
Sent: 15/11/2021 1:50:22 PM
Subject: FAO: Nick England - DA2021/1900 - Amended objection letter re: 2A Allen Avenue, Bilgola Beach
Attachments: Amended Objection letter - 2A Allen Ave, Bilgola Beach - DA20211900.pdf;

Hi Nick,

Please find attached an amended objection letter regarding the above. Please note that the only amendment made is a reference to the address of my client from 4A to 4B on pages 2 and page 15, this was to correct an error only. 4A doesn't exist.

To avoid confusion, please can you supersede the objection letter sent yesterday dated 14th November for the attached dated 15th November.

A confirmation of receipt by return e-mail would be appreciated.

Kind regards,

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15 November 2021

The Chief Executive Office
Northern Beaches Council
725 Pittwater Road
Dee Why NSW 2099

By e-mail: council@northernbeaches.nsw.gov.au

FAO: Nick England

Dear Nick

**Submission with regard to Development Application DA2021/1900
Construction of a fence to existing tennis court
2A Allen Avenue, Bilgola Beach, NSW 2107**

I write regarding the above Development Application DA2021/1900 (subject DA) on behalf of John Sexton (my client).

This submission is prepared further to the assessment of the plans, reports and Statement of Environmental Effects (SEE) submitted as part of the subject DA against the relevant EPIs and Planning Controls and with the benefit of a site visit to assess the impact of the proposed development on my client.

The subject DA seeks consent for the construction of a 3 metre high fence at the northern boundary of 2A Allen Avenue, Bilgola Beach (subject site). My client's property sits immediately to the north of the subject site at 4B Allen Avenue. I have reviewed the planning history from Council's records, photographic and written evidence provided by my client, submitted DA plans and reports and considered the impacts on my client to arise by virtue of the proposed development against the relevant planning controls. A summary of the impacts and non-compliance of the subject DA is set out overleaf and discussed in greater detail in this submission.

My client has concerns with regard to the following key issues:

1. Unlawful tennis court and associated fencing to which the proposed fence is stated to be ancillary to, as discussed in detail from page 3.
2. Impacts of the proposed 3 metre high fence to northern boundary of the site abutting No. 4B Allen Avenue, as discussed in detail from page 9.

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The objections set out in this letter are summarised below:

Summary of submission

- Unlawful development of tennis court and associated fencing.
- Proposed development is non-compliant development contrary to CM Act and SEPP (CM) 2018; Pittwater LEP 2014 and Pittwater DCP 2014 Controls, A4.3 Bilgola Locality; C1.5 Visual Privacy; C1.6 Acoustic Privacy; C1.16 Development ancillary to residential accommodation – tennis courts; C3.1 Character as viewed from a public place and D3.12 fences.
- Loss of visual privacy by the removal of a 1.8 metre close board fence and the erection of open wire 3 metre fence enabling visual access across the entire northern boundary between the subject site and no. 4B Allen Avenue contrary to DCP Control C1.5 – Visual Privacy.
- Impact on acoustic privacy given the unlawful tennis court and associated use at the subject site and removal of the 1.8 metre close board fence which provides a slightly better level of acoustic privacy contrary to DCP Control C1.6
- Impact on amenity of neighbouring occupiers – cumulative impact of the above.
- Impact on the character of the area - visual amenity and the natural environment when viewed from Allen Avenue, abutting the Bilgola visual protection area as shown on the Bilgola Locality Map 3 and adjacent to the Locally listed Heritage Items 2270030 and 2270009.

Site details and character of the area

The subject site is located on the western side of Allen Avenue, Bilgola Beach, just outside of the visual protection area and adjacent to listed heritage items 2270030 and 2270009. The boundary identification survey shows the site area as 801.75m. The northern boundary abutting my client's property at no. 4B Allen Avenue extends to 42.671 metres and the front boundary abutting Allen Avenue is 18.288 metres.

The site is situated on a gently sloping site. The site is within Hazard H1 of Council's Landslip Risk Map for gradients of between 5-25 degrees, but the affected part of the site is to the rear.

Surrounding development is predominantly made up of detached dwellings which complement the low density and well landscaped environment. An important aspect of the surrounding environment is the narrow beach road (Allen Avenue), heritage listed street trees and adjacent landscaped areas that form the grassed verges and landscaped front gardens to the dwelling houses to which they serve. The area has a casual beach feel, where formal built form is secondary to the natural environment and this is reflected in the desired future character of the locality within the DCP.

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Proposed development

Development Application DA2021/1900 seeks consent for a new 3 metre high fence along the northern boundary of the site at 2A Allen Avenue, Bilgola Beach. The DA description for the construction of a fence to existing tennis court is challenged in this submission and although the tennis court is existing it is considered unlawful and should not form part of the assessment of this DA.

As outlined in the recommendations of this submission, the proposed development description should be amended to read, *'Construction of a fence'*.

Should amended plans be submitted to try to overcome concerns raised in this submission letter, then my client requests the opportunity to submit an additional submission accordingly. However, it is not recommended that the tennis court be considered via amended plans. A new application should be required should the applicant seek consent for the unlawful tennis court and associated fencing.

This submission relates to the proposed 3 metre fence only.

Unlawful development and use of tennis court and associated fencing

The description of the subject DA is for construction of a fence to existing tennis court and the SEE submitted to support the subject DA refers to the tennis court as being a *'legal structure permissible by Council'*.

As detailed in this submission, my client does not agree that the tennis court is a legal structure and evidence under the planning history found on Council's website is referenced in this submission accordingly. It is my professional option, as outlined in this submission that there is no extant or current DA consent that lawfully permits the tennis court which has been constructed on the subject site. This option is supported by Council (see e-mail under planning history – 22nd April 2020). A Building Information Certificate has been issued for the tennis court but as Council will be aware, this does not constitute compliance of the tennis court or provide retrospective consent.

For the tennis court to be lawfully approved a Development Application should be submitted and assessed accordingly. For this reason, this submission will provide information regarding the planning history, photographic and written evidence of the site with regard to the unlawful development of the tennis court but does not make submission with regard to the tennis court itself, tennis court fencing or and the resulting visual and amenity impacts of the structures.

Relevant Planning History and supporting photos/written evidence for 2A Allen Avenue, Bilgola Beach

2004 - DA N0601/01 – Alterations and additions to existing dwelling – Modification approved 25/10/2004

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The SEE for DA N0601/01 is included in the information submitted with the subject DA. The SEE and master set plans show a tennis court located to the front of no. 2A Allen Avenue in 2004. There are no planning history records available on Council's website to determine whether the tennis court at the subject site in 2004 had lawful consent.

2010 - The tennis court was demolished as per the photo in figure 1 below. The tennis court is replaced with a landscaped front garden and lawn area. The demolition of the tennis court in 2010 removes any claim for a continuation for lawful use or existing use rights. My client has an extensive library of photos dating back from 2010 and can supply photos to Council on their request.

Figure 1 – Tennis Court at 2A Allen Avenue being demolished in 2010. The 1.8 metre wire fence with shade cloth on the northern boundary is also evident in the photo.



Source: Client's photo taken 2010

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2011 – Photos of landscaped area to the front of no. 2A Allen Avenue, Bilgola Beach that replaced tennis court

Figure 2 – Photos of landscaped area including existing 1.8 metre closed board fence at northern boundary at the same location as proposed 3 metre high fence. Photo taken from front of dwelling serving no.2A Allen Avenue.



Source: Client's own photo

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Continuation 2011 - Photo taken from the top deck of No. 4B Allen Avenue looking down into the landscaped front garden of No.2A Allen Avenue.



Source: Client's own photos

2016 – DA N0039/16. – Alteration and additions include new garage – Approved 08/04/2016

The approved stamped plans for DA N0039/16 include a lawned area and landscaping to the front of no.2A Allen Avenue. The approved plans do not include a tennis court and tennis court fencing. Figure 3 below is an extract of the approved stamped plans and the full set of plans on Council's website clearly show that the tennis court was not in existence at the subject site in 2016.

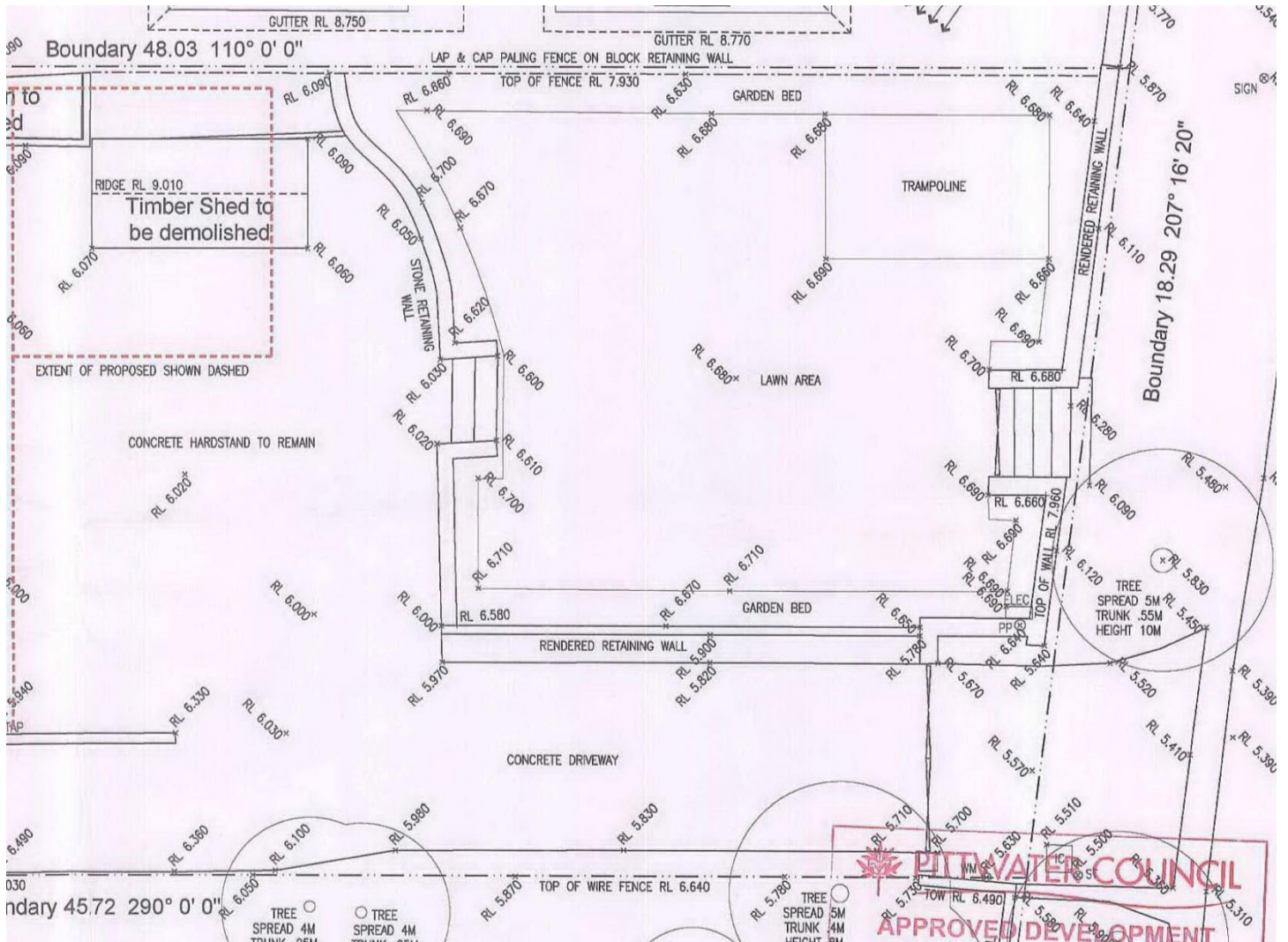
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Figure 3 – Extract from approved stamped plans for DA N0039/16 showing the landscaped layout of the site area where the tennis court is now located



Source: Northern Beaches Council website – DA N0039/16

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22 April 2020 – E-mail correspondence from Northern Beaches Council to my client regarding the unlawful development of the tennis court and compliance procedures (own emphasis)

From: Dominic Brooks

Sent: Wednesday, 22 April 2020 3:13 PM

To: 'John Sexton'...

