

Submission – Residents, Owner and family members of 10 The Serpentine, Bilgola Beach Re - Application DA 2022/1494 at 2a Allen Ave Bilgola Beach.

August 2023

In summary we submit:

- It would be unreasonable and potentially unconscionable to give an individual such significant concession where there is no public good or public interest associated with the application, nor, in our opinion, does the application reasonably meet the thresholds for obtaining concession under the relevant instruments (detailed in Sections 4 and 5 below).
- There are no planning or historical grounds to “quarantine” the land represented by the tennis court.
- In particular **and of significant concern to us** - the proposed development is **inappropriately located on the site**. The proposed location on the site:
 - Re-enforces the lack of build harmony with adjacent houses along the western side of Allen Avenue and due to its height and prominence, does not integrate with the landform.
 - Compounds loss of amenity (views, access to sun, privacy) for us, Rick and other neighbours; and
 - Raises significant risks associated with extreme weather events predicted as a result of Climate Change, this is reinforced due to the lack of soft ground landscaping and if approved brings onto question the relevance of the advice contained in “Towards 2040”.
- Since a “knock-down rebuild” is proposed (rather than a renovation) the decision-maker should consider the site as a “blank canvas” and apply all controls.

Core submissions by the Applicant

The Applicant seeks:

1. To retain the tennis court.
2. To build in a way that allows access to more views.
3. To develop “in the interests of the properties on either side”.

4. To claim clause 4.6 of the PLEP would support his application to build to a height 14.5 meters when the control is 8 meters.
5. To claim section 4.15(1) of the EP&A Act would support his application for a greatly diminished landscaping allocation and the setting aside of the rear and side set back controls.

1. The Tennis Court

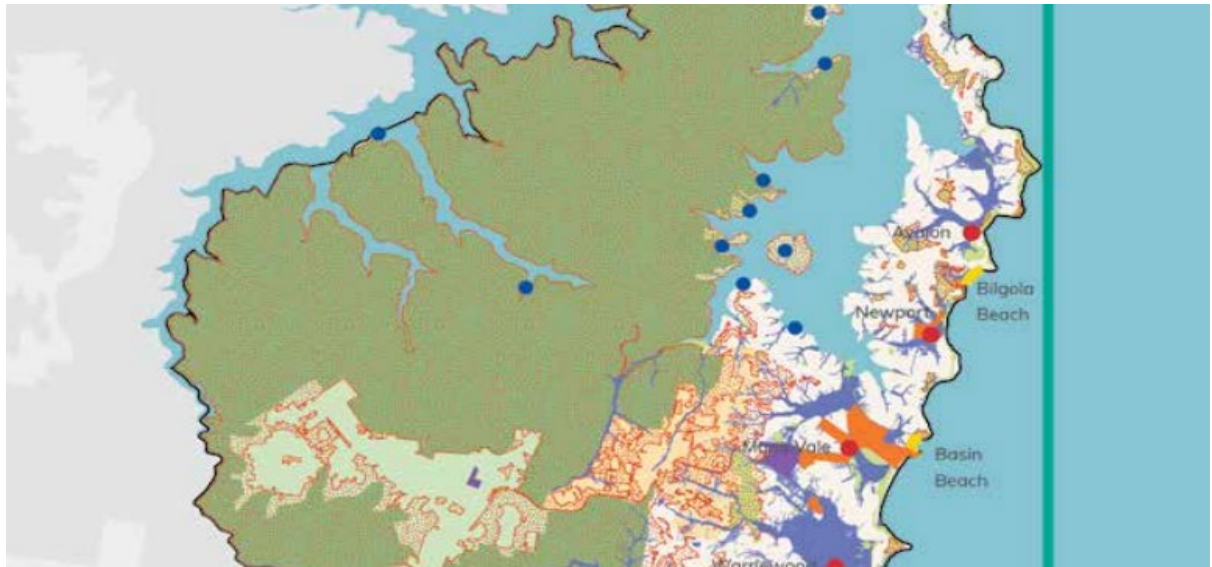
When the applicant purchased the property, **it did not have a tennis court.**

The applicant reinstated the tennis court AFTER purchase, without prior permission. In fact, the property did not have a tennis court for over 10 years prior to purchase by the applicant, *well and truly breaking any chain of connection between the tennis court and the locality.*

The applicant claims that the tennis court is “meaningful” because it was originally built by his grandfather and his mother was a good tennis player.

