From: [redacted]
Sent: Wednesday, 22 January 2025 9:53 PM
To: Anaiis Sarkissian [redacted]
Subject: SUBMISSION da2024/1708

Hello Anaiis,
Herewith my submission/objection to DA2024/1708 2A Allen Ave
I tried to load it online but it would not accept bold type etc
Kind regards
Rick Osborn
8 The Serpentine
Bilgola Beach 2107
[redacted]

Unlike other areas Bilgola Beach has an 8m height limit for very good reasons

Commissioner Byrne of the Land and Environment Court stated at the hearing of Wimbledon P/L 1963 v Northern Beaches Council, in regard to the Bilgola Beach 8m height limit.

"This demonstrates the intent of the planning controls for this environmentally unique and sensitive area of the Northern Beaches LGA justifying serious consideration and weight to be given to the public interest in the assessment of development applications under the EPA Act."

This DA2024/1708 is a new application and as such must be considered against all the controls and I believe it fails on the following,

Height
View Loss from Neighbouring Properties
Rear Boundary Setback
Number of Storeys
Building Envelope & Scale
Landscaping
Character of Locality
Acoustic and Visual Invasion of Privacy
Private Open Space
Wildlife Corridor
Precedent

The new DA has not addressed any noncompliance in the previous DA which was refused by three approval bodies and I believe the findings of those bodies applies equally now as then. Commissioner Byrne also stated;
"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."

Commissioner Byrne concluded
"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."

I refer to the Applicant's 'Clause 4.6 Variation Request' and "The Statement of Environmental Effects" both written by Mr Grag Boston

Both these reports contain inaccuracies and false contentions.
These inaccuracies have the effect of changing the truth and as a result could lead council to the wrong conclusions. The writer of these reports will be paid and move on but we the residents and locals who cherish what we have at Bilgola Beach will suffer for the rest of our lives.
Because what is at stake here is not just this proposed development but it will set a **precedent** that will allow every subsequent developer to build a four storey house devoid of landscaping and cheek and jowl with neighbours.

The SoEE Conclusion by Mr Boston
The Applicant's version of the quote from the Commissioner of the LEC in his conclusion in the Statement of Environmental Effects (SoEE) is not correct.
It is not quoted verbatim and in my opinion by leaving out a key phrase implies that at the end of the hearing there were only two issues remaining to be resolved. The quote actually relates to before the hearing and should also include the other issues to be resolved at that time, namely View Loss. Mr Boston's version of the Commissioner's quote adds and deletes phrases, changes words and omits words.
What the Commissioner actually said is reprinted in Footnote 1 below.
Furthermore these were not the only issues in dispute at that time. The experts also disagreed on View Loss. See Footnote 2 below.

The following Contentions by the Applicant within the Clause 4.6 Variation Request are either irrelevant or erroneous in my opinion.

Contention # 1. The Applicant believes the ground level once was higher before any housing was built and believes he should be allowed to build on that (imaginary) higher ground

John Lowe, a surveyor was asked to draw up a plan of what the undisturbed ground may have looked like. Mr Lowe noted on the report that it was a plan not a survey and yet it has been identified as a survey in the SoEE pages 18 and 19 and in Figure 10 by Mr Boston even though he is well aware that it is not empirical, and is clearly not a survey.

I spoke to Mr Lowe on 30th June 2023. He advised me that his plan was **"very iffy, pure guesswork, based on no historical data at all"** and yet this plan is the justification for the noncompliance of the building height.
It is a work of fiction. This has already been pointed out before but it is again submitted as evidence by the Applicant.

In fact, subsequent to the LEC hearing on 30th September 2024, Mr Lowe conducted a survey of the ground level. The Merman case law does not apply as **Mr O'Gorman-Hughes** counsel for Northern Beaches Council made this observation to the LEC at the hearing of Wimbledon 1963 Pty Ltd v Northern Beaches Council.
"Difficulties in assessing ground level (existing) have been addressed by the court in cases where an existing building to be demolished occupies an entire site, but this is not such a case. The ground level around the perimeter of the building is similar to the ground level of the existing building."

Mr O'Gorman-Hughes goes on to state
"An assumed natural surface plan" accompanies the DA. It is used to justify the applicant's written request under cl. 4.6 to justify contravening the height limit. It is neither accurate nor is it based on any survey material in evidence."

In regard to the application of Merman v Woollahra Municipal Council the Commissioner of the LEC Ms Byrne stated regarding the matter at hand;
"It unnecessarily complicates the case and I rely on the definitions in the PLEP. The existing ground level is readily discernible on the Site."

There is good reason why the maximum building height is 8m and not 8.5m as in other localities. **Bilgola Beach is classified as a unique and environmentally sensitive area.**
As Commissioner Byrne stated in her Refusal of the DA
"89 Mr Boston points out that "the Bilgola Beach Area is the only area in which dwelling houses are permissible pursuant to PLEP where a maximum prescribed building height of 8 metres applies. That is, an 8.5 metre building height standard applies to dwelling houses located on land outside the Bilgola Beach Area with clause 4.3(2D) of PLEP.
90 This demonstrates the intent of the planning controls for this environmentally unique and sensitive area of the Northern Beaches LGA justifying serious consideration and weight to be given to the public interest in the assessment of development applications under the EPA Act."

Contention #2. The applicant believes he should be allowed to go higher to retain views he never had but did exist in the past before he purchased.
Apart from the fact that if the dwelling did have those views he may well have paid a lot more for the property, this is a nonsensical argument.

Commissioner Byrne stated

56 ……."I do not consider that reparation of past view loss wrongs (if that is accepted) is a relevant consideration in my decision making as to whether to allow the height standard breach in this development proposal to create views. That could have the consequence that for each successive house seeking to regain views lost by a building is entitled to go higher to regain or gain those views and there would be no limit to the successive height gains in the locality. The building at 7-9 Allen Ave was approved by this Court in 2015 and complied with the 8m height standard Throsby & Anor v Pittwater Council [2015] NSWLEC 1471 (Throsby) at [106]. The Commissioner considered at length the impact of the proposal on views and applied the principles of view sharing. All the properties mentioned in this matter including the Applicant's property were assessed as suffering some view loss from the approved development: Throsby at [110 - 116].

It is not reasonable for one building to gain additional views at the expense of neighbours behind.

58 Such an approach in my opinion is not consistent with the view sharing objective of the standard."

Contention #3 The Applicant claims the council has demonstrated flexibility in the past in regard to the objective "to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,"

Commissioner Byrne stated;
"Firstly, the objective does not speak in terms of flexibility, rather it says 'to ensure consistency with the desired future character'. Secondly, the proposal is not 1, 2 or 3 storeys but 4 storeys and therefore inconsistent with the DFC which states "dwelling houses a maximum of two storeys in any one place in a landscaped setting".

Contention #4. The Applicant considers View loss of neighbours is reasonable
Comment by Commissioner Byrne
"In my opinion and taking into account my own observations on site and the evidence given, there is no doubt that No 8 and No 10 The Serpentine would experience unacceptable view loss from the non-compliant proposal"

Contention #5. The Applicant claims a precedent has been set regarding height at 2-4 Bilgola Ave
He is wrong. This house is not 4 levels like his proposed house – it is a 2 storey home with garaging under the southern side. Quite an oversight by the Applicant as it is not a precedent for a four story dwelling.
In any event it is in a totally different setting. There are no homes behind this house and it was built on two blocks. One entire block is devoted to native landscaping. It also has half the number of rooms as that proposed by the applicant (12 rooms versus 24). This is not a precedent for the applicant.

Commissioner Byrne stated
"With respect to Mr Boston's reference to the new building under construction at 2 – 4 Bilgola Avenue, to the extent that it is relevant, that development is across two parcels of land, is on a curved corner position that is very different in topography and scale, and has a much larger landscaped area."

To be comparable the Applicant would need to remove an entire storey and replace the tennis court with deep soil planting.