Subject: BLD2020-00321 2A Allen Avenue Bilgola Beach [Tennis Court]

Good afternoon Mr Sexton

1. Firstly I apologise for the delay in responding to you.
2. We spoke briefly last night.
3. Council has reviewed its records and has determined no approvals are in place for the tennis court.
4. Council does acknowledged that a tennis court did exist at the lot some time ago.
5. A report has been prepared and is with my Team Leader.
6. A Notice has been recommended i.e. demolition.
7. Council is also undertaking a company search and is in-contact with the R/L Agent. Reason: The person who owns the property resides overseas.
8. Council expects that the new owner will do the following on receipt of the Notice:-
 - a. Make representation.
 - b. May disagree with Council's findings.
 - c. Submit a Building Information Certificate Application for the structure i.e. Tennis court and fencing
 - d. Submit a planning application for the land-use re: Tennis court.
9. The landowner is permitted to make these applications and Council cannot prevent them doing so.
10. When the report has been approved and the Notice issued I be in contact to confirm such with you.
11. Any further concerns, please contact me on 8495-5455

Dominic Brooks

Contractor - Building Control Officer

Building Control
t 02 8495 5455

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2020 – BC2020/0091 – Building Certificate issued on 01/02/21 for dwelling and tennis court.

A Building Information Certificate (BIC) does not constitute lawful consent, compliance or retrospective consent. As set out in Division 6.7 of the Environmental Planning & Assessment Act 1979 (The Act), a BIC prevents council for a period of 7 years from the date of issue from making an order under the Act requiring the structure (tennis court) to be demolished. Once the 7 year period has expired, Council can issue an order for demolition of the unlawful structure (tennis court and fencing to the remaining boundaries).

2021 – DA2021/1900 – Subject DA submitted for the construction of a fence to existing tennis court.

As is clear in the planning history, supporting photographic and written evidence (Council's e-mail dated 22 April 2020), the tennis court and associated fencing are not a lawful structure and do not have development consent.

Impacts and non-compliance of proposed 3 metre high fence to the northern boundary

As previously outlined, this submission includes a review and assessment of the impacts of the proposed 3 metre high open wire mesh fence to the northern boundary. This submission does not include the impacts of the unlawful tennis court and associated tennis court fencing to the other boundaries as a new application should be submitted and assessed.

Relevant legislation and Planning Controls

In preparing this submission, I have carefully considered the following legislation and planning controls:

Environmental Planning & Assessment Act 1979 (The Act)
Environmental Planning and Assessment Regulation 2000 (The Regulations)
Coastal Management Act 2016 (CM Act)
State Environmental Planning Policy (Coastal Management), 2018
Pittwater Local Environmental Plan 2014 (LEP)
Pittwater Development Control Plan 2014 (DCP)

Coastal Management Act (CM Act), 2016 and associated SEPP (Coastal Management), 2018

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The subject site is located in a Coastal Use area, as specified in Clause 8 of the CM Act 2016.

I4 Development on land within the coastal use area

- (1) Development consent must not be granted to development on land that is within the coastal use area unless the consent authority—*
- (a) has considered whether the proposed development is likely to cause an adverse impact on the following—*
- (i) existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
 - (ii) overshadowing, wind funnelling and the loss of views from public places to foreshores,*
 - (iii) the visual amenity and scenic qualities of the coast, including coastal headlands,*
 - (iv) Aboriginal cultural heritage, practices and places,*
 - (v) cultural and built environment heritage, and*
- (b) is satisfied that—*
- (i) the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or*
 - (ii) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or*
 - (iii) if that impact cannot be minimised—the development will be managed to mitigate that impact, and*
- (c) has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.*
- (2) This clause does not apply to land within the Foreshores and Waterways Area within the meaning of [Sydney Regional Environmental Plan \(Sydney Harbour Catchment\) 2005](#).*

Comments: The proposed development of a 3 metre fence clearly visible from public domain will have a detrimental impact on the scenic qualities of the surrounding environment and appear obscure and out of character. The proposed development would significantly impact on the visual amenity and scenic qualities currently enjoyed contrary to I4 (1) (a) (iii).

Development consent should not be granted in accordance with I4 (b) of SEPP (Coastal Management) unless amended plans overcome the impacts identified.

Local Environmental Plan (LEP)

Land use zone: The subject site is zoned E4 Environmental Living under the LEP.

The zone objectives are as follows:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*

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- *To provide for residential development of a low density and scale integrated with the landform and landscape.*
- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

Comment: The proposed development would appear as an incongruous structure that would dominate the streetscene when viewed from the Allen Avenue and when viewed from no. 4B Allen Avenue. A 3 metre high fence is not of a scale integrated with the landform and landscape and would adversely impact the aesthetic values of the surrounding environment contrary to the objectives of the zone.

Clause 5.10 Heritage conservation

- (5) **Heritage assessment** *The consent authority may, before granting consent to any development—*
- (a) *on land on which a heritage item is located, or*
 - (b) *on land that is within a heritage conservation area, or*
 - (c) *on land that is within the vicinity of land referred to in paragraph (a) or (b),*
- require a heritage management document to be prepared that assesses the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage item or heritage conservation area concerned.*

Comments: The proposed development is within the vicinity of locally listed heritage items 2270030 (street trees – Norfolk Island Palms and Date Palms) and 2270009 (The Palms (House)), which are included with Schedule 5 of the Pittwater LEP. A heritage management document should be prepared and submitted as part of the assessment of this subject DA.

The Statement of Environment Effects does not include information regarding the impact of the proposed development on the heritage item and outlines that, ‘*there are no Heritage Items located in the immediate vicinity of this Property*’. Please see figure 4 for an extract of the Pittwater Heritage Map.

Figure 4 – Extract of Pittwater Heritage Map, Pittwater LEP 2014



Source: Northern Beaches Council Planning Maps

Clause 7.6 Biodiversity

The subject site is located within the Pittwater Biodiversity Map. Cl.7/6 (4) (a) requires that development consent must not be granted unless the consent authority is satisfied that the development is designed, sited and will be managed to avoid any significant adverse environmental impacts.

The proposed 3 metre high wire fence would have significant visual impacts on the surrounding environment, and it should be considered whether fauna movement would be impacted upon by the 3 metre high boundary treatment (fence).

Clause 7.7 Geotechnical hazards

The subject site is located within Area H1 on the Landslip Risk Map. A Preliminary Geotechnical Report should be submitted with the Development Application although it is acknowledged that the proposed development is not located within the part of the site affected by the H1 zone. Having said that, drawing no. DA2-01 – North Elevation, does not provide any details to the remaining boundary treatment to the northern boundary and it is assumed in this submission that the existing boundary treatment is proposed to remain.

Development Control Plan (DCP) - Non-compliant development and amenity impacts

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DCP Control A4.3 Bilgola Locality

Desired Future Character - The Bilgola Beach Area:

Is a visual catchment that is environmentally significant and extremely susceptible to degradation. Its unique local and regional significance requires protection and preservation, and further investigation for listing as an environmental protection and/or conservation area. 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. A Visual Protection Area (as identified in Bilgola Locality Map 3) contains particular controls to minimise the impact of development that is visible from public places. The beach, valley and headlands represent a quiet uncrowded environment with no formal commercial activity. Its unique natural, unspoilt, non-commercial character makes it attractive to local residents and visitors alike and reflects the relaxed beach lifestyle. The local topography and natural features, notably the beachfront, headlands and stands of cabbage tree palms in the valley demand different sets of constraints on building design.

Comment: The construction of a 3 metre high wire mesh fence to form a boundary fence between dwellings is not in keeping with the desired future character of the Bilgola Beach area. The proposed development does not reflect the relaxed beach lifestyle or accord with the unique natural, unspoilt and non-commercial character of this area and is non-compliant with DCP Control A4. The photos shown in figures 5 and 6 show the impact of the proposed development given the unlawful associated tennis court fencing. The proposed 3 metre high open mess tennis court fence as proposed under this subject DA is stated to be the same as what is already in place.

Figure 5 – Photo towards site taken from Allen Avenue. The unlawful tennis court fencing already erected is evidence of the impact of the proposed development on the streetscene.



Source: Own site photo

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Figure 6 – Photo taken from Allen Avenue showing the tennis court and associated tennis court fencing in photo 5. Given the colour of the dwelling house at no. 4B Allen Avenue, the black 3 metre high fence is highly visible



Source: Own site photo

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DCP Control C1.5 - Visual Privacy

Comment: DCP Control C1.5 seeks to optimise visual privacy through good design and create a sense of territory and safety. The stated controls seek to ensure that adjoining dwellings are to be protected from direct overlooking within 9 metres by building layout, landscaping, screening devices.... The existing close board fence of approx. 1.8 metres high along the northern boundary currently provides visual privacy to the private open space, to the front, side and rear of no.4B Allen Avenue and the downstairs bathroom (see figure 6). The open wire mesh fence would remove the level of privacy as existing and you would expect from a side boundary fence between frequently used neighbouring private open space and adjoining dwelling houses.

DCP Control C1.6 – Acoustic Privacy

Comment: The existing 1.8 metre close board fence provides a level of acoustic protection when the tennis court is in use. Although the close board fence does not overcome the acoustic impacts arising from the use of unlawful tennis court, an open mesh fence would provide no acoustic protection. Noise would not be substantially contained from private open space areas contrary to the outcomes of DCP Control C1.6.

DCP Control C1.16 – Development ancillary to residential accommodation – Tennis Courts

Although this submission does not address the impacts of the unlawful tennis court as a new application should be submitted, DCP Control C1.16 does relate to tennis court fencing to which this DA seeks consent for.

DCP Control C1.16 is set out as follows:

Outcomes

Minimal adverse impact on the existing landform, natural vegetation or visual quality of the site. (En)

Controls

Night lighting of tennis courts ancillary to a dwelling is not permitted.

Fence colour must be dark green or black.

Landscaping should be provided between the tennis court fencing and external boundaries of the property where possible.

Comment: The 3 metre high wire mesh fence which is proposed to serve the unlawful tennis court on site would not meet the outcomes of DCP Control C1.16. The fence would be highly visible from the streetscene which is in close proximity to the Bilgola Beach visual protection area and adjacent heritage item. The visual impact of the 3 metre high wire fence would appear as an incongruous structure and at odds with the more open, landscaped character of the streetscene.

Furthermore, in contrast to the stated controls, there is no opportunity for landscaping to be provided between the tennis court fencing and external (north) boundary of the site.

The proposed development is clearly contrary to both the outcomes and controls of DCP Control C1.16.

DCP Control D3.1 – Character as viewed from a public place

As previously outlined under DCP Control A4.3, the proposed development is contrary to the desired future character of the locality. The 3 metre high wire mesh fence would be highly visible from the public domain and cannot be considered a secondary to the landscaping and vegetation. There is no opportunity to soften the 3 metre high fence with landscaping or vegetation and it would be seen as out of character with the expected scale and height of a boundary fence in this location contrary to the outcomes of DCP Control D3.1.

DCP Control 3.12 – Fences – General

The proposed 3 metre high open wire mesh fence to the northern boundary of the subject site (front / side) fails to meet the following outcomes of the above control:

Outcomes [to which the proposed development does not achieve]

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

To ensure fences compliment and conserve the visual character of the street and neighbourhood....

To contribute positively to the public domain...

Fences, where provided, are suitably screened from view from a public place...

To ensure heritage significance is protected and enhanced...

The relevant control for the subject site is set out below:

Controls

a. Front fences and side fences (within the front building setback)

Front fences and side fences (within the front building setback) shall:

- *not exceed a maximum height of 1 metre above existing ground level,*
- *be compatible with the streetscape character, and*
- *not obstruct views available from the road.*

Fences are to be constructed of open, see-through, dark-coloured materials.

Landscaping is to screen the fence on the roadside. Such landscaping is to be trimmed to ensure clear view of pedestrians and vehicles travelling along the roadway, for vehicles and pedestrians exiting the site.

Original stone fences or stone fence posts shall be conserved.

Front fences to a maximum height of 1.8 metres may be erected on the boundary for those properties that have frontage to Bilgola Avenue, or Allen Avenue. These fences should be constructed of sandstone or like materials to conform to adjoining fences and should provide extensive landscaping incorporated into the fence or in front of the fence.

Comment: The proposed development fails to meet the outcomes of DCP Control D3.12, as included above.

The proposed 3 metre high open wire mesh fence is a side fence within the front building setback and is located at Allen Avenue. The proposed fence should therefore be no higher than 1 metre, although it is considered that a merit assessment would permit a 1.8 metre side boundary fence in this location (given the controls relating to part C of this control). A 3 metre high fence is clearly non-compliant and should be refused in this location given non-compliance with the stated DCP Control and associated impacts discussed.

Impact on amenity of neighbouring occupiers

The proposed development would clearly have a materially significant impact on neighbouring amenity. The Development Application fails to comply with either the CMSEEP, LEP or DCP controls referred to in this submission. The impact on neighbouring amenity would arise from the construction of a 3 metre high fence along the northern side boundary of the subject site would have a detrimental impact on visual and acoustic privacy and overbearing impact to the occupiers of no. 4B Allen Avenue.

Impact on the character of the area

The proposed development would have a harmful impact on the surrounding natural environment in its current proposed form. The 3 metre high wire mesh fence along the north side boundary within the front setback of no. 2A Allen Avenue is considered to contrary to the future desired character of the locality and would be detrimental to the visual quality of the surrounding environment, as set out in this submission (see figures 5 and 6).

Recommendations

- The description of the subject DA should be amended to avoid any future assumptions with regard to the unlawful development of the tennis courts and should read as follows:

‘Construction of a fence’.

- A Heritage Management Document should be submitted to assess the impact of the proposed development within the vicinity of heritage listed items.

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- This subject DA should be refused for the reasons set out in this submission.
- Amendments to the subject DA to include the tennis court and associated fencing should not be facilitated as part of this application. A new application should be required to consider the significant impacts of the tennis court and associated fencing.
- Should this DA be approved, contrary to the clear objections set out in this submission, a condition should be attached to the consent restricting the DA approval to the fence to the northern elevation and the stamped plans should be marked to reflect that the tennis court and associated fencing as unapproved structures.
- When the BIC Certificate BC2020/0091 expires in 7 years from issue (at 01/02/2028), Council should immediately issue a demolition order should an approved consent not have been granted for the unlawful use of the tennis court.

Conclusion

This submission sets out my client's concerns regarding the proposed development under Development Application DA2021/1900 and recommendations/requests.

The proposed development would have a materially detrimental outcome on the amenity of neighbouring occupiers (my client) and the surrounding environment.

This Development Application is non-compliant with the Coastal Management Act and SEPP (CM) 2018; Pittwater LEP 2014 and Pittwater DCP 2014 Controls, A4.3 Bilgola Locality; C1.5 Visual Privacy; C1.6 Acoustic Privacy; C1.16 Development ancillary to residential accommodation – tennis courts; C3.1 Character as viewed from a public place and D3.12 fences.

It is respectfully requested that the proposed development be refused to address the concerns outlined in this submission. Should amended plans be submitted to address concerns expressed, my client requests that he be given an opportunity to comment accordingly.

I thank you in advance for your consideration of the concerns raised in this submission.

Kind regards,

Karen Buckingham *on behalf of Mr John Sexton*
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