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29 January 2025

Northern Beaches Council
PO Box 82
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Att: Anais.Sarkissian

Via email: [REDACTED]

RE: SUBMISSION ON DA2024/1708 - 2A ALLEN AVENUE BILGOLA BEACH

I am pleased to make this submission in response to Development Application (DA2024/1708) which seeks consent for the demolition of the existing dwelling and the construction of a new dwelling and swimming pool with the retention of the existing unauthorised tennis court. The works include excavation for a basement; rear courtyard and associated landscape and site works.

This submission is made on behalf of Mr. Rick Osborn and Ms. Judy Houlton the owners of No. 8 The Serpentine Bilgola Beach; Ms. Joan Hughes, the owner of No. 10 The Serpentine, Bilgola Beach.

It is noted that a previous development application (DA2022/1494) on the subject site, was the subject of a LEC refusal (Wimbledon 1963 Pty Ltd v Northern Beaches Council), and the current application as described by the applicants SEE is a response to the matters remaining in dispute during the Court proceedings (see extract below).

“The dwelling house design, the subject of this application, responds to the matters that remained in dispute between the planning experts as detailed within the joint expert report prepared to assist the Court in the previous proceedings namely:

8. The experts agree that as a consequence of joint conferencing that the elements of the proposal remaining in dispute relate to the extent of building height breach calculated above ground level (existing) and consequential visual impacts and whether a 3 metre setback should apply to the whole of the dwelling to increase deep soil landscaping at the rear of the property and minimise building bulk as viewed from the properties to the west. The experts agree that the balance of the contentions are capable of resolution as detailed within this Expert Report.

In response to the disputed matters the perimeter of the Level 3 roof form has been lowered by 1010mm whilst the uppermost ridge level has been lowered by 500mm compared to that previously proposed. The proposal also now incorporates a 3 metre deep soil rear setback with both design changes depicted in the following plan extract”.

In this regard, it is acknowledged that the current application is an attempt to respond to the planning matters remaining in dispute however, it is a new development application, and any application needs to be considered on its own merits. Should the current “amended” DA be the subject of a new appeal, there

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may be different planning experts with different views. Merely addressing planning matters in dispute as part of a previous DA, is not a holistic response to the overall reasons for refusal by Council and for that matter the LEC.

The current “amended” application remains an overdevelopment of the site having regard for the desire to retain the tennis court as summarised within the judgment of Commissioner Byrne (par 94),

94 I note Council’s opinion is that to achieve the size of the house in this development application the tennis court would have to go because it constrains the redevelopment of the site and exacerbates impacts in relation to height, setback, building envelope, landscaped area and desired future character controls. The DA is an attempt to squeeze too much onto the Site that in my opinion for the reasons set out above is unacceptable and unworkable in this locality. The amendments made by the Applicant prior to the hearing only tinkered at the edges of a non-compliant proposed development. If retention of the tennis court is the primary goal it is possible to design a new dwelling house that is compliant with the planning controls.

In summary, the matters of concern are as follows (each of which is discussed in detail below):-

1. Inconsistency with existing and desired future character of the Bilgola Locality;
2. Non-compliance with building height pursuant to Clause 4.3 of the Pittwater LEP 2014;
3. Extent of excavation proposed;
4. Non-compliance with side and rear setbacks;
5. Non-compliance with building envelope;
6. Non-compliance with landscape area; and
7. Amenity impacts by way of
 - 7.1. View loss
 - 7.2. Acoustic and visual privacy; and
 - 7.3. Overshadowing

1. Inconsistency with existing and desired future character of Bilgola Beach locality

Bilgola Beach is a unique locality within the Northern Beaches LGA, with direct access to the beach. The controls reflect this uniqueness by requiring a maximum of two storey’s and an 8m height control, identifying it as a visual protection area demanding a different set of constraints on building design.

The proposal is for a 4 storey development which breaches the 8m reduced building height limit by 1.24m, resulting in a built form which is inconsistent with the existing surrounding developments which predominantly consist of two storey developments, as well as the desired future character of the locality.

The proposed bulk and resultant impact on the amenity of adjoining properties as well as its poor response to the existing site constraints (built form and natural environment) results in a proposal which is inconsistent with the desired future character of Clause A4.3 Bilgola Locality of the Pittwater DCP21 as well as the objectives of the C4 Environmental Living Zone under the PLEP 2014.

2. Non-compliance with building height

The building height as measured from the existing ground level to the maximum ridge height of RL18.30, is 9.24m, resulting in a maximum 1.24m exceedance of the 8m building height control pursuant to Clause 4.3 of the Pittwater LEP 2014 – refer to **Figure 1**.

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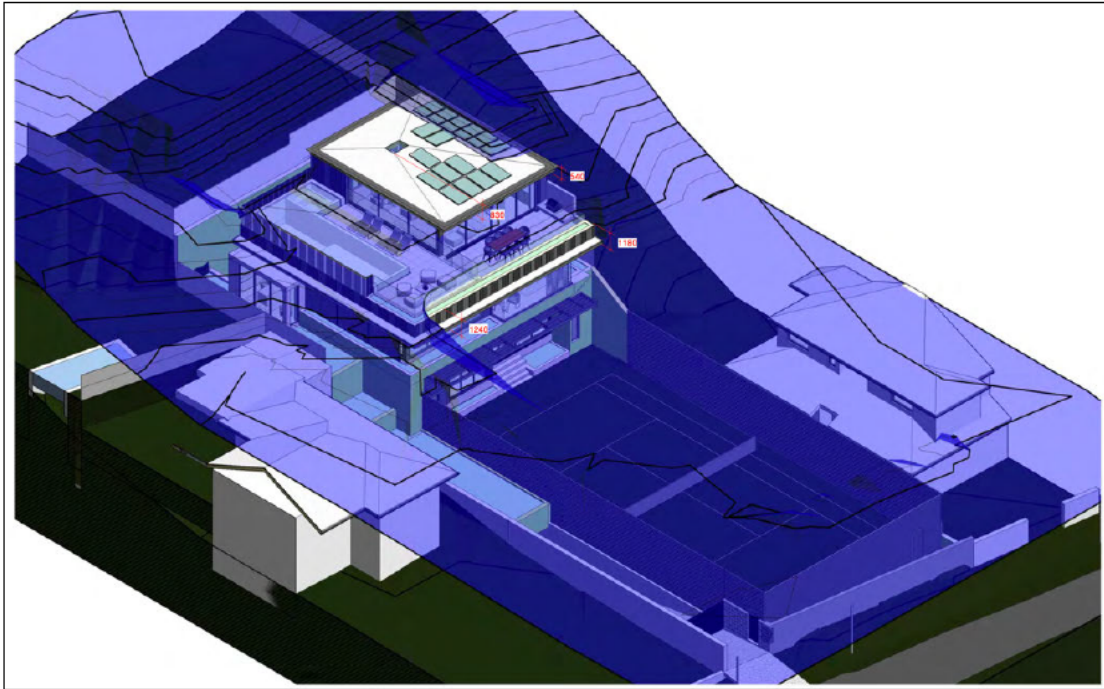


Figure 1: Section AA excerpt with building height variation shaded in red

The Clause 4.6 lodged with the development application relies on undisturbed ground level prior to any development on the site to measure building height. The applicant Cl4.6 is understating the degree of non-compliance with the building height because of the interpretation of the definition of building height.

The Courts prefer the measurement of height in accordance with ***Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*** however, it acknowledges that there will be a distortion compared with the surrounding existing topography (extrapolation method) and that this may be planning grounds to be considered as part of the Cl4.6 variation.

In this regard the applicants Cl4.6 variation (p4) notes as follows: -

*“On the basis of this survey information, an 8 metre building height blanket was able to be overlaid on the plans to determine the height of the development relative to **undisturbed levels** being the levels of the land **prior to excavation occurring to accommodate the existing dwelling house**”.*

emphasis added

I do not agree with the applicants approach. The measurement of height is to be consistent with the definition within the PLEP and taken from the ground level that is ‘**existing**’. That word cannot be ignored. The existing ground level is readily discernible on site and can be relied upon to determine levels.

Notwithstanding the numerical non-compliance consistency with objectives of the height of buildings standard is considered below: -.

- a) **to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,**

Comment:

The desired future character for the Bilgola Locality, with respect to height and scale, is set out in clause A4.3 of Pittwater 21 DCP. Particularly the locality is described as: -

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*“...primarily a low-density residential area with dwelling houses a maximum **of two storeys** in any one place **in a landscaped setting**, integrated with the landform and landscape”.*

*“Strict development controls will apply to this area (**including a reduced building height limit to 8m**) to ensure that its unique qualities are preserved through development that is sensitive to the area's characteristics.*

Emphasis added

The locality is described as a visual protection area containing particular planning controls to minimise the impact of development for this environmentally unique and sensitive area confirming the serious consideration and weight to be given to building height.

The proposal is for a 4 storey development (3 storeys above ground) which breaches the 8m reduced building height limit by 1.24m, with minimal landscape setting.

The applicant CI4.6 (p10) argues that the 3 storey presentation to the street is a *“consistent outcome with the DFC as reasonably applied to a steeply sloping site”*. The historic excavation has significantly altered the site. The site cannot be described as steeply sloping. Rather 2/3 of the site is level land with a driveway leading to the existing dwellings level building platform, and then the land rises sharply 9m at the rear boundary.

The resultant built form is inconsistent and incompatible with the existing surrounding developments as well as the desired future character of the locality.

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

Comment:

The proposed development is inconsistent with the predominant two storey existing development in the immediate area. The perceived scale is much larger than that of adjoining dwellings.

The applicant's CI4.6 draws comparisons with the approved 2 storey plus basement dwelling at No 2-4 Bilgola Avenue with an approved maximum height of 9.5m. In this regard, No 2-4 Bilgola Avenue has a larger site area (comprising two lots) than the subject site, has a corner / curved position with a very different topography and relationship to adjoining properties. It cannot be said to be a reasonable comparison to draw a compatible height and scale.

The proposed massing is considered to overwhelm surrounding spaces by virtue of its placement so close to the boundaries, especially the rear boundary. As such it fails to provide for a bulk and scale which is compatible with the height and scale of surrounding developments.

c) to minimise any overshadowing of neighbouring properties,

Comment

Refer to comments below under point 7.3. Insufficient information has been provided by the applicant to allow for an informed assessment/decision on the extent of impact by way of overshadowing.

d) to allow for the reasonable sharing of views,

Comment

Refer to comments below under point 7.1. Given the sites ability to facilitate an alternative or more skillful design which complies with the building height control and rear setback, the proposal does not allow for the reasonable sharing of views.

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- e) *to encourage buildings that are designed to respond sensitively to the natural topography,*

Comment

The proposal allows for extensive excavation with significant disturbance across the site.

Due to the location of the building, there is no capacity for a stepped height building form which integrates with the landform and landscape. Accordingly the proposal does not sensitively respond to the topography.

- f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

Comment

The proposal will have an impact on the streetscape being significantly raised above the level of the adjoining dwellings at Nos. 2 and 4 Allen Avenue, taking away from the prominence of the heritage listed trees in terms of height and proportions. Moreover, views from neighboring properties towards the heritage listed trees; ocean and the beach will be diminished. Accordingly, the proposal does not minimise adverse visual impact on the scenic quality and heritage value of the locality.

The applicants variation is not well founded as the variation is not unreasonable and unnecessary in the circumstances of the case pursuant to Cl4.6(3)(a) and the written request has not adequately demonstrated that there are sufficient planning grounds to justify the variation pursuant to Cl4.6(3)(b).

3. **Extent of excavation proposed**

It is acknowledged that the Geo-technical report and Excavation Methodology report demonstrates that the excavation is physically possible, and conditions of consent can be imposed to protect adjoining properties (such as dilapidation reports), however it does not justify the appropriateness thereof. The proposed development necessitates the extent of excavation which would otherwise not be required or at least would be reduced in scale if the proposal was more appropriately scaled.