Contention #6 The Applicant admits noncompliance on Private Open Spaces, Side & Rear Building Setbacks, Building Envelope, Landscaping – Environmentally Sensitive Lane but states they should be acceptable on merit,
His reasoning why all of these noncompliant controls should be waived is a simple phrase **"acceptable on Merit"** This translates to mean there are no facts or evidence to support them.
All of these controls are vitally important to our locality. It is absurd to claim there is merit in throwing the controls out.
In regard to Landscaping Commissioner Byrne Stated
"83 I agree with Mr Croft's opinion that the desire to retain the tennis court significantly diminishes the ability of the proposal to provide a landscaped area that is commensurate with the scale of the proposed dwelling and that complies with the controls under PDCP D3.11 Landscaped Area – environmentally sensitive land and PDCP C1.1 Landscaping. I note there was

some cross examination on this topic but I accept and agree with Mr Croft's opinion in the Joint Report that a minimum 3m setback is required in conjunction with a reduction in the scale of the built form to overcome the deficient landscaped area proposed.
84 This is just another example of the Applicant seeking to fit excessive built form into what is only 1/3 of the Site."

A further impact to the small amount of deep soil planting proposed will be the need to erect a retaining wall against the western boundary. This will certainly reduce the width of the proposed landscaping and I seriously doubt there will be sufficient light to support plant life in this narrow and dep gap between building and retaining wall.

In regard to conforming with the objectives of the C4 Zone the Commissioner stated
I am not satisfied that notwithstanding the contravention of the height standard the proposal is consistent with the objectives of the C4 zone, for the following reasons:
(1) The proposal is not a low-impact residential development but rather by a combination of a 4 storey building with a pool on the roof with non-compliant height, setbacks, building envelope and landscaping on a significantly constrained site of 280m2 will result in a high impact dwelling in the Bilgola Beach 'environmentally significant and extremely susceptible to degradation' area [ref PDCP A4.3];
(2) The proposal does not pay homage to the values eschewed in objective one because it cannot be described as low-impact as stated above;
(3) The proposed residential development does not integrate with the landform and landscape as discussed;
(4) I do not consider that objective 4 is strictly relevant to the Site as it does not contain riparian and foreshore vegetation and wildlife corridors. With respect Mr Boston's submission is not directly responsive to the subject matter of the objective.
In regard to the boundary setbacks Commissioner Byrne stated
"78 Considering the planners assessments and evidence in respect of Setbacks and Building Envelope, I prefer the position of Mr Croft in this regard. Mr Boston puts too much emphasis on retention of the tennis court when 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. I agree with and accept the reasons of Mr Croft as to why he cannot accept the noncompliance: Ex 2, pages 31 – 35."

“80 Mr Croft contends that the proposed rear setback (2 – 3 metres) is inconsistent with the siting of adjoining properties”

Contention #7 The Applicant states that the proposal is in the public interest
A petition of over 1,500 residents and users of Bilgola Beach agreed that the proposal is NOT in the public interest. In my opinion if another petition were to be undertaken the result would be the same
Commissioner Byrne stated
“In respect of the mandatory requirements of cl 4.6(4)(a)(ii), I am not satisfied that the height of the proposed development is consistent with the objectives of the C4 zone and the height of building development standard for the reasons set out above at paras [51, 53, 54, 56-59 & 65]. As a consequence, the proposed development is not in the public interest.”

In Conclusion the Commissioner stated
“If the proposed development is inconsistent with the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)”

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
In Mr O’Gorman-Hughes words in summary at the LEC hearing
“This is a redevelopment of the site, replacing a two storey dwelling with a four story dwelling. The proponent should not be able to take advantage of the illegally constructed tennis court to argue that the shortfall in landscaping should be justified. *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) NSWLEC 207 at (128).”

An almost identical DA has been refused by three independent approval bodies and still the applicant puts up the same arguments with the same noncompliance.
In my opinion it would be **unreasonable** to approve this Development Application.

In my opinion the Statement of Environmental Effects and the Clause 4.6 Variation Request are deeply flawed documents and should not be considered as evidence in the council's deliberations

Rick Osborn
8 The Serpentine
Bilgola Beach

Footnote 1
From LEC Refusal
15 The planners agreed statement after joint conferencing prior to the hearing is a reasonably accurate statement of what remained in dispute at the hearing. Namely that "the elements of the proposal remaining in dispute relate to the building height breach and consequential visual impacts and whether a 3 metre setback should apply to the whole of the building 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 the balance of the contentions are capable of resolution as detailed in this (Joint) Report".

Footnote 2
14 The principle issue in dispute arises from Contention 1, and as a consequence, Contention 3 particularly in respect of view loss. It is not disputed that the proposed development does not comply with the height of buildings development standard at cl 4.3 of the PLEP.