Our submission is:

- A claim that something is “meaningful” to an individual should not be a planning ground on which to quarantine land from development – this could lead to ridiculous outcomes. I could claim my garden (which might have won awards for its nice azaleas) should be quarantined.
- Since the original house (built by the applicant’s grandfather) is to be demolished - **there is no reason why the block should not be seen as blank canvas and the rear set back control of 6 meters should be enforced.** This would bring the proposed house into visual harmony with adjacent houses and largely resolve amenity issues with the houses behind.
- To ignore rear sets backs would be to ignore the advice in the **Towards 2040** Planning Instrument which identifies Bilgola Beach as a high hazard area for slip and vulnerable to extreme weather events associated with Climate Change. See image below. This advice is particularly relevant to the proposed setback and landscaping proposals. Note the recommendation of the report is that within vulnerable areas “avoid developments that rely on performance-based solutions”.
- Further:
 - Clause 1.2(2)(i) of the PLEP 2014 requires the decision maker to minimise risks to the community in areas “subject to environment hazards, including Climate Change” and
 - Clause 2.12 of SEPP (Resilience and Hazards) prescribes that development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.



Legend					
	Urban area		Populations vulnerable to urban heat ¹⁴		Partner with research organisations to understand climate change impacts
	Ingleside Growth Area		Flood prone area		Promote and maintain public access and build resilience through regeneration and beach nourishment
	National park		Bush fire prone land		Onsite sewerage management system areas in close proximity to waterways or coast
	Major public parkland/bushland		Employment lands with risk of stormwater contamination		
	Metropolitan Rural Area (MRA)		Build resilience to coastal hazard		
	Future MRA investigation area				
	Strategic and local centres				

We submit that to ignore rear setbacks just because of a tennis court which holds no public benefit or historical significance to the Bilgola region - would be unreasonable and potentially unconscionable.

2. Access to more views

The applicant claims he should be able to access more views. However, the applicant already has ocean views at a height of about 5m above excavated ground level. See photo below from existing house.

These views exceed views available to other houses along the western side of Allen Avenue.

These views are the views the applicant purchased because the house across the road at number 7-9 Allen Avenue (which the applicant refers to in his submission) was fully built at the time of purchase. See aerial photo of no. 2A Allen Avenue on Jan 23, 2020, just after applicant purchased the property (shows no tennis court and a completed residence at no. 7-9 Allen Avenue).



For this applicant to obtain views additional to those he purchased and far exceeding views available to other residents on the western side of Allen Avenue:

- ALL local area Controls have to be “set aside” for this individual; and
- Existing views have to be taken away from us at no.10 The serpentine and Mr Osborn at no. 8 The Serpentine.



3. Develop “in the interests of the properties to either side”.

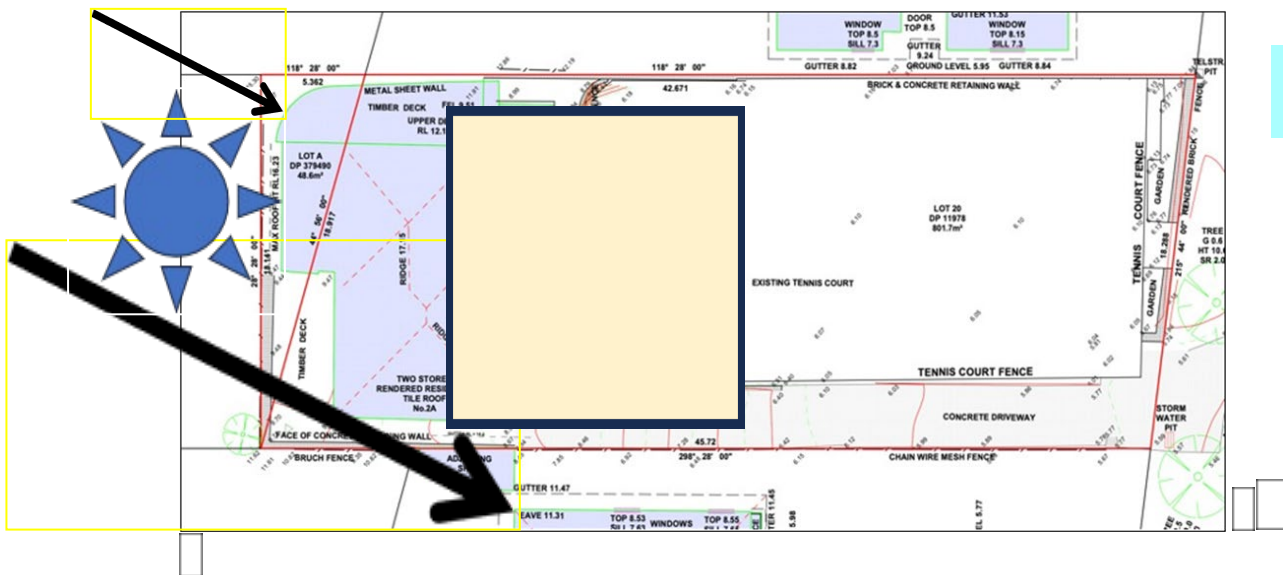
The applicant submits that the building is best placed on the top of the block just 1m from the rear boundary because it reduces overshadowing of neighbouring properties to the north and south.

However, if the development is brought forward to allow a 6.5m set back:

- **The development would be in greater harmony with adjacent houses and integrate better with the landform.**
- Moving the development forward would lower the development and more closely align it with the desired character of Bilgola Beach and its Zoning; and
- Due to greater alignment with the house to the south and more open space in the rear of no. 2A – the house to the south is likely to get more afternoon sun.

The desired future character for Bilgola Beach is for the Bilgola locality “to remain 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”. (PLEP 2014).

Below is an estimate of the new house location if the rear set back control is observed.



Rear setbacks are enforced in order to allow for consistent built alignments. Rear setback allows for greater sense of openness; preserves amenity of adjacent land; maintains visual continuity and pattern of buildings; and the opportunity for privacy between dwellings. The proposal fails all of the above.

4. If Merman applies, then the applicant appeals to Clause 4.6 of the PLEP 2014 (height of buildings variations)

It is our reading of the Instrument that to satisfy clause 4.6 of the PLEP 2014 an applicant must satisfactorily demonstrate each matter in clause 4.6(3)(a) and clause 4.6 (3)(b) and clause 4.6(4).

Clause 4.6(3)(a): compliance with the development standard (height) is “unreasonable or unnecessary”.

The applicant argues that compliance with the development standard is “*unreasonable or unnecessary*” because the “objectives” of the development standard are achieved notwithstanding non-compliance with the standard.

However, the applicant has based his arguments on a determination of building height which is inconsistent with the recent direction of the Land and Environment Court on what is ground level i.e. **Building height is not to be taken from “natural ground levels”, as suggested by the applicant.**

As you know there has been caselaw for sites occupied by a basement *Bettar v Council of City of Sydney* [2014] (Bettar)]. However, we understand that Bettar was superseded by the NSW LEC judgement in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSW (Merman).

The Court found in Merman that the maximum building height standard is measured from the excavated ground level (within the footprint of the existing building) to the highest point of the proposal directly above. Compared with the old version of an extrapolated ground line under the building based on levels around the footprint of the existing building.

We understand that Bettar was dealing with a block of land very different to the land in Merman and at 2A Allen Avenue. In Bettar we understand the existing development covered the entire block so there was no exposed undisturbed land and further there was a deep basement to the existing development. The applicant has not, as far as we can tell, made a convincing argument for why the decision of the Court in Merman should be set aside in favour of Bettar.

Applying the approach of the Court in Merman in calculating building height, we understand the building is 14.5 meters high (when the control is 8 meters).

Further, for the record, we strongly disagree with the applicant's submission that the development is a largely "2-story development" (p55 of SEF) and that the proposed development is "similar to the scale as that which currently exists" (p 54 SEF). The current dwelling is a little over 9 meters above excavated ground level, not 14.5 meters.

In conclusion we believe that clause 4.6(3)(a) is not satisfied.

Clause 4.6 (3)(b): sufficient environmental planning grounds to justify contravening the development standard.

Noted that in Merman "the prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.

However, we strongly dispute the applicants estimate of the "natural undisturbed topography of the land". Our neighbour Mr Rick Osborn has extensively researched this issue and we understand he has provided evidence of his findings to Council. We also understand that unfortunately council has not retained the original survey from the 1950s.

Therefore, without a reliable survey of the natural undisturbed topography - **we submit there is insufficient grounds to form an opinion of whether the prior excavation of the site within the footprint of the existing building distorts the height of buildings**

development standard plane overlaid above the site when compared to the topography of the hill.

In conclusion we submit that clause 4.6(3)(b) cannot be determined to a *satisfactory level of confidence in the absence of historical surveys* such that a positive determination under this clause would be a best guess estimate, technically unsafe and should not be made.

Clause 4.6 (4): proposed development is in the public interest.

We understand that Public Interest for this clause means its consistent with the objectives of the particular standard (height) and the objectives for development within the Zone.

The decision of Merman refers to Preston CJ in *Initial Action* (Para 27). Preston described the relevant parameters of the test as follows:

If the proposed development is inconsistent with either 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).

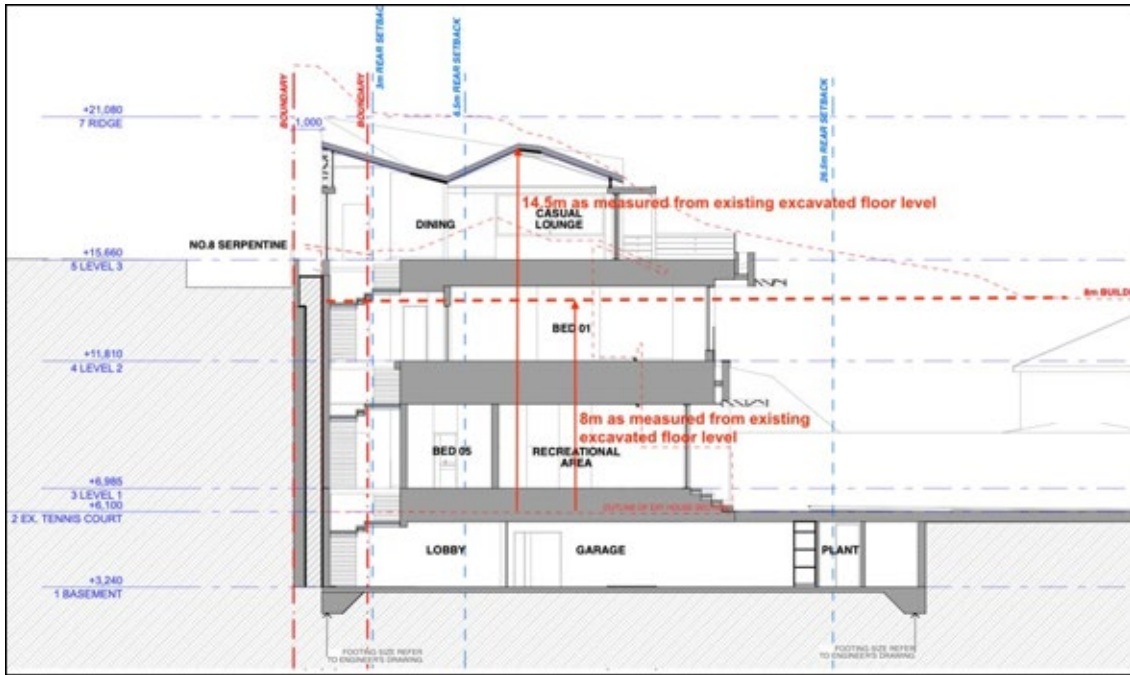
Objectives of the Height of Buildings Standard

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

The desired future character of Bilgola is set out in the P21 DCP:

“The Bilgola locality will remain 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”.

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.*



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

The proposed development is inconsistent with the predominant two storey existing development in the immediate area.

c) to minimise any overshadowing of neighbouring properties.

The proposed development by virtue of its excessive height and location on the block will cast a large shadow, particularly with regards to morning sun (for Numbers 8 and 10 the Serpentine) and then afternoon sun from midday onwards with regards to the homes to the south of the proposed development.

d) to allow for the reasonable sharing of views,

There are views available from around 5 meters above excavated ground level. These are the views the applicant purchased. These views far exceed the views of others along the western side of Allen Avenue. In order for the decision maker to give this applicant more views than what he purchased it means “taking from Peter to pay Paul”. There are no planning or compelling public interest grounds to do this.

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

Extensive excavation with significant disturbance across the site.

Objectives of the Zone

Under Part 2 of the PLEP 2014 it is noted that Bilgola Beach is C4 “Environmental Living”. The objectives of this Zone are set out in the PLEP and include:

“To provide for residential development of low scale”.

This is simply not a low scale development. When you consider the development also includes a roof top pool and entertaining deck which will be further bulked with privacy screens and plantings, any remaining views of residents behind the development will be obscured even further.

In conclusion and in addition to our arguments above, the submissions made by the applicant under this clause 4.6(4) are not relevant because they rely on a determination of building height which is inconsistent with the decision in Merman. We therefore submit that clause 4.6(4) has not been satisfied.

5. To Justify non-compliance with all setbacks and landscaping controls the Applicant appeals to clause 4.15 of the EP&A Act

The proposed development results in non-compliance with the side and rear setback controls, the prescribed building envelope and landscaped area controls. The applicant submits that such variations succeed pursuant to section 4.15(3A)(b) of the EP&A Act, which allows the decision maker to be flexible in applying such provisions. However, the decision maker needs to be satisfied that the applicant has presented reasonable alternatives that achieve the objects of those standards for dealing with that aspect of the development under the DCP.

4.15 Evaluation

(1) Matters for consideration--general 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, and

(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

(iii) any development control plan, and

(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

(2) Compliance with non-discretionary development standards--development other than complying development If an environmental planning instrument or a regulation contains non-discretionary development standards and development, not being complying development, the subject of a development application complies with those standards, the consent authority--

(a) is not entitled to take those standards into further consideration in determining the development application, and

(b) must not refuse the application on the ground that the development does not comply with those standards, and

(c) must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards, and the discretion of the consent authority under this section and section 4.16 is limited accordingly.

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards--

(a) subsection (2) does not apply and the discretion of the consent authority under this section and section 4.16 is not limited as referred to in that subsection, and

(b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.

Note : The application of non-discretionary development standards to complying development is dealt with in section 4.28(3) and (4).

(3A) Development control plans 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, and

(c) may consider those provisions only in connection with the assessment of that development application.

The applicant claims in his submission that having given due consideration to the matters pursuant to Section 4.15(1) of the EP&A it is considered that there are “*no matters which would prevent Council from granting consent to this proposal in this instance*”. However,

- the applicant has not addressed clause 4.15(1)(a)(i) and (ii) as it did not consider the new Local Strategic Planning Instrument (Towards 2040).
- the applicant did not adequately consider the suitability of the site for the development as required by clause 4.15(1)(c) (specifically, the suitability of the selected site on the block); and
- the applicant has not provided an argument as to why this development would be in the “public interest” as required by clause 4.15(1)(e).

The side and rear setbacks raise significance geotechnical risks in a zone tagged as a vulnerable zone for future environmental hazard associated with Climate Change, as noted previously. In such zones risk mitigations should be avoided and strict compliance should be enforced.

Objects of the standards in the DCP

The objects of the standards for side and rear setback for the Bilgola locality (P21 DCP, clause D 3.7) are not achieved. The objects of the side and rear setbacks controls include (clause D 3.7):

- To achieve the desired future character of the Locality (*predominately low scale 2-story development integrated into landform etc*).
- The bulk and scale of the built form is minimised (*4 story development with additional entertaining space and pool on top of the upper level*).
- Equitable preservation of views and vistas to and/or from public/private places (*views to the beach and ocean significantly blocked by this proposed development*).
- To ensure a reasonable level of privacy, amenity and solar access is provided within the development site and maintained to residential properties (*morning sun significantly blocked by the proposed development to residences behind and afternoon sun to residences to the south. Privacy could only be preserved through the erection of privacy screens which will add further to the height and bulk of the development*).

For these reasons and those stated previously in this submission the proposed development does not meet the objectives from the DCP with regards to the objects of the set-back controls. As such,

the consent authority should not disapply these controls using its flexibility under clause 4.15(3A)(b) of the EPA Act.

The objects of the standards for landscaping for the Bilgola locality (P21 DCP, clause D 11] are not achieved. The objects of the side and rear setbacks controls include (clause D 3.11)

- Achieve the desired future character of the Locality (*predominately low scale 2-story development integrated into landform etc*).
- The bulk and scale of the built form is minimised.
- A reasonable level of amenity and solar access is provided and maintained.
- Vegetation is retained and enhanced to visually reduce the built form.
- Conservation of natural vegetation and biodiversity.
- Stormwater runoff is reduced, preventing soil erosion and siltation of natural drainage channels.
- To preserve and enhance the rural and bushland character of the area.
- Soft surface is maximised to provide for infiltration of water to the water table, minimise run-off and assist with stormwater management (*definitely not, court is synthetic grass on concrete base*)

Controls

The total landscaped area on land zoned R2 Low Density Residential, R3 Medium Density Residential or E4 Environmental Living shall be 60% of the site area. Since this is a totally new build from the ground up as per submission, there are no grounds not to enforce this control.

For these reasons and those stated previously in this submission the proposed development does not meet the objectives from the DCP with regards to landscaping. As such, the consent authority should not disapply this control using its flexibility under clause 4.15(3A)(b) of the EPA Act.

The objects of the standards for building envelope for the Bilgola locality (P21 DCP, clause D3.9] are not achieved.

- To achieve the desired future character of the Locality (*predominately low scale 2-story development integrated into landform etc*).
- To enhance the existing streetscapes and promote a building scale and density that is below the height of the trees of the natural environment (*the development is proposed to sit on the highest and most prominent part of the block significantly out of alignment with adjacent houses*).
- To ensure new development responds to, reinforces and sensitively relates to spatial characteristics of the existing natural environment.

- The bulk and scale of the built form is minimised (*the development includes 4 levels plus an additional level of living space on the top of the development which will be bulked even further with privacy screens and plantings*).
- Equitable preservation of views and vistas to and/or from public/private places (*views from the residences behind the development (no. 8 and 10 The serpentine) are significantly diminished and privacy is a huge issue as the development will tower over the homes behind*).
- To ensure a reasonable level of privacy, amenity and solar access is provided within the development site and maintained to residential properties (*as above*).
- Vegetation is retained and enhanced to visually reduce the built form (*only 1% landscaping is proposed*).

For these reasons and those stated previously in this submission the proposed development does not meet any of the objectives from the DCP with regards to building envelope. As such, the consent authority should not disapply this control using its flexibility under clause 4.15(3A)(b) of the EPA Act.

Yours sincerely

The owner, residents and family of No10 the Serpentine Bilgola Beach.

(Joan Hughes, Owner)