authority as to whether to grant consent or not, are set out in s 4.15(1) of the EPA Act which provides, in part, that:

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—

- (a) the provisions of—
- (i) any environmental planning instrument...

In the determination of this matter, SEPP Housing is obviously a key environmental planning instrument (EPI), the provisions of which need to be taken into consideration. The provisions of KLEP also need to be taken into consideration in this respect. In addition, under this part of the statutory scheme, the provisions of KDCP require consideration under s 4.15(1)(a)(ii), but mindful of s 4.15(3A), which provides that:

“If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority—

- (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and
- (b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, ...

There is also a need to take into consideration likely impacts, site suitability, submissions and the public interest, under other provisions of s 4.15(1). Section 4.15(2) is also of significance, relating to non-discretionary development standards, a matter of relevance in this case.

I will now work through the individual policy instruments, attempting to provide a somewhat synthesised outline.

State Environmental Planning Policy (Housing) 2021

Outline

The applicant, in closing submissions highlights what were seen to be the difficulties that the State is finding at the moment in the provision of housing, and that SEPP Housing can be seen as an important and necessary policy response. I accept this submission. It seems to me that the underlying purpose, or reason for being, certainly of the relevant provisions of SEPP Housing, including those that provide increased building height and density controls (ie over local controls) is to help with the State’s housing problems.

In accordance with s 4.15(1)(a)(i) of the EPA Act, I have taken into consideration SEPP Housing. I note a set of “principles of policy” are nominated at s 3 of SEPP Housing. There are then objectives relating to various applicable chapters and parts. A range of provisions, including non-discretionary development standards are nominated, one would reasonably think, aimed at achieving the ambitions of this particular EPI. When I consider SEPP Housing, there seem to be distinguishable themes of particular relevance to the remaining contentions in these proceedings. These might be thought of as threefold

The first theme is concerned with increasing housing supply in well located areas, generally, and increasing housing density in areas with good access to transport infrastructure, including well-serviced train stations. This site is within easy walk to Killara Station. Provisions outlining SEPP Housing ambitions under this theme include: s 3(a) and (d) (eg “promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services” etc), s 142(1)(d) and (e) (eg “to better satisfy the increasing demand for residential apartment development...”) and s 150(a) and (c) (eg “to increase housing density within 400m of existing and planned public transport”). I will outline the related controls later. This theme might be abbreviated as “increasing housing density near stations”.

The second theme is concerned with the delivery of new in-fill affordable housing to meet the needs of the vulnerable and lower income households. With this point I am quoting the objective of Ch 2 Pt 2 Div 1, which is an important applicable division relating to infill affordable housing. But I also note for example s 3(b) (eg “encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households ...”), s 142(1)(f) (“to support housing affordability”), and s 150(c) (“to encourage the development of affordable housing to meet the needs of essential workers and vulnerable members of the community”). This second theme might be abbreviated as “facilitating affordable housing”.

The third theme is concerned with the design of proposed residential apartment development. Among others, I note the principle at s 3(f) (“reinforcing the importance of designing housing in a way that reflects and enhances its locality”) and s 142, generally, which outlines the aims of Chapter 4, concerned with “improving the design of residential apartment development” for various purposes. One purpose of relevance to the contentions in this proposal is “to achieve better built form and aesthetics of buildings, streetscapes and public spaces” (s 142(1)(b)). Chapter 5 includes among its aims that buildings are “well designed” and “of appropriate bulk and scale” (s 150(b)(ii)). This third theme can be abbreviated as “design”.

I emphasise here that I completely understand that there is no suggestion of a need for compliance with the nominated principles, aims or objectives. For me, this attention to what I think to be relevant ambitions of SEPP Housing, helps somewhat in appreciating how the parties can have differing views on what this EPI is seeking to achieve, and thus the differences between them.

I am aware that there are many other important objectives of SEPP Housing, including in relation to sustainable development, providing good amenity and generally minimising environmental impacts. Some of these matters arose in the contentions; and a limited number will arise later in the judgment, but in the evaluation of this proposal such matters are not determinative in my opinion.

Provisions

I will now look at certain SEPP Housing provisions in a little more detail. First is to note s 8(1) which makes clear that SEPP Housing prevails, relevantly, to the extent of any inconsistencies with other environmental planning instruments. I now turn to some of the particulars.

Increasing housing density near good transport and facilitating affordable housing

Relevant to this proposal, the first two themes I outlined above work together to establish development standards relating to height and FSR for the proposal. Chapter 5 of SEPP Housing is concerned with transport oriented development (TOD). It establishes certain FSR and building height standards, generally beyond those applicable under KLEP, for sites like this one, which are located within 400m of a station. There is a requirement for at least 2% of the gross floor area (GFA) of the building to be used for affordable housing in perpetuity.

Then Ch 2 of SEPP Housing is concerned exclusively with affordable housing. As a means of facilitating (additional) affordable housing, Ch 2 provides for a significant further density and building height uplift in return for its supply. As indicated earlier, the proposal would provide for more than sufficient affordable housing, for the designated 15 year period. In turn the maximum uplift under Ch 2 is available. This is an increase of 30% on both the building height and FSR standards under KLEP. With its dedicated affordable housing provision, the proposed building height would meet the uplifted standard (22m height limit under Ch 5 v 28.6m height limit under Ch 2) and would be well within the uplifted FSR standard (2.5:1 FSR under Ch 5 v 3.25:1 FSR under Ch 2). As indicated above, the building is close to the maximum building height and has an FSR of 2.55:1.

Design

In relation to design, SEPP Housing is then quite selective in assigning development standards, or criterion, for various design elements. The particulars are quite detailed. The key provisions are outlined as follows. This subsection of the judgment is longer in its text; this is because the particulars are more detailed.

Chapter 2 (affordable housing)

Under Ch 2, certain non-discretionary development standards are nominated at s 19. Below I reproduce only the provision relevant to the key contentions:

- (b) a minimum landscaped area that is the lesser of—
 - (i) 35m² per dwelling, or
 - (ii) 30% of the site area,

The experts agree the proposal complies with the 30% minimum landscaped area.

It is noteworthy for me, here, that s 19(3) specifies that the otherwise nominated non-discretionary development standard relating to deep soil zones (s 19(2)(c)) does not apply to development to which Ch 4 applies. Chapter 4, concerned with the design of residential apartment development, applies to this proposal.

Chapter 2 also nominates certain “design requirements” (s 20(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—

- (a) the desirable elements of the character of the local area, or
- (b) for precincts undergoing transition—the desired future character of the precinct.

The planning and design experts agreed that the site falls within a precinct undergoing transition. If I accept this expert view, and I have no problem doing so, under SEPP Housing there is a mandatory requirement to consider whether the design of the residential development is compatible with the desired future character of the precinct.

Chapter 4 (design of residential apartment development)

Under Ch 4 (s 147(1)), and again relevantly (I am advised there is no design review panel advice), consent cannot be granted unless the consent authority has considered:

- (a) the quality of the design of the development, evaluated in accordance with the design principles for residential apartment development set out in Schedule 9,
- (b) the Apartment Design Guide

Schedule 9 outlines a series of design principles, under nine topics. There are numerous relevant principles. In my opinion all relating to good design; with a good level of attention to, what I might term, response to context. As an example of relevance to the contentions in play, topic one is titled “context and neighbourhood character” and provides that:

- (1) Good design responds and contributes to its context, which is the key natural and built features of an area, their relationship and the character they create when combined and also includes social, economic, health and environmental conditions.
- (2) Responding to context involves identifying the desirable elements of an area’s existing or future character.
- (3) Well designed buildings respond to and enhance the qualities and identity of the area including the adjacent sites, streetscape and neighbourhood.
- (4) Consideration of local context is important for all sites, including sites in the following areas —
 - (a) established areas,

- (b) areas undergoing change,
- (c) areas identified for change.

Chapter 4 also provides a set of non-discretionary development standards. However, none of these standards relate to outstanding contentions.

Other pointers in Ch 4 indicate that the Apartment Design Guide (ADG) prevails over, in this instance, KDCP. However this is only with respect to a selection of nominated matters which are not relevant to the outstanding contentions (I turn briefly to solar access later). Matters where the ADG would prevail over KDCP are (s 149 of SEPP Housing): visual privacy, solar and daylight access, common circulation and spaces, apartment size and layout, ceiling heights, private open space and balconies, natural ventilation and storage.

A point of difference between the parties is what weight if any might be assigned to KDCP provisions relating to deep soil, landscaping and side setbacks, if they are not, in a mandatory sense, overruled by provisions of the ADG.

Chapter 5 (transport oriented development)

Chapter 5 is the initiating provision to provide for building height and floor space increases in nominated areas, including this site, which are close to public transport. The aims of this chapter 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.

Section 153 relates to inconsistencies with other environmental planning instruments but also inconsistencies between Ch 5 and other provisions within SEPP Housing. It provides as follows:

If there is an inconsistency between this chapter and another provision of this or another environmental planning instrument, whether made before or after the commencement of this chapter, this chapter prevails to the extent of the inconsistency.

Above I reference various principles, objectives and aims otherwise expressed within SEPP Housing. If the provisions of s 153 were to be thought to suggest the objectives of Ch 5 should prevail over other chapter objectives, I would not interpret the provision this way. The aims of Ch 5 are the aims of this chapter. Other chapters may have different aims. SEPP Housing has

nominated principles of policy, etc. There is no relevant inconsistency in my view. In any event, the aims of Ch 5 are quite aligned with other provisions insofar as this question relates to policy for design (see s 150(b)(i) and (ii)).

Related to the contentions, I note briefly that s 159 of Ch 5, establishes that consent must not be granted unless the “...lot is at least 21m wide at the front building line...”. The site frontage complies with this provision.

I also note that s 161 again indicates the need for consideration of the ADG before the grant of consent.

Other policy

Ku-ring-gai Local Environmental Plan 2015

The provisions of KLEP having some relevance to the evaluation of the proposal are noted here. More recent changes, affecting neighbouring sites and the rest of the “precinct”, rather than the site itself, are introduced a little later.

The relevant objectives of the applicable R4 High Density Residential zone under KLEP are as follows:

- *“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 provide for high density residential housing close to public transport, services and employment opportunities.”

Context-wise, the land opposite the site, across Lorne Avenue is zoned R2 low density and constitutes the Marian Street heritage conservation area (HCA). In its SOFAC (p 15 particular c), the Council suggests, among other things:

“ii) The Marian Street HCA includes dwellings with single detached houses from the Federation, Inter-war and Post-war periods. These buildings make an important contribution to the character and significance of the HCA as they have a key historical layer, most are true to an architectural type, style or period and some are substantially intact including their garden setting.”

Council contended that the provisions of cl 6.6, with respect to minimum site width for residential flat buildings (relevantly 30m) should be understood as distinguishable from the provisions of s159 of SEPP Housing (requiring lots to be 21m wide at the front building line). As a consequence of my ultimate findings, I have not needed to make a determination with respect to this question here.

Amendments to KLEP and SEPP Housing

While the SEPP Housing controls (including building height and FSR uplifts) described above are indeed applicable to the site (and the DA before the Court), adjacent and nearby land north of Lorne Avenue, which previously shared these controls and development uplift opportunities, no longer do. The background to this relates to certain statutory planning changes, developed by the Council as an alternative proposal to the otherwise TOD-related uplift provisions under Ch 5 of SEPP Housing. Ultimately, these Ku-ring-gai Council “Alternative TOD” provisions were agreed as satisfactorily accommodating the relevant State interests and have been gazetted. The baseline provisions located in the immediate site environs along Lorne Avenue (including the site’s immediate neighbours) include a maximum building height of 18.5m and maximum FSR of 1.3:1. The additional affordable housing related uplift in building height and FSR under Ch 2 of SEPP Housing remain. An area fronting the Pacific Highway (ie west of the site) and another area immediately west of Killara Station have higher height and FSR standards which are considered later.

Ku-ring-gai Development Control Plan

Part 7 of KDCP concerns residential flat buildings. Section 7A.3 and 7A.6 had most relevance to the remaining contentions.

Section 7A.3 relates to building setbacks. There are too many objectives to cite but, they include:

“1 To ensure buildings are situated within a garden setting dominated by tall trees.

2 To soften the built form and maintain the garden character of Ku-ring-gai.

3 To provide effective deep soil areas that are able to create a garden setting, including medium and tall trees, to all sides of the building.

4 To reduce the visual bulk of buildings from the street.

...

13 To minimise bulk and scale impacts on neighbouring development.

14 To ensure setback areas limit elements that compromise deep soil planting and growth of tall trees.

...”

The controls include a 10m front setback control, with a 2m articulation zone, with which the proposal complies. There is also a 6m side and rear setback control for all levels up to the fourth storey, then 9m.

Section 7A.6 of KDCP relates to deep soil and landscaping. It would require 50% of the site be provided for deep soil landscaping (with 2m minimum width). Some objectives of relevance include:

“1.To ensure landscape areas contribute to the garden character and canopy of the Ku-ring-gai locality.

2.To provide consolidated deep soil zones of adequate area in all residential development sites through quality planning and building design.

3.To provide landscaped areas that are appropriate to the scale and context of the development.

...

5. To create high quality landscaped areas through retention and/or planting of tall and medium sized trees particularly at the street frontage.“

Consideration of legal submissions with respect to KDCP

There was some argument about the general applicability of KDCP, mindful of the provisions of ss 3.42 of the EPA Act, which relates to the purpose and status of development control plans. The applicant referred to clause 1A.1 of KDCP. Wording in this provision includes that “the DCP provides more detailed guidance to facilitate the aims and objective in the KLEP and to facilitate development permissible within the KLEP”. The applicant also noted that clause 1A.7 indicates KDCP is to be read in conjunction with (among other things) “SEPP Housing and the ADG”. The provision also indicates that if there is “any inconsistency between this DCP and any relevant SEPP, the provisions of the SEPP prevail”. The applicant’s argument was that KDCP had not been made for the purposes of SEPP Housing and had been instead made for the purposes of KLEP (Tcpt, 16 April 2026, p 362 (18-23)):

“... the suggestion was you're going to the DCP as if it's a DCP made for the SEPP, as opposed to what is plainly the correct approach to the cascading policy documents, which is ch 5, and it's ADG prevailing over the whole of SEPP. It's non-discretionary development standards and ADG, and then into, as we've described it, the entirely different anticipation of built form by the LEP and DCP.”

I think, perhaps, the point which was pressed here was that, in areas where both ADG and KDCP might be under consideration, the ADG should be seen as prevailing. This was because KDCP had not been made for the purposes of SEPP Housing, mindful of s 3.42(1) of the EPA Act, and instead had been made to support the ambitions of KLEP, an EPI at odds with SEPP Housing and subservient to it in any points of inconsistency. If my interpretation is correct, I don’t believe this argument has been made out. Clause 1A.1 of KDCP also indicates that KDCP has been prepared in accordance with s 3.43 of the EPA Act, which indicates development control plans can be prepared to provide the guidance referred to in s 3.42(1) of the EPA Act, which indicates as follows:

The principal purpose of a development control plan is to provide guidance on the following matters to the persons proposing to carry out development to which this Part applies and to the consent authority for any such development—

- (a) giving effect to the aims of any environmental planning instrument that applies to the development,

The reference to “environmental planning instrument” at s 3.42(1)(a) could of course include SEPP Housing. The provisions of SEPP Housing, itself, makes clear that it (ie SEPP Housing) has been made mindful of these local, non statutory, development control plans. Within SEPP Housing, this is evident from the direct references to development control plans, including that the ADG is to be seen to prevail over them, and in what instances. While the choice could have been made, for example, to have the ADG prevail over development control plans, generally, this is not what SEPP Housing has elected to do.

Apartment design guide

The ADG also has been given consideration. The provisions of most direct relevance to the dispute between the parties include those relating to deep soil zones and landscaping.

Section 3E, includes provisions for deep soil and includes certain details relating to trees and soil volumes. Objective 3E1 is as follows:

Deep soil zones provide areas on the site that allow for and support healthy plant and tree growth. They improve residential amenity and promote management of water and air quality.

The design criterion is that 7% of the site should qualify as deep soil (in this instance with minimum dimension of 6m for sites greater than 1500m²). The “design guidance” includes reference to 15% deep soil for sites greater than 1500m², and suggests that achievement may not be possible on some sites (including “high density areas”).

Section 4O is concerned with landscape design, it suggests (p 113):

Successful landscape design complements the existing natural and cultural features of a site and contributes to the building’s setting.

Recommended tree planting is “1 large tree or 2 medium trees per 80m² of deep soil zone”.

As an aside, I am aware of the ADG provisions relating to visual privacy at Part 3F-1, which includes a table detailing certain setback standards, with which the proposal does not comply in any event. In any event, I think the proposal is generally satisfactory with respect to privacy (an area where the ADG would prevail over KDCP). However, the objectives and provisions of Section 7A.3 of KDCP of interest to me here relate to building setback as a factor in achieving landscape outcomes. An ADG privacy-related provision would not be reasonably seen as prevailing over a development control plan provision related to landscape outcomes.

Among other sections, I have also considered the provisions at Section 2F relating to building separation and 2H relating to side and rear setbacks, which suggests side and rear setbacks might vary according to context and suggests building separation requirements can sometimes provide guidance.

Evidence

The experts assisting the Court in relation to the outstanding contentions are outlined in the table below.

Expert

Expertise

Called by

E Wu

Landscape architect

Applicant

F Ambrosino

Landscape architect

Council

D Gowenlock

Arborist

Applicant

J Mead

Planner

Applicant

B Newell

Planner

Council

Bonus

Urban design

Applicant

Hunter

Urban design

Council

Disputed areas

Synthesising the outstanding contentions, mindful of evidence and related submissions, suggests four topics: 1) proposed deep soil and landscaping 2) visual impact, 3) character compatibility considerations, and 4) balancing positive and negative aspects of the proposal.

Deep soil and landscaping

There are three points to cover here. The first relates to numerical standards and is concerned with submissions rather than expert evidence. The other two relate to the deep soil characteristics and the landscaping potential, and do focus on the evidence.

In submissions, the applicant put it that a critical difference between the parties appeared to be that “the Council’s controls would like a greater landscaped area than the State Policy controls provide for as a nondiscretionary development standard ...” (Tcpt, 14 April 2026, p 316 (47-49)). The applicant went on to indicate that the non-discretionary development standard for landscaped area (under s 19(b) of SEPP Housing) was 30%, with which the proposal complied (at either 33.7% or 34.8%).

This submission requires some unpacking. Under SEPP Housing, deep soil zone should be understood as a subset of landscaped area. This is based on the Dictionary to SEPP Housing at Sch 10 which provides as follows:

deep soil zone means a landscaped area with no buildings or structures above or below the ground.

...

landscaped area means the part of the site area not occupied by a building and includes a part used or intended to be used for a rainwater tank, swimming pool or open-air recreation facility, but does not include a part used or intended to be used for a driveway or parking area.

As already mentioned, SEPP Housing includes a non-discretionary development standard relating to landscaped area (see [33]), but there is none for deep soil zone. Nonetheless, the definitions above indicate to me that it would be reasonable to understand that the deep soil zone for a proposed development could not be required to be greater in area than the non-discretionary development standard for landscaped area, which is 30% of the site area.

Then I note that both the ADG and KDCP have provisions relating to deep soil, which themselves differ. This provision, for deep soil, is not one where the ADG would prevail over a development control plan (see [41]). Insofar as numerical standards are concerned, the experts agreed that the ADG indicates 15% of site area for deep soil with a minimum dimension of 6m (although I note this as a “design guidance” provision), whereas actual deep soil area available with the proposal, with a minimum dimension of 6m, is 14% of the site area. KDCP indicates 50% of the site area should be deep soil with a minimum width of 2m. The architectural drawings (Ex C DA009) indicate 36% of the site area would have deep soil with a minimum width of 2m, although Ms

Ambrosini would suggest a little less.

Further, KDCP is explicit in nominating objectives relating to ensuring landscaping on development sites contributes to the garden character and canopy of “the Ku-ring-gai locality”. It nominates a control that lots are to support “a minimum number of tall trees capable of attaining a mature height of at least 18m” (I note Ms Ambrosino’s uncontested comment that shale was the relevant base (Tcpt, 14 April 2026, p 302 (12))). For a site of this area seven tall trees would be required under this KDCP control. The ADG has its own definition for “large trees” as 13-18m in height with a 16m “spread” and medium trees as 9-12m height with an 8m spread (Section 3E Table 2). The ADG’s recommended planting in deep soil zones is one large tree or two medium trees per 80m² of deep soil, with which Ms Ambrosini indicated, in oral evidence, the proposal complies. KDCP also adopts a 6m standard relating to side and rear setbacks (7A.3 Control 5), objectives of which include relating to “effective deep soil areas that are able to create a garden setting, including medium and tall trees, to all sides of the building”.

When I turn to the evidence, the deep soil characteristics of the proposal were understood and generally agreed. But there was some difference on the landscaping potential available from this deep soil and its suitability, especially in relation to tall trees and canopy trees more generally.

Mr Wu’s evidence was that, in accordance with the landscape plans at Ex D Tab 14, plantings would include five canopy trees. Four of these would be located in the rear setback area with one (a Turpentine) in the front setback within a deep soil area towards the south-east corner, near some retained trees. One of the trees in the rear corner (Angophora) was estimated to have dimensions 15-20m height and 7-13m spread. The others (a Turpentine and Lilly Pillies) were estimated as 13-15m height and 8-10m spread. Medium “fastigate form” trees would be planted along the side boundaries, recognising the soil volume constraint. The indicated heights were from 7-12m. Most trees had spreads less than the 8m ADG provision. Mr Wu suggested that these trees were “slender and narrow” but would have a screening effect (Tcpt, 14 April 2026, p 296 (46-50)).

Ms Ambrosino’s key concerns were that there was insufficient area to provide for tall trees to the side boundaries and in the south-western corner (ie to the Lorne Avenue streetscape), where she suggested there was a need for the driveway to be setback further from the side boundary. Increased setbacks would allow for additional large trees to western and eastern boundaries as required under KDCP. She referenced the proposal’s minimum side setback of 2m, although I note that the more general minimum setback indicated in the plans is 3m and there are insets towards the centre of the building to each side boundary with a greater “spread” opportunity (minimum of about 7m on the western side and 5m on the eastern side) (Ex C DA 090).

Finding: compliant with ADG but not KDCP

I need to consider both the ADG and KDCP with respect to deep soil and landscaping. It is clear enough to me that the proposal complies or near complies with the ADG which really does not bring forward any requirement for large canopy trees (reference Section 40 p 115 Table 4). This is

a point at odds with the KDCP controls which is explicit in its aims to, among other things, ensure landscape areas and tall trees (along with medium trees) contribute to the garden character and canopy of the Ku-ring-gai locality; and reduces the visual bulk of buildings from the street. When evaluated against KDCP provisions, there is clearly a significant deficiency in the landscape scheme, in terms of tall trees and canopy trees. I do further note, especially mindful of neighbour objections, that Mr Wu's evidence that the proposed fastigate trees along side boundaries would have a screening effect was not contested, although the height of this screening would be only from 7-12m.

I am aware that the proposed landscape area already exceeds the relevant non-discretionary development standard (ie 30%). In considering the proposal's deficiencies with respect to KDCP, above, I am not convinced that achievement of KDCP garden setting and streetscape ambitions, or getting closer to it at least, necessarily requires more than the 30% landscaped area. However, to do so would require a significant rethink of where the landscaped areas are located and a revision of their minimum dimensions, with implications in relation to the layout, more generally.

There is more analysis required before the significance of this particular finding can be understood.

Visual impact

Concerns were raised by the Council with respect to visual impact in relation to the public domain, and also in relation to adjacent apartment buildings both east and west of the site. There was no visual impact assessment, in relation to the impact on neighbours. But I had the opportunity to view from a number of these neighbouring properties. The experts also assisted in giving a generally shared appreciation of the building massing from the points from which we observed things.

Mr Bonus prepared a visual impact assessment, including photomontages from various points along Lorne Avenue (Ex C Tab 1 Annexure B, henceforth VIA). It was noted that the VIA presented an earlier version of the scheme, but the points of difference were understood by the experts (Ex C Tab 1 par 3.8 and 3.63) and myself I believe. While Ms Hunter thought a remodelled VIA was required, in my opinion, the capacity to understand the visual impact of the proposal in relation to Lorne Avenue was assisted by the VIA.

The VIA examined nine viewpoints along Lorne Avenue and made findings in relation to visual impact according to a matrix system (0-15 numerical scale translated into nil, low, medium, high). Mr Bonus explained the ranking system conceptually and then analysed visual impact from each of nine visual positions (VPs), drawing conclusions and assigning a visual impact from each. The nine VPs are described as follows (VIA p 3):

“VP1 - VIEW FROM THE ROAD RESERVE OPPOSITE 35 LORNE AVENUE KILLARA LOOKING EAST TOWARDS SITE

VP2 - VIEW FROM THE ROAD RESERVE ADJACENT TO KILLARA RESERVOIR LOOKING EAST TOWARDS SITE

VP3 - VIEW FROM THE ROAD RESERVE INFRONT OF 29 LORNE AVENUE LOOKING NORTHEAST TOWARDS SITE

VP4 - VIEW FROM FOOTPATH INFRONT OF 29 LORNE AVENUE LOOKING NORTHEAST TOWARDS SITE

VP5 - VIEW FROM THE ROAD RESERVE OPPOSITE THE SITE LOOKING NORTH

VP6 - VIEW FROM FOOTPATH ADJACENT 1 LORNE AVENUE LOOKING WEST TOWARDS SITE

VP7 - VIEW FROM FOOTPATH ADJACENT 21 LORNE AVENUE LOOKING WEST TOWARDS SITE

VP8 - VIEW FROM ROAD RESERVE ADJACENT 8 LORNE AVENUE LOOKING NORTHWEST TOWARDS SITE

VP9 - VIEW FROM ROAD RESERVE OPPOSITE 29 LORNE AVENUE LOOKING NORTHEAST TOWARDS SITE”

Impact was found by Mr Bonus to be nil (VPs 1, 6) or low (VPs 2, 3, 4, 7) from six of the locations and medium from three of the locations (VPs 5, 8, 9). The medium impact was determined from points directly opposite the site, and up and down Lorne Avenue a little.

Ms Hunter documented her own position in relation to visual impact from each of these VPs and from Regimental Park (Ex C Tab 1 par 3.67). It was agreed that there would be nil impact with respect to VPs 1 and 6. However Ms Hunter disagreed with the other findings of Mr Bonus. A high impact was indicated for VPs 3, 4, 5, 9, with medium-high for VP 8 and medium impact for VP2. Ms Hunter was also concerned about impacts on public domain views from Regimental Park.

Finding: considerable adverse visual impact

I note that in its closing submissions, the Council suggested that some of the viewpoints from which the photographs for the VIA were taken were “unnatural positions on the roadway which was lower than the footpath or properties across the road which the subject site would be more naturally viewed” (Council Written Submissions par 82). I did observe this during the site inspection and Mr Bonus’ comment that VPs were sometimes selected to avoid trees. While I don’t believe there was anything intentional here, my impression was, and notwithstanding the VIA, that there were considerable areas where the proposed building would be very prominent in visual terms. These areas included: 1) across Lorne Avenue, along the southern footway and within the heritage listed properties, 2) along Lorne Avenue’s northern footway west of the site and to a lesser extent east of the site. This was from the considerable areas where vegetation would not significantly screen any visual impression of the site. I also note Mr Bonus also agreed that Jacarandas were a prominent tree along Lorne Avenue which commonly lose foliage for a time during winter.

It is unnecessary for me to review each of the findings from individual viewpoints, in coming to my view that the proposed building would stand out markedly and negatively when viewed from certain areas of Lorne Avenue. In my opinion, the impact is adverse because at present Lorne Avenue is a scenic street dominated by landscape. It is notable that Lorne Avenue has managed to impart a garden setting while also delivering a significant level of housing density. This proposal would detract considerably from it because of its limited landscaping.

Rather than reflecting and enhancing its locality, among the many and varied ambitions of SEPP Housing, the proposal would be noticeably jarring in visual terms. In coming to these findings, I generally accept the evidence of Ms Hunter (over Mr Bonus). My reasoning is outlined below.

I thought key reasons which Mr Bonus adopted for his opinion of limited impact could be understood as follows (Ex C Tab 1 Annexure B).

“setback controls for the adjoining sites are similar to that proposed for the subject site

...

building height controls for the adjoining sites (18.5m without and 24.05m with ARH) are similar to that proposed for the subject site by DA0157/25 (28.57m with ARH). The difference in permissible building height of 4.52m would provide for a difference in building envelope of only one storey,

...

the visual catchment of Lorne Avenue is dominated by landscape which unfolds in layers north and south of the centreline of the roadway. This provides a visual boundary that separates the R2 zone and HCA lands from impacts arising from development on the northern side of Lorne Avenue. The character and low-density scale of the southern side of Lorne Avenue will not be impacted.”

Mr Bonus also indicates his view that the VIA itself “illustrates” that the proposed development fits comfortably within the visual catchment and that “the design ... is situated within a garden setting due to the picturesque nature of the Lorne Avenue landscape, which is supported by the retention of significant canopy trees on the subject site” (VIA p 11).

I have concerns with each of these points. In reverse order, first I note that during the site inspection, and even from the photographs in the VIA, which did not always depict the worst case settings, it was quite evident that the proposal would be much taller (almost twice the height) of its neighbours. That is, I didn’t agree that the VIA illustrated that the proposed building would sit comfortably with its setting. Second, I was not convinced that the retention of the small group of canopy trees in the south-east corner of the site would have substantive visual softening effect given the bulk and minimal side setbacks of the proposal. Third, while there was a visual distinction between the buildings on the north (R4 zone) and south (HCA and R2 zone) of Lorne Avenue, a feature of the street was the canopy landscaping on either side of the street and that existing building massing did not generally disrupt the sense of a scenic or picturesque whole

street, dominated by canopy trees. Fourth, there is a difficulty, for me, with the assumption that the proposal should be evaluated against what seems to be an unrealistic redevelopment of the adjacent sites. I consider this point more fully below. Fifth, the side setbacks adopted for the proposed development certainly as presenting to Lorne Avenue (presenting to the street as 3m – see Ex C DA 200), are in the order of half of that currently in place for the adjoining buildings. Ms Hunter also noted that under the Alternative TOD provisions, the 6m side setback controls would continue to apply (Ex C Tab 1 par 3.67).

The proposal's visual impact on Lorne Avenue is of most significance. There would also be a negative visual impact from the north-eastern corner of Regimental Park, although for me this impact is lesser in scale, because Regimental Park is an open area which does not actually fit within the canopied garden setting of Lorne Avenue. There would be a significant visual impact experienced from some areas of adjoining residential premises. I do acknowledge the increased side setbacks in certain parts of the building and reduced height in the centre. Screen planting would also soften the perceived visual massing to some extent.

Character compatibility

The experts agreed that the precinct in which the site is located is undergoing transition. Therefore, under s 20(3) of SEPP Housing, before any consent is granted there is a requirement to consider whether the design of the residential development is compatible with the desired future character of the precinct.

The evidence has given attention to this, including representations in Drawing DA 025a (Ex C) and the applicant's Schedule 9 Report (Ex H including p 12). This material provides a representation of potential development uplift along the northern side of Lorne Avenue and in Wallaroo Avenue (immediately north of the site) with the Council's Alternative TOD controls, including 30% building height and FSR bonuses under Ch 2 of SEPP Housing (assuming 15% affordable housing to be provided). It is noteworthy that the site at the corner of the Pacific Highway and immediately west of Killara Station could develop to nine storeys. Otherwise, heights of 7.5 storeys are indicated.

The experts also agreed that that there would be a maximum potential height difference of 4.52m between the proposed building height and alternative TOD controls (Ex 3 Tab 1 par 3.69 and Annexure B p 9). Although there are some other relevant controls under the Council's Alternative TOD provisions which I outline below, the particulars in Drawing DA 025a and Ex H would seem to support a conclusion that the proposal is compatible with the desired future character of the precinct.

The strongest argument in support of the proposal's compatibility with desired future character, and even if I consider the further question of likely future character, is the proposal's compliance with the building height and FSR standards. This warrants considerable weight. However, there are some distinctive additional circumstances, which also warrant attention in my opinion. Three relevant points come to mind. First is that the provisions for taller buildings at the Pacific

Highway, and near the station, involve a precinct character element with a different logic. These areas are actually on transport corridors and, in the case of Pacific Highway sites, along a ridgeline. These higher intensity development areas are readily distinguished from the rest of the Lorne Avenue (north) “precinct” and the visual catchment of the site in my own opinion.

Second, relates to the comparable planning provisions applying to the site and other areas along Lorne Avenue (north). Now setting aside those areas outlined immediately above and located adjacent to transport corridors. FSR controls under KLEP allow a maximum FSR of 1.3:1 in this precinct, or up to 1.69:1 with 15% affordable housing (Ex 3 Tab 1 par 3.42). This amounts to about 2/3 of the 2.55:1 FSR associated with the current proposal, obviously a considerable amount less. I then consider the fact of the KDCP side setback controls, and can find there is a sense to Ms Newell point that the Alternative TOD scheme encourages slender buildings (Ex 3 Tab 1 par 3.29).

The third circumstance, and less concerned about s 20(3) of SEPP Housing and more relating to likely future development, is that it seems to be agreed that the relatively recent development on the adjacent sites will remain as is (eg Mr Mead’s comments at par 3.8). This makes sense, entirely, given their relatively recent construction and the full parameters which would face redevelopment under the Alternative TOD scheme.

The question of compatibility, as analysed for example in *Project Venture Developments Pty Ltd v Pittwater Council* (2005) 141 LGERA 80 [2005] NSWLEC 191 (*Project Venture*) at [22-31], goes beyond visual presentation concerns and includes physical impact considerations. I am aware of the concerns raised by objectors relating to such matters as visual and acoustic privacy and loss of solar access. I note the evidence of the experts is that the design before the Court was seen to reasonably address “all direct privacy impacts” (Ex 6 par 15.1). I accept this advice mindful of *New Century Developments Pty limited v Baulkham Hills Shire Council* (2003) 127 LGERA 303 [2003] NSWLEC 154 (at [61] – [64]). Ms Hunter remained concerned with the impacts on current solar access that would be experienced by certain neighbouring apartments (Ex X). While this was a negative aspect of the proposal, it is unlikely that of itself it would be a determinative factor in my consideration.

Before I draw conclusions on character compatibility there are some points in the evidence that warrant further attention.

Thinking behind the expert evidence relating to character compatibility

It is notable that the experts adopt differing underpinning parameters for the evaluation of character compatibility related concerns and the reasonableness of the proposal. A point in common, in a sense, is that Mr Mead does not believe that the full FSR available under SEPP Housing can be expected to be achieved on the site. In turn, Ms Hunter does not expect that all of the KDCP particulars would be reasonably applied to a redevelopment of this site.

In relation to building bulk and massing, and thus character, Mr Mead believed the proposal responds appropriately to site constraints. In highlighting the proposed FSR, which as indicated is well under the applicable FSR controls, and the public benefit associated with affordable housing provision, Mr Mead believed impacts were commensurate with impacts expected of development designed in accordance with relevant controls (Ex 3 Tab 1 par 7.5, 7.6):

“... The proposed setbacks are a product of site shape, width, car parking requirements (in terms of basement footprint) and achieving workable internal apartment layouts. In my opinion, the modelling of the building mass in the suggested revised proposal provides for setbacks which mediate building bulk, provide for appropriate planting opportunities and address privacy and solar impacts. The building form is well articulated through variation to setbacks and through modelling of the facades. The varied height also breaks down visual bulk.

Accordingly, the proposal results in impacts consistent with impacts that may be reasonably expected under the controls, the height and bulk relate to the height and bulk desired under the relevant controls and will fit with the desired future character of the precinct which is in transition. The proposal consistent with the bulk and character intended by the planning controls.”

Mr Mead criticises Ms Hunter for opposing the controls and the process which arrived at them, when considering character (Ex 3 Tab 1 par 3.7):

“In my opinion, KH sets out in part an objection to the planning controls and the strategic planning process which arrived at them, when considering character. In my opinion, this is not the proper approach. The planning controls, particularly in an area agreed to be undergoing transition, will be at the forefront of understanding desired future character. Opposition to the controls is not a sound basis for appraisal of the proposal.”

Ms Hunter does refer to the background to the gazettal of the Alternative TOD system in Ku-ring-gai, which provides for higher densities in some local centres but not so much the environs of Killara Station. This point is not material in the evaluation I undertake here.

Mr Mead’s interpretation of deep soil zone controls was also interesting for me, where he sought to assist with a “more detailed consideration of the relevant controls” and found that the proposal “complies with the applicable deep soil requirements” (discussed at Ex 6 pars 18-33). In this commentary Mr Mead noted that the deep soil zone controls at s 19(2)(c) of SEPP Housing did not apply to the proposal. Mr Mead also referenced the ADG as a consideration and submitted, correctly, that the proposal would far exceed the ADG design criteria for deep soil and for large tree provision. Mr Mead then went on to call up s 3.43(5) of the EPA Act, which provides that:

A provision of a development control plan (whenever made) has no effect to the extent that—

- (a) it is the same or substantially the same as a provision of an environmental planning instrument applying to the same land, or
- (b) it is inconsistent or incompatible with a provision of any such instrument.

Mr Mead in turn argued that (Ex 6 par 32):

“In my opinion, it cannot be said that the DCP deep soil provisions seek to be different provisions to the deep soil control in the Housing SEPP (and the ADG). They are the same by name and in my view, objective (as set out in Section 7A.6 of the DCP). The deep soil provisions would be considered to be substantially the same between the Housing SEPP and DCP and the DCP provision therefore incompatible. Therefore they do not apply.”

This logic escaped me. On this point of interpretation, seeming to be aimed at suggesting a statutory bar to consideration of the KDCP deep soil provisions, I saw things much more in alignment with Ms Newell (Ex 6 par 33.2). I think Ms Newell’s interpretation is that there is no applicable environmental planning instrument provision relating to deep soil zones. KDCP, which includes deep soil provisions, is a consideration under s 4.15(1)(a)(iii) of the EPA Act. SEPP Housing’s provisions certainly make clear the need to consider the ADG deep soil provisions but they do not suggest that in a statutory sense, the ADG prevails over KDCP with respect to any inconsistency on that front.

Finding: the proposal exhibits low levels of character compatibility

The visual characteristics of Lorne Avenue exhibit a pleasing garden setting with tall canopy trees, filtering views to both residential apartment development and residential dwellings (in this case as heritage items). Ms Hunter saw this as the type of scenic character that is sought to be achieved under KDCP. In this instance and, as it happens, mindful of the findings of Project Venture (eg at [26] and [29]), the proposal’s relationship to the space around it, and in particular its side setbacks and limited capacity to deliver tall canopy trees, would be very jarring in its setting and result in an incompatible built form. Notable for me here is the capacity for side setback landscaping, towards the front of a site, to also influence streetscape character. While no finding is required, in a jurisdictional sense, I would see the proposed scheme as discordant rather than compatible with both the desired future character for the precinct and the likely future character in the site environs within Lorne Avenue.

To make such a factual finding should not be seen as determinative of itself, as it needs to be considered with other, including positive, aspects of the proposal.

On balance, the proposed design configuration is unacceptable

It is clear that the overall ambition of SEPP Housing is to assist in addressing the State’s housing supply problems. This relates to what I have identified as the first two (relevant) themes of SEPP Housing (at [24] and [25]). I do give considerable weight to the fact that the proposal complies with building height and FSR controls, along with many other provisions relevant under SEPP Housing (and other policy). The applicant’s argument that the proposal is a very considerably compliant development needs to be acknowledged.

Above, I have considered both the ADG and KDCP. In this particular contextual setting, I give weight to KDCP in relation to deep soil, side setback and tall canopy tree related provisions over the ADG. I have done so because of the particularly contextual features of Lorne Avenue in the site environs, and mindful of the third SEPP Housing theme I outline above (at [26]). It is notable, and there is a public benefit in the fact, that the current Lorne Avenue setting in the immediate site environs does seem to align considerably with the type of outcome sought in KDCP with respect to garden setting and canopy trees. The ADG's provisions do not capture this context and do not actually require any large trees under its provisions (Table 4 p 115).

Section 4.15(3A)(b) then provides that if, such as in this case, the proposal does not comply with development control plan standards, I am to be flexible in applying any such provisions and am to allow reasonable alternative solutions that achieve the objects of those standards. Earlier, I have highlighted the pertinent objectives of KDCP deep soil and setback standards (see [54], [56]) which, in short, relate to ensuring buildings are situated within a garden setting dominated by tall canopy trees. The proposal would not achieve such objectives. I have considered the need to be flexible in the application of such provisions, which I think takes me into this territory of subjective weightings and balancing.

SEPP Housing as a whole indicates to me a policy intention that the considerable intended uplift in building height and housing density occur in association with contextually responsive design (which I have referenced as a "third (relevant) theme"). Having regard to all of the design principles for residential apartment development set out in Schedule 9 of SEPP Housing, I find the quality of design wanting. The most serious concern is in regard to the first principle, relating to context and neighbourhood character. I am not satisfied that the proposal responds adequately to the local context. The built form context is identifiable and distinctive in providing quite wide spacing between buildings. This configuration assists the achievement of the garden setting in Lorne Avenue by allowing for the evident tall canopy trees. The subject design would not contribute to its context but would instead take something of significance away. There is a similar problem with the design when the fifth principle, relating to landscaping, is considered. When I consider the eighth design principle, relating to housing diversity and social interaction, the proposal seems to positively respond, given the intended affordable housing units, and their location which involves some scattering around the overall complex.

I find that the proposed design configuration is unacceptable. My decision should not be interpreted to suggest it is necessary that all of the controls or even objectives of KDCP, relating to landscape and streetscape character (and related matters of building setback and deep soil) need to be achieved here. The fact of the applicable development standards and the first two themes of SEPP Housing suggest otherwise to me. I also note that some design efforts have been made to respond to the contextual particulars of this setting. But in my opinion, to date, these have managed to sufficiently mitigate the adverse effects I have outlined above. In this particular instance, and on balance, I am not persuaded that the case has been made that the proposal warrants the grant of consent. The considerable adverse impacts of the proposal in this scenically pleasing and visually sensitive streetscape setting of Lorne Avenue, at its interface with

a heritage conservation area, outweigh the positive aspects of the proposal.

Other matters

The Council raised a number of other contentions against the proposal, including certain property related matters. Given my findings, otherwise, there is no benefit in my making findings with respect to other contentions.

Orders

The Court orders that:

The appeal is dismissed.

Development application No eDA0157/25, seeking consent for a residential flat building and associated development at 23-25 Lorne Avenue, Killara is refused.

The exhibits are returned, with the exception of exhibits A, C and D which are retained.

P Walsh

Commissioner of the Court

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Decision last updated:

03 September 2026

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