Moreover the proposed basement is excessive with multiple plant rooms; storage rooms shower lockers; lobby and cellar. In addition the rear courtyard also necessitates additional excavation some 4.5m deep below existing ground level. Excessive excavation is necessary to allow solar access and ventilation which would otherwise not be required if there were no rooms below EGL (or only max 1m below ELG).

The proposal allows for extensive excavation with significant disturbance of the site inconsistent with the provisions of Clause 7.2 of the Pittwater LEP 2014.

4. **Non-compliance with rear and side setbacks**

D3.7 of Pittwater21 DCP requires a side setback of 1m to one side, and 2.5m to the other as well as a minimum rear setback of 6.5m. The proposal allows for a minimum side setback of 1.5m for Levels 1 & 2 along the southern boundary and a rear setback of 3m resulting in a non-compliance with the control – refer to **Figure 2** below.

Rear setbacks are enforced in order to allow for consistent rear built alignments allowing for a usable back yard or private open space. Rear setback allows for greater sense of openness; preserve amenity of adjacent land; maintain visual continuity and pattern of buildings; rear gardens and

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landscape elements and the opportunity for privacy between dwellings. The proposal fails all of the above.

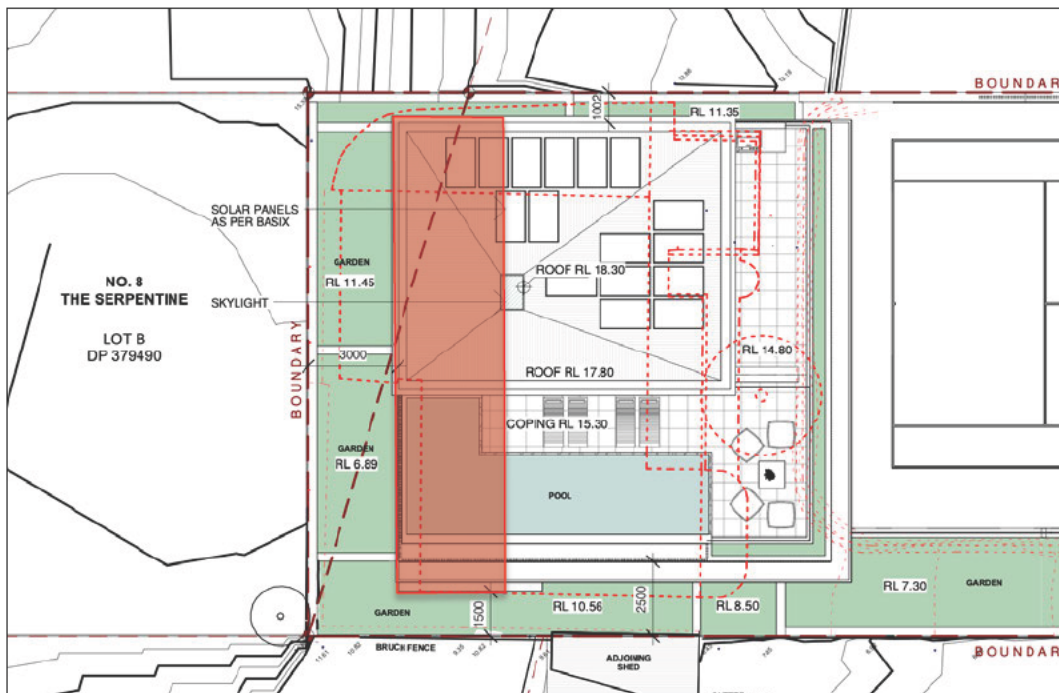


Figure 2: Rear setback non-compliance shaded in red

Source: Applicant site plan

The desire to retain the tennis court and to obtain water views, necessitate the siting of the dwelling towards the rear of the site. Consequently, the proposal seeks to locate the multi-level dwelling within the remaining relatively small developable area, with a third of the new footprint located within the rear setback area. The rear setback of the dwelling is inconsistent with the siting of adjoining properties.

In this regard the LEC judgment (*Wimbledon 1963 Pty Ltd v Northern Beaches Council*, the subject of the appeal for DA2022/1494) par 74 notes as follows:- “*there are no significant planning or heritage reasons to support the Applicant’s desire to retain it necessitating a non-compliant siting of the proposed dwelling.*”

Notwithstanding the numerical non-compliance, consistency with objectives of the setback control is considered below: -

- *To achieve the desired future character of the Locality.*

Comment:

Refer to discussion under point 1 above. The proposal is inconsistent with the desired future character of the Bilgola Locality.

- *The bulk and scale of the built form is minimised.*

Comment:

The non-compliance with the side and rear setbacks results in a massing which becomes visually dominating by virtue of its placement so close to the common boundaries.

- *Equitable preservation of views and vistas to and/or from public/private places.*

Comment:

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Refer to the discussion under point 7.1 below. Due to the downward angle of the views (especially from No. 8 The Serpentine) when the built form is pulled back towards the rear it becomes more prominent within the viewing angle, compared to a massing stepped further forward or complying with the rear setback. Accordingly the non-compliance with the rear setback, exacerbates the view impacts.

- *To encourage view sharing through complimentary siting of buildings, responsive design and well-positioned landscaping.*

Comment:

The proposed development is not considered a site responsive design, failing to allow for a complimentary siting of buildings consistent with the existing adjoining built forms.

- *To ensure a reasonable level of privacy, amenity and solar access is provided within the development site and maintained to residential properties.*

Comment:

The setback non-compliances contribute to the unreasonable privacy, amenity; noise and solar access impacts of the development.

- *Substantial landscaping, a mature tree canopy and an attractive streetscape.*

Comment:

The proposed side and rear setbacks do not enable substantial landscaping capable of mature canopy tree planting. The Pittwater DCP requires a minimum area of 3m x 3m for trees to ensure growth is not restricted. The proposed rear courtyard, which necessitates min. 4m retaining walls will restrict the sites ability to accommodate canopy tree planting. Moreover the side setback of 1m and 1.5m also do not facilitate mature tree plantings.

- *Flexibility in the siting of buildings and access.*

Comment:

The desire to retain the unauthorised tennis court dictates the siting of the dwelling within the rear portion of the site. The degree of flexibility sought in relation to siting of the dwelling is not appropriate in the circumstances of the case.

- *Vegetation is retained and enhanced to visually reduce the built form.*

Comment:

The existing site is devoid of significant vegetation and not much is proposed for removal. However, the proposed landscape area is insufficient to visually reduce the bulk and scale of the proposed built form.

- *To ensure a landscaped buffer between commercial and residential zones is established.*

Comment:

N/A

Having regard to the above, it is considered that the proposed development is inconsistent with the relevant objectives of the rear setback control pursuant to D3.7 of the Pittwater 21DCP.

5. Non-compliance with building envelope

D3.9 of the Pittwater21 DCP requires building planes to be projected at 45 degrees from a height of 3.5m above existing ground level at the side boundaries to the maximum building height. The “amended” development application results in a non-compliance along the northern and southern elevations – refer to **Figure 3**.

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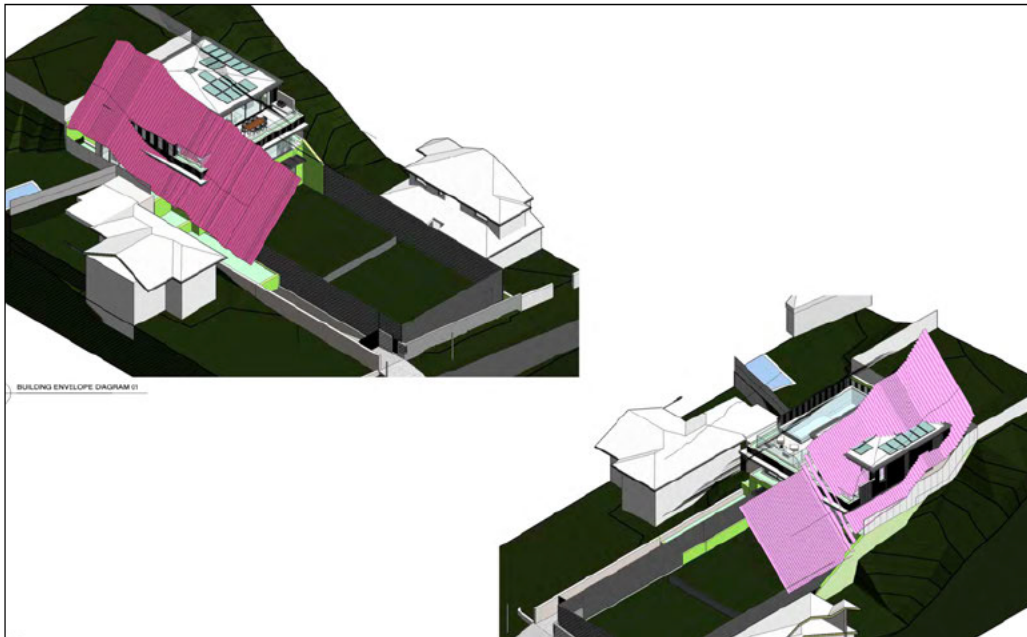


Figure 3: Non-compliance with building envelope
Source: Applicants Architectural plans

Notwithstanding the numerical non-compliance, consistency with objectives of the building envelope control is considered below: -

- *achieve the desired future character of the Locality.*

Comment

Refer to discussion under point 1 above. The proposal is inconsistent with the desired future character of the Bilgola Locality.

- *To enhance the existing streetscapes and promote a building scale and density that is below the height of the trees of the natural environment.*

Comment

The proposed development is not considered to enhance the existing streetscape resulting in a building scale inconsistent with the height of trees.

- *To ensure new development responds to, reinforces and sensitively relates to spatial characteristics of the existing natural environment.*

Comment

The proposed development does not respond or reinforces the existing spatial characteristics, resulting in a massing inconsistent with the predominant 2 storey, low scale dwellings.

- *The bulk and scale of the built form is minimised.*

Comment

The non-compliance with the building envelope results in a massing which becomes visually dominating by virtue of its height and bulk and impacts directly on views. The proposal by virtue of the non-compliance does not respond to the site topography or that of surrounding land. Locating the dwelling further up the hill results in a massing which dominates the surrounding.

- *Equitable preservation of views and vistas to and/or from public/private places.*

Comment

Refer to the discussion under point 7.1 below.

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- *To ensure a reasonable level of privacy, amenity and solar access is provided within the development site and maintained to residential properties.*

Comment

The proposed non-compliances contribute to the unreasonable privacy, amenity and solar access impacts of the development.

- *Vegetation is retained and enhanced to visually reduce the built form.*

Comment

The proposed landscape area is insufficient to visually reduce the bulk and scale of the proposed built form.

Having regard to the above, it is considered that the proposed development is inconsistent with the relevant objectives of the building envelope control pursuant to D3.9 of the Pittwater 21DCP.

6. Non-compliance with landscape area

Clause D3.11 of the Pittwater 21DCP requires a minimum landscape area of 60% for the subject site or 510sqm. The proposal allows for a total landscape area of 116.7sqm or 13.7%. It is acknowledged that Clause D3.11 of the Pittwater DCP allows a variation for “**up to 6% of the total site area**” to be included as impervious landscape treatments. A maximum 6% of the total site area equates to 51sqm. The applicant included all impervious landscape treatments (inclusion area of 88.6sqm). The landscape area plus the inclusion area equates 167.79sqm or 19.7% which remains a considerable non-compliance with the control.

It is acknowledged that the proposed development will increase the existing landscape area on site however, as the proposal is for a new built and not for alterations and additions, full compliance is expected by the controls.

The significant departure from the landscape area control is mostly due to the retention of the tennis court. However the non-compliance is exacerbated by the extent of excavation proposed as well as a generously sized dwelling.

Moreover, the proposal fails to provide for a landscape setting, or satisfy the desired landscape setting/character. The proposed build form does not give the appearance of being secondary to landscaping and vegetation.

The failure to allow for appropriate landscaping on the site is a failure to allow for appropriate density. The application remains inconsistent with Clause C1.1 Landscaping and Clause D3.11 Landscape area of the Pittwater 21 DCP.

7. Amenity impacts

7.1 By way of view loss

It is acknowledged that the proposed height was reduced from what was originally proposed at a maximum ridge height of RL21.08 to RL18.80 (reduction of 2.28m). However the amended DA still does not comply with the maximum building height of 8m, allowing for a height of 9.35m.

The proposal does not comply with the maximum building height; building envelope; side and rear setbacks and landscape area built form controls. Where view loss occurs because of a non-

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compliance, even a **moderate** impact may not be considered reasonable. Even with a complying development application, the question should be asked whether a more skilful design or location of structures, could provide the same development potential to the applicant and reduce the impact on the views of neighbours.

It becomes less a question of how much views are lost but rather is the view loss reasonable?

The proposed development does not meet the reasonableness test because the proposed built form is inconsistent with what could be reasonably anticipated by the controls. Moreover, the proposal is not considered a skilful design, driven by the desire to gain more views over the compliant building height of No. 7-9 Allen Avenue, as well as retaining the tennis court which necessitate the siting of the dwelling within the rear setback. It is not reasonable for a development to gain views at the expense of neighbours behind.

Not allowing the new dwelling to sit further east on the flatter parts of the site where any proposal would likely have a more comparable height to that of the adjoining dwellings, impacts on existing views – refer to visual impact assessment by Urbaine Design Group.

Accordingly the application is inconsistent with Clause C1.3 Views of the Pittwater 21DCP.

7.2 By way of acoustic and visual privacy

Pools are common within the locality; however the elevated nature of the proposed pool is inconsistent with the surrounding area. The elevated nature will exacerbate periods of unreasonable noise disturbance inconsistent with Clause C1.6 Acoustic Privacy of the Pittwater 21 DCP.

The elevated pool is located 3m from the rear boundary with a finished coping level at RL15.8 and the pool terrace level at RL15.3. The top of the proposed screen is at RL16.6 being only 1.3m above the proposed FFL of the terrace. **Figure 4** below demonstrates the opportunity for direct overlooking from the pool terrace at an eye level of 1.6m for a length of 9m into the backyard of No. 8 The Serpentine.

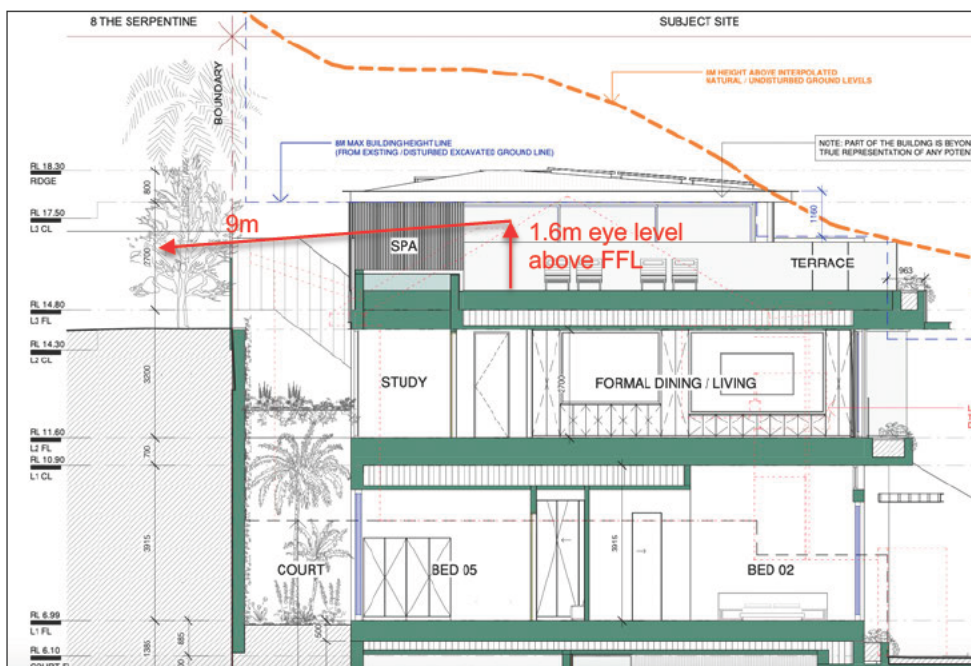


Figure 4: Overlooking opportunity

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The proximity of the pool to the rear and side boundaries as well as the elevated nature of this active recreational use results in an adverse impact on visual and acoustic privacy. Moreover, there are no elevated pools within the immediate area, accordingly the pool and spa are inconsistent with the surrounding neighbourhood character. Allowing an elevated pool will set an undesirable precedent within the Bilgola Beach locality.

7.3 By way of overshadowing

The study and bedroom 4 results in a non-compliance with the side setback measuring 1.5m resulting in additional overshadowing to adjoining properties towards the south (No 2 Allen Avenue).

The shadow diagrams do not include any elevational shadow diagrams and without these visual aids, it is not possible to determine the extent of proposed shadow to windows of adjoining properties, consistent with the planning principles established and adopted by Senior Commissioner **Moore of the NSW Land and Environment Court in relation to The Benevolent Society v Waverley Council [2010] NSWLEC 1082**.

In conclusion, the application is considered not suitable for the site, contrary to Section 4.15(c) of the EP&A Act.

The desire to retain the unauthorised tennis court and to gain water views, necessitate the siting of the dwelling towards the rear of the site, up the slope. Accordingly, the proposal seeks to locate the multi-level dwelling within the remaining relatively small developable area, located within the rear of the site. Not allowing the new dwelling to sit further east on the flatter parts of the site where any proposal would likely have a more comparable height, to that of the adjoining dwellings, impacts on the amenity of surrounding properties.

The proposed bulk and resultant impact on the amenity of adjoining properties as well as its poor response to the existing site constraints (built form and natural environment) results in a proposal which is inconsistent with the desired future character of the Bilgola Locality.

Table 1: Numerical control comparison

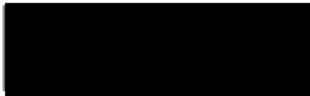
| Control | Original DA2022/1494 | LEC | Current DA2024/1708 |
|---|--|---|---|
| Building height 8m | 9.35m | 9.32m | 9.24m |
| Side Setback 1m to one side, 2.5m to the other. | Northern elevation Basement = 0m Level 1 = 1m Level 2 = 1m Level 3 = 1m | Basement = 1m Level 1 = 1m Level 2 = 1m Level 3 = 1m | Basement = 1m Level 1 = 1m Level 2 = 1m Level 3 = 1m |
| | Southern elevation Basement = 0m Level 1 = 1m Level 2 = 2.5m Level 3 = 2.5m | Basement = 2.5m Access ramp = 0m Level 1 = 2.5m Level 2 = 2.5m Level 3 = 2.5m | Basement = 2.5m Access ramp = 0m Level 1 = 1.5m Level 2 = 1.5m Level 3 = 2.5m |
| Rear Setback 6.5m | Basement = 0m Level 1 = 1m Level 2 = 1m Level 3 = 1m | Basement = 0m Level 1 = 2m Level 2 = 2m Level 3 = 2m | Basement = 3m Level 1 = 3m Level 2 = 3m Level 3 = 3m |

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| | | | |
|---|---|---|---|
| Building envelope 45 degrees from a height of 3.5 metres above ground level | Non-compliance along northern and southern elevations | Non-compliance along northern and southern elevations | Non-compliance along northern and southern elevations |
| Landscape area Min. 60% | 136.83sqm or 16% | 131.19smq or 15.41% | 116.7sqm or 13.7% |

Moreover, the current “amended” DA is similar to the DA2022/1494 as refused by the LEC. In this regard, as noted by Commissioner Byrne during the LEC proceedings, the applicant keeps tinkering with the scheme without a material effort to comply with the controls and adequately address the reasons for refusal, all driven by the desire to retain the tennis court. The amendments made under the current application is insufficient (as demonstrated by the continued non-compliances listed in the Table above) resulting in adverse amenity impacts by way of overshadowing; overlooking and view loss, and do not warrant approval.

Kind regards



Annelize Kaalsen