



Land and Environment Court
New South Wales

Case Name: Wimbledon 1963 Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2024] NSWLEC 1224

Hearing Date(s): 13 & 14 November 2023

Date of Orders: 30 April 2024

Decision Date: 30 April 2024

Jurisdiction: Class 1

Before: Byrne AC

Decision: The Court orders that:
(1) The Appeal is dismissed.
(2) Development consent for development application No DA2022/1494 for demolition of existing dwelling and construction of new dwelling and swimming pool incorporating retention of existing tennis court on land at 2A Allen Avenue, Bilgola Beach, NSW 2017, being Lot 20 DP 11978 and Lot A in DP 379490, is refused.
(3) Exhibits returned except Exhibit H.

Catchwords: DEVELOPMENT APPEAL – demolition and construct new 4 storey dwelling - existing tennis court - height standard breach - whether cl 4.6 request should be allowed - desired future character - landscaping & setbacks - DCP non-compliances - environmentally sensitive location – heritage listed trees – Bilgola beach area - view and amenity impacts to neighbours - public interest

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7
Land and Environment Court Act 1979, s34AA
Pittwater Local Environmental Plan 2014, cl 4.3, 4.6
Pittwater 21 Development Control Plan 2014, A4.3

Cases Cited: Deancliff Developments v Hornsby Shire Council (2005) 141 LGERA 362; [2005] NSWCA 271
Initial Action P/L v Woollahra MC (2018) 236 LGERA 256; [2018] NSWLEC 118
Merman v Wollahra Municipal Council [2021] NSWLEC 1582
RebelHM Neutral Bay Pty Ltd v North Sydney Council [2019] NSWCA 130
Throsby & Anor v Pittwater Council [2015] NSWLEC 1471
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827
Zhang v Canterbury Council (2001) 51 NSWLR 589

Category: Principal judgment

Parties: Wimbledon 1963 Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
A Galasso SC (Applicant)
R O’Gorman Hughes (Respondent)

Solicitors:
G McKee, McKees Legal (Applicant)
M Domingo, Northern Beaches Council (Respondent)

File Number(s): 2023/151325

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal by Northern Beaches Council (the Council) of development application No DA2022/1494 (the DA), for the demolition of the existing dwelling and construction of a new dwelling and swimming pool ‘incorporating the retention of the existing tennis court’ on land at 2A Allen Avenue, Bilgola Beach, NSW 2017, being Lot 20 DP 11978 and Lot A in DP 379490 (the Site).
- 2 The DA seeks consent for:
 - (i) Demolition of all existing structures (except for existing tennis court).

- (ii) Excavation and groundworks.
 - (iii) Construction of a multi-storey dwelling house with swimming pool, front fence and driveway.
 - (iv) Associated landscape and site works.
- 3 The appeal commenced on Site as a conciliation conference under s 34AA of the *Land and Environment Court Act* 1979 (LEC Act). The Court heard from the party's experts and a number of neighbouring resident objectors at the view of the Site and surrounding locality, which included inspecting the proposed development from the objectors' properties. On the return to Court I terminated the conciliation conference by agreement and the appeal proceeded to a hearing before me, in accordance with s34AA of the LEC Act, this being an appeal in respect of a residential single dwelling development.
- 4 I was assisted in this matter by oral submissions from Mr Galasso SC for the Applicant and written and oral submissions from Mr O'Gorman-Hughes for the Council.

Background – The Site and Planning Controls

- 5 The Site is largely built upon by the existing dwelling, driveway and tennis court which dominates the front aspect of the Site. There is very little vegetated area because of the dominance of the tennis court on the Site which has also meant the house was built and is intended to be rebuilt very close to the rear boundary (Council assessed the current rear setback as nil). The adjoining properties to the rear front onto The Serpentine (Nos 8 and 10). Bilgola Beach fronts the Pacific Ocean on the eastern side of Barrenjoey Road and is a relatively small residential beach front area accessed from Barrenjoey Road at the northern and southern ends. The land slopes steeply from Barrenjoey Road to the beach which accounts for the limited and highly sought after buildable land at Bilgola Beach. The locality retains much of the native vegetation including remnant littoral rainforest and a unique flora and fauna belt that exists in the Bilgola Beach Area by the interconnection of Hewitt Park with Attunga Reserve via the dedicated portion of the Hamilton Estate at the western end of the Bilgola Valley [Source: PDCP A4.3 Bilgola Locality statement].
- 6 The Site falls by approximately 9m at the rear of the land towards Allen Avenue and has a street frontage of 18.288m and a maximum depth of 48.033m,

resulting in an overall surveyed area of 850.38m² [Source: ASOFAC]. The footprint of the existing two-storey dwelling and proposed multi-storey dwelling occupies approximately 280m² (1/3) [ref Survey, Ex H, tab 10] of the total land area which constrains the buildable area for the proposed multi-storey dwelling the subject of this appeal. The Site is not a uniformly sloping Site but is flat over 2/3 due to the tennis court.

- 7 The proposed new dwelling house is across 4 levels, including a basement with parking for four vehicles, lift, lobby, wine cellar, store, laundry, and vehicle turntable, 5 bedrooms and 3 bathrooms, formal dining and lounge rooms, casual lounge room, kitchen, games room, roof top pool and jacuzzi and various terraces: [Plans DA1-01 – DA1-05 by Saota; Ex A].
- 8 Allen Ave at Bilgola Beach runs roughly parallel to the beach front and the subject Site is located on the western side of Allen Ave. The location and close proximity of the Site to the beach is demonstrated in the following aerial image from the council's ASOFAC at Figure 1:



- 9 In close proximity to the Site are the following Heritage Items:
 - (1) *Item 2270120 – Ocean Rock Pool*

(2) *Item 2270030 – Street Trees – Street trees—Norfolk Island Pines (Araucaria heterophylla) and Canary Island Date Palms (Phoenix canariensis)*

10 The Site is zoned C4 Environmental Living (“C4”) under the Pittwater Local Environmental Plan 2014 (“PLEP”) and the proposed development is permissible with consent. The objectives of the C4 zone are:

- 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.
- 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.

11 The Pittwater 21 Development Control Plan 2014 (PDCP) applies to the development and the relevant clauses are referenced below.

12 The Bilgola Locality statement – Context and Desired Future Character, Bilgola Beach Area, in the PDCP at A4.3 states as follows:

“Desired Future Character

The Bilgola Area 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. 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.” [Emphasis added]

Council's Contentions

- 13 Council amended the SOFAC on 31 October 2023 (ASOFAC) in response to the Applicant's amended plans, leave being granted by the Registrar on 25 October 2023. At the hearing Council argued that the Proposed Development failed to meet the following Contentions such that the Appeal should be dismissed:
- (1) Contention 1 – Building Height – a 16.5% variation to the required control of 8 metres (clause 4.3 PLEP) is not supported by the Applicant's cl 4.6 request.
 - (2) Contention 2 – Setbacks and Building Envelope – contrary to PDCP D3.7 – side and rear building line; and PDCP D3.9 – Building Envelope.
 - (3) Contention 3 – Amenity – View Loss – contrary to PDCP C1.3 – View Sharing; PDCP C1.5 – Visual Privacy; and PDCP C1.6 – Acoustic Privacy.
 - (4) Contention 4 – Excavation and Groundworks – inconsistent with Clause 7.2 PLEP 2014; PDCP A3.4, PDCP A4.3, and PDCP D3.6.
 - (5) Contention 5 – Landscaping – fails PDCP D3.11; inconsistent with PDCP D10.13 and PDCP C1.1
 - (6) Contention 6 - Desired Future Character and C4 Environmental Living Zone – inconsistent with C4 PLEP zone objectives; and PDCP A4.3 Bilgola Locality statement.
 - (7) Contention 7 – Public Interest – the proposal is not in the public interest as it is inconsistent with the bulk, scale and level of environmental and amenity impacts that could be reasonably expected within the C4 environmental zone given the matters raised in submissions made to Council and given their consistency with the contentions raised above.

Issues in dispute at the hearing

- 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.
- 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”.

Public Submissions and history of the DA

- 16 The DA the subject of this appeal attracted a significant amount of public interest such that I consider it relevant to set out the history of the DA intertwined with submissions made by members of the public from the local neighbourhood of Bilgola Beach and surrounding areas of the Northern Beaches LGA. The following chronology is taken from Council’s ASOFAC filed 31 October 2023.
- 17 The DA was lodged on 5 October 2022 and notified to the public from 7 October 2022 to 27 October 2022, and re-notified from 18 October 2022 to 7 November 2022. As a result of the public exhibition, Council received 17 submissions, all of which were in objection to the Proposal.
- 18 The submissions raised a number of concerns that are broadly categorised as follows:
 - (1) Built form non-compliance, bulk and scale
 - (2) Excavation and groundworks
 - (3) Landscaping
 - (4) View loss
 - (5) Privacy (visual and aural)
 - (6) Solar Access
- 19 Following referral of the DA to internal and external bodies and a view loss analysis undertaken by Council from No 8 and No 10 The Serpentine, on 3 May 2023 Council wrote to the Applicant advising that the DA was not supportable for the following reasons:
 - (1) Building height variation;
 - (2) Inconsistency with existing and desired character of the Bilgola Locality;
 - (3) Built form and site planning;
 - (4) Amenity impacts – view loss, privacy and solar access;
 - (5) Excavation.

- 20 On 10 May 2023, the Applicant submitted amended plans in response to the NECC – Development Engineering referral comments.
- 21 On 12 May 2023, Council was notified that the Class 1 Appeal was filed with the Land and Environment Court against Council's deemed refusal of the DA.
- 22 On 22 May 2023, Council advised the Applicant that a number of Council's internal referral bodies did not support the Proposal and required the submission of additional information and/or amended plans.
- 23 On 4 September 2023, Council wrote to the Applicant to again request amendment of the Proposal to address the issues previously raised. No further amended plans were provided.
- 24 In accordance with the EPA Act the DA was reported to the Northern Beaches Local Planning Panel (NBLPP) for determination with a recommendation that the DA be refused.
- 25 Objectors to the DA were notified of the NBLPP meeting date and were given the opportunity to address the NBLPP. Seven objectors registered to address the NBLPP, and provided further submissions (including a petition) raising concerns as to the following:
- (1) Built form non-compliance, bulk and scale
 - (2) Excavation and groundworks
 - (3) Landscaping
 - (4) View loss
 - (5) Privacy (visual and aural)
 - (6) Solar Access
 - (7) Natural environment impact
- 26 On 18 October 2023, the NBLPP determined the DA by way of refusal for reasons set out in full in the ASOFAC including the height of buildings standard breach and that the cl 4.6 request could not be supported.
- 27 On 25 October 2023, the Applicant was granted leave by the Court to rely on amended plans for the DA. The amended plans:
- (1) reduce the overall height of the Proposal to 9.32 metres (previously 11.7 metres)

- (2) provide a minimum northern side setback of 1 metre, and a minimum southern side setback of 2.5 metres (previously nil)
 - (3) provide a rear setback of 2 metres (previously nil)
 - (4) provide a deep soil landscaped area of 12.1% (previously 2%)
 - (5) proposed level 1 has been reconfigured
 - (6) a 1.8 metre high privacy screen has been included adjacent to the proposed pool on level 3 on the south and west boundaries
- 28 On 25 October 2023, the amended DA was provided informally to objectors to the DA. A petition that the Proposal is not in the public interest was provided to Council and further submissions received raising issues of height and bulk, excavation, inaccurate depiction of the western elevation, privacy noise and light, rear setback, existing ground level, view sharing, landscaping, impact on a Phoenix Canariensis Palm and the public interest.
- 29 The resident objectors and their consultants made submissions to the Court on Site which included inspecting the subject property from adjoining residences at 8 The Serpentine, 10 The Serpentine, 4B Allen Ave, 2 and Allen Ave (I note the names of objectors/owners are not reproduced in judgments for privacy reasons). Photomontages were used to demonstrate prospective view loss to Nos 8 and 10 The Serpentine by the proposed new dwelling. The DA proposed a swimming pool on the roof of the new dwelling which raised noise and privacy issues with adjoining residents. A significant amount of material from the objectors and their consultants was included in the Council's bundle of Documents (Ex 4). The Bilgola Beach Residents Association prepared a 3 page summary of submissions from the site view: Ex 11. The main areas of concern were non-compliant building height and setbacks, non-compliant landscaping, PLEP and PDCP – local character, loss of views, excessive excavation, overdevelopment of the Site, and retention of the tennis court.

Expert Evidence

- 30 The parties engaged the following experts who prepared joint reports and were cross examined jointly in the hearing:
- Town Planning: Greg Boston (GB) for the Applicant and Adam Croft (AC) for the Respondent: Joint Report Ex 2.

- Landscaping: Paul Scrivener (PS) for the Applicant and Joseph Tremonte (JT) for the Respondent: Joint Report Ex 3. [contention 5]

31 I will firstly deal with the principal issue in the proceedings being the height of buildings.

Contention 1: Height of Buildings

32 The planning experts agreed on the following regarding the height of the proposed dwelling: [Ex 2 para 3.1.1]

- (a) “The Experts agree that the proposal has a maximum building height of 9.32 metres measured above ground level (existing), that being RL9.48, representing a variation of 16.5%.
- (b) The Experts agree that the subject land has been previously excavated to accommodate the existing dwelling house and tennis court with such excavation distorting the height of buildings development standard plane overlaid above the site when compared to the topography of the hill.
- (c) Under such circumstances, the experts agree that for the purpose of determining the extent of prior excavation it is reasonable to interpret/ assume original undisturbed levels based off available survey levels around the perimeter of the site.
- (d) The experts agree the building height breaching elements appear to be accurately depicted on plan DA4-07(B) filed in these proceedings and the below Figure A. [not reproduced]”

33 The planning experts disagree on [para 3.1.2 Ex 2];

- (a) “With reference to particular (f) the experts could not agree as to whether a greater level of compliance with the height standard was necessary given the impact of the building height breaching elements on views available from the upper level primary living areas of 8 The Serpentine and the lower level secondary living areas and adjacent rear private open spaces of 8 and 10 The Serpentine and the visual bulk impact of the building height breaching elements as viewed from 8 The Serpentine.
- (b) The experts could not agree as to whether the proposal is of a level of bulk and scale commensurate with the existing and desired character of the locality, notwithstanding the proposed building height variation.
- (c) The experts could not agree as to whether the clause 4.6 variation request was well founded.”

Height of Buildings controls

34 The maximum building height permitted for the Site under clause 4.3 of the PLEP is 8 metres. The objectives of clause 4.3 are as follows:

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- (b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (c) *to minimise any overshadowing of neighbouring properties,*
- (d) *to allow for the reasonable sharing of views,*
- (e) *to encourage buildings that are designed to respond sensitively to the natural topography;*
- (f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

35 Building height is defined in the PLEP to mean, relevantly:

“(a) in relation to the height of a building in metres – the vertical distance from ground level (existing) to the highest point of the building, ...”

36 The PLEP defines existing ground level as follows:

“Ground level (existing) means the existing level of a site at any point.”

37 The Applicant raised the principles in *Merman v Woollahra Municipal Council* [2021] NSWLEC 1582 (*Merman*) to argue the site should be extrapolated to the ground level before the excavation. However, that case can be distinguished because in it the Applicant contended that the height was compliant, *Merman* at para [69], and there was a contest as to where the height was measured from. In this matter there was agreement between the planners as stated above at paragraph 32(a), which I see no reason to disturb, it unnecessarily complicates the case and I rely on the definitions in the PLEP stated above. The existing ground level is readily discernible on the Site.

Clause 4.6 request to vary maximum height standard

38 Given the proposed development does not comply with the maximum height standard, development consent cannot be granted by the Court exercising the powers as consent authority except in accordance with cl 4.6(2) of the PLEP 2014.

39 Clause 4.6 provides, at ss (2), (3) and (4) as follows:

“(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a

development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained."

40 I have set out above the objectives of the clause 4.3 height standard and the applicable C4 Zone of the Site above.

41 The Applicant filed an updated clause 4.6 request – height of buildings – dated 7 November 2023, conjunctively with the Joint Planners Report such that the planners could respond to the updated clause 4.6 request in their joint conferencing and Report [Ex 2].

Principles of clause 4.6 LEP application

42 It is well established that cl 4.6(4) imposes two preconditions that must be satisfied before the Court exercising the function of consent authority can exercise the power to grant development consent for development that contravenes a development standard: *Initial Action P/L v Woollahra MC* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [13].

43 The first opinion of satisfaction in cl 4.6(4)(a)(i) is twofold. Firstly, that the applicant's written request has adequately addressed the matters required to

be addressed by sub clause 4.6(3)(a) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and secondly, in accordance with sub clause 4.6(3)(b) - that there are sufficient environmental planning grounds, [includes subject matter, scope and purpose of EPA Act including the objects in s 1.3 of EPA Act] to justify contravening the development standard: *Initial Action* at [23]; *RebelHM Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130, at [4].

- 44 The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with; firstly, the objectives of the relevant development standard that is sought to be contravened by the development and secondly; it is consistent with the objectives of the relevant zone: *Initial Action* [26].
- 45 The Court must form positive opinions of satisfaction as to the matters in cl 4.6(4)(a) to enliven the power of the Court to grant development consent (*Initial Action* [14]).
- 46 Regarding cl 4.6(4)(b), the Court on appeal has the power under cl 4.6(2) to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(6) of the LEC Act.

Consideration of the clause 4.6 request to vary maximum height standard

Clause 4.6(3)(a) - Is compliance with the height standard unreasonable or unnecessary?

- 47 Has the written request ‘adequately addressed’ the following:
- (i) that compliance with the development standard is unreasonable or unnecessary;
 - (ii) that there are sufficient environmental planning grounds to justify contravention.
- 48 In seeking to establish that compliance with the height standard is unreasonable or unnecessary, the written request relies on the first and third of the tests described in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (“Wehbe”), that the objectives of the height standard and of the C4 Zone are met notwithstanding the contravention.

49 The reasoning detailed in the written request by Mr Boston can be summarised as follows: [Ex 2, pages 10 – 29].

Height Standard objectives analysis

50 Mr Boston submits with reference to the objective (a) “*to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*” the fact that dwelling houses of 1, 2 and 3 storeys have been approved and constructed pursuant to the current PLEP and PDCP provisions demonstrates flexibility in relation to the 2 storey DFC statement as it relates to steeply sloping sites within the Bilgola Beach area.

51 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*”. Thirdly, the subject Site is not steeply sloping in a uniform fashion but 2/3 is level land a driveway proceeds up to the level building platform of the existing house and then the land rises sharply 9m at the rear boundary. The Site is significantly altered to what would be described as a ‘steeply sloping site’.

52 Mr Boston submits with reference to objective (b) of the height standard “*to ensure that buildings are compatible with the height and scale of surrounding and nearby development,* a significant number of properties located within the Bilgola Locality are located on steeply sloping sites upon which dwelling houses of 1, 2 and 3 storeys in height have been approved and constructed pursuant to the current PLEP and PDCP provisions. In particular the approved development at 2 – 4 Bilgola Avenue, Bilgola Beach, located to the south-west of the site, being a 3 storey dwelling house with an approved maximum height of 9.5 metres (DA2018/1877). In addition Mr Boston states that the proposed design response where the dwelling steps back up the site to follow the slope of the land, is entirely consistent with that seen throughout the locality on sloping sites and does not result in any adverse impacts upon adjoining dwellings such that it could be said that the resultant development is not in harmony with surrounding development.

- 53 I do not agree that the subject land follows this trajectory. There is no capacity for a stepped height building form into the hill which integrates with the landform and landscape as can be applied to a steeply sloping site. I do not agree that the resultant development is in harmony and integrates with surrounding development.
- 54 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.
- 55 With respect to objective (d) of the standard "*to allow for the reasonable sharing of views*" Mr Boston undertook a detailed view analysis in accordance with the view sharing principles established in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 to support the Applicant's argument under cl 4.6(4)(a)(ii) that the proposal achieves the objective of minimising view impact demonstrated by his view sharing outcome including views available from the subject property [Ex 2, pages 15 – 25]. On the later point Mr Boston stated:
- "Accordingly, in considering the acceptability of the building height breaching elements and associated view impacts on 8 and 10 The Serpentine I have given consideration to objective 4.3(1)(e) of PLEP and the stated outcome of the clause C1.3 P21DCP being the reasonable sharing of views amongst dwellings. That is, it is not an unreasonable proposition for any proposed dwelling house on the subject property to be designed and sited to achieve a reasonable view sharing outcome with surrounding dwellings and in doing so seek to regain some of the view lost across the front boundary of the property as a consequence of the dwelling house constructed at 7-9 Allen Avenue pursuant to DAN0450/17."*
- 56 Mr Boston refers to the completed development at 7-9 Allen Avenue a number of times in the cl 4.6 request to bolster the reasoning that the height standard breach should be allowed by the Court: see notes and photos (figures 1 and 2) at page 8-9, Ex 2 and commentary at pages 27-28, Ex 2. He notes that the amended plans adopt an upper floor level from which views will be achieved across the front boundary and over the roof of the dwelling house constructed at 7-9 Allen Avenue to the ocean/sky interface. However, 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].

57 I accept that the existing building at 7-9 Allen Ave will probably continue to block some of the Applicant's views of the sea and beachfront of the new build which is why the Applicant wants to go higher. But from my observations on Site, the existing house at 2A Allen Ave currently has views of the ocean and horizon beyond demonstrated in the evidence before the Court [Figure 2, page 9 of 58, Ex 2]. 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.

59 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. I accept Mr Croft's opinion of the overall level of view loss to be moderate as assessed against the View Loss Planning Principle [Ex 2, para 3.1.2.13]. Mr Croft referred to the view loss montages prepared by Gartner Trovato Architects on behalf of the proponent and Urbaine Design Group, dated 30th October 2023, on behalf of the adjoining residents, and that the affected views include material portions of water and beach elements in addition to heritage listed street trees [Ex 2, para 1.2.14].

C4 Zone objectives analysis

60 The cl 4.6 request addresses the *Zone C4 -Environmental Living* objectives as follows:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

61 Mr Boston states “The proposed development has been sited in the location of the existing dwelling to minimise site disturbance and impacts to neighbouring properties and has been skilfully designed to ensure that the visual impact is appropriately managed”.

- *To ensure that residential development does not have an adverse effect on those values*

62 Mr Boston states “the proposed development has a positive impact on such values, with a significant enhancement of the quality and quantity of landscaping on the site, and the creation of a high quality architecturally designed home. The elements of the building that protrude beyond the 8m height plane do not detract from consistency with this objective.”

- *To provide for residential development of a low density and scale integrated with the landform and landscape.*

63 Mr Boston states “The proposed dwelling house is a low-density development that is appropriately integrated into the existing disturbed slope of the land and softened by landscaping. The elements of the building that protrude beyond the 8m height plane do not detract from consistency with this objective”

- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

64 Mr Boston states “*The proposed development will result in the significant enhancement of landscaping across the site, providing enhanced habitat value within the wildlife corridor. The elements of the building that protrude beyond the 8m height plane do not detract from consistency with this objective. Rather, noting that the non-compliance along the eastern edge of the upper level planter facilitates plantings, it can be said that this non-compliance promotes consistency with this objective.*”

65 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.

Clause 4.6(4)(b) – are there Sufficient environmental planning grounds to justify the variation

66 The Applicant relies on the following environmental planning grounds.

- Ground 1 - Steep and artificially modified topography of the land;
- Ground 2 - Appropriate distribution of building height to achieve a view sharing outcome amongst development;
- Ground 3 - The application of a reasonable degree of flexibility in relation to building height on a steeply sloping site within the Bilgola Beach Area.

67 As regards Ground 3, the Site is not 'a steeply sloping site', it is relatively flat for 2/3 of the Site having been excavated 70 years ago to install the tennis court and existing dwelling house. The Site rises to 9m when you reach the rear boundary so overall cannot be described as a steeply sloping site. I disregard Ground 3. The same factual matrix applies to Ground 1. In any event I do not see how an artificially modified topography is an environmental planning ground. The 2nd ground may qualify as an environmental planning ground but I do not consider it is sufficient to justify the building height contravention and do not consider that the height distribution does achieve view sharing. The facts are that the Applicant already has the benefit of a significantly excavated and cleared Site to build on and there are limited environmental benefits arising out of the non-compliant building height standard on this Site.

Clause 4.6(4)(a)(ii) - will the proposed development be in the public interest because it is consistent with the objectives of the contravened height development standard and the C4 zone

68 Mr Boston refers to his analysis in the request that the proposed development is consistent with the objectives of the standard and the C4 zone to support his conclusion that the proposed development is in the public interest: [Ex 2, pages 10 to 29].

Consideration of cl 4.6 request and findings

69 Having considered the Applicant's request, I am not satisfied that the request adequately addresses that compliance with the height development standard is unreasonable or unnecessary in the circumstances of the case. The circumstances of the case include that the proposed development does not comply with the PDCP setback and building envelope contributing to excessive bulk and scale and does not comply with the landscape area controls designed to provide a softening of bulk and scale [see below]. In addition to the matters discussed above, the request does not address holistically these elements of the proposal and the cumulative impacts.

70 I also find as discussed above at [67], that there are insufficient environmental planning grounds to justify contravening the height of buildings standard.

71 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.

72 Notwithstanding my findings that mean the Court has no power to uphold the appeal and grant consent to the DA, I will address the other relevant issues in contention at the hearing.

Setbacks and building envelope – Contention 2

73 The following is a direct quote from part of the Planners Joint Report [Ex 2].

“[3.2.1.2] The experts agree that compliance with the front and rear boundary setback provision contained within P21DCP would prevent the retention of the existing tennis court.

[3.2.1.3] The experts agree that the proposed rear setback ranges from between 2 and 3 metres and contravenes the 6.5m requirement prescribed by clause D3.7 PDCP.

[3.2.1.8] The experts agree that the proposed front and side boundary setbacks are acceptable provided agreement is reached between the landscape experts in relation to the acceptability of the landscape treatments notwithstanding the non-compliant landscaped area proposed and the building envelope encroachments at levels 2 and 3.

[3.2.1.9] The Experts agree that the proposed dwelling breaches the building envelope control prescribed by PDCP D3.9. The breach at the northern elevation relates to the front portion of the Level 3 wall and smaller portions of the Level 2 balustrade and Level 1 wall, with a maximum encroachment of 1.8m at Level 3. The breach at the southern elevation relates to the front portion of the Level 2 wall and the majority of the privacy screen adjacent to the swimming pool at Level 3, with a maximum encroachment of 2.7m at the forward (eastern) extent of the privacy screen.

[3.2.2.1] The Experts disagree under the circumstances outlined above as to whether the existing tennis court on the site is lawful.

[3.2.2.2] The Experts do not agree as to whether a 3 metre rear 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. [Ex 2, para 3.2.3].

[3.2.2.3] The Experts do not agree as to whether the extent of building envelope breach is acceptable noting that wall height is intrinsically tied to the overall height of the building.”

- 74 Mr Boston put the Applicant’s position in the context of a detailed history of the tennis court: [Ex 2, pages 20 to 30] and the planners disagreed on its lawfulness as I have noted above. I do not consider that the lawfulness or otherwise of the tennis court is a relevant issue for debate by the planners. I note the Applicant’s DA [Ex H, tab 1] states under ‘Description of Development’ *“Demolition of existing dwelling and construction of a new dwelling and swimming pool incorporating retention of existing tennis court”* (Emphasis added). Although the planning report did not support the location of the tennis court, it has the benefit of a Building Information Certificate (BIC) issued under s 6.25 of the EPA Act on 29 January 2021, and is lawful to that extent. The legal effect of the BIC is that Council cannot issue an order for its removal, which is valid for 7 years from the date of issue: see the BIC application, report and certificate at [Ex 4, Tab 9]. It is established law that development consent for an existing structure can only be granted to the extent of the use of the

existing structure. Retrospective approval of the construction of an existing structure is not permissible.

- 75 In my opinion the existing tennis court is relevant to the merit assessment of the DA on the various planning grounds outlined by the council in its ASOFAC. However, the detailed history of the tennis court is not a matter that I consider to be a relevant or decisive factor in the consideration by the town planners of Contention 2 and ultimately by the Court. The case before me does not raise the issue of existing use rights for example.
- 76 Therefore, I do not consider I am required to resolve an issue concerning the lawfulness or otherwise of the existing tennis court. I note that Council has issued the BIC and any further action is a matter for Council and the owner of the land outside of this appeal.
- 77 If I were allowing the appeal and granting development consent, I would have to carefully consider whether the words 'incorporating retention of existing tennis court' should remain in the order of the Court as this could be read as granting consent to not just the use of the tennis court but the structure itself. I note the submission of Mr O'Gorman Hughes, correctly, that the EPA Act does not define development as including the retention of something which has already been built. On balance I will leave those words in the order as I am refusing consent and that description is what the Applicant applied for in the DA lodged with Council [Ex H, tab 1].
- 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 non-compliances: Ex 2, pages 31 – 35.
- 79 Mr Croft further said as follows: [Ex 2, page 32]

[3.2.4.4] I am of the opinion that the proposed rear setback and building envelope non-compliances are direct consequences of the proposal's inappropriate position towards the rear of the site. The proposed siting is also considered to contribute to the building height standard variation and the

overall height of the dwelling, as discussed further below. This proliferation of built form non-compliances is considered to represent an overdevelopment of the site.

- 80 Mr Croft contends that the proposed rear setback (2 – 3 metres) is inconsistent with the siting of adjoining properties which brings the bulk of the development higher up the site. This is demonstrated by Figure F, Joint Report:



Figure F: Aerial image illustrating the siting of the proposed dwelling (green) in relation to the existing dwellings on adjoining properties to the north and south on Allen Avenue (Source: Nearmaps) [Ex 2, page 32]

- 81 Mr Croft is also of the opinion that the proposed building envelope encroachments must be addressed through a reduction in wall height, increased upper level side setbacks or a combination of the two. He notes that a reduction in wall height is readily achievable through reduced floor slab thicknesses as discussed in relation to Contention 1 [Ex 2, page 34].

Contention 3 – Amenity

- 82 Particular - view loss – this has been dealt with in the cl 4.6 analysis. In summary the point of concern of Council is the impact of the building height breaching elements on views available from the upper level main living areas of 8 The Serpentine and lower level living areas and adjacent rear private open spaces of No 8 and 10 The Serpentine.

Contention 5 – Landscaping – (i) Planners expert evidence

- 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.

(ii) Landscape Architects expert evidence

- 85 It is agreed by Mr Scrivener (Applicant) and Mr Tremonte (Council) that the proposed landscaped area (12%) is significantly less than the 60% numerical control due to the tennis court on the Site: Joint Report, Ex 3. There was some discussion and agreement between the experts as to amendments to improve the deficit which could be resolved by appropriate conditions

- 86 I note that the landscape experts were questioned on the application and interpretation of the DCP controls. However, I accept and agree with Mr Tremonte's conclusion in the Joint Report as follows:

Mr Tremonte contends that additional deep soil "landscaped areas" are required to achieve a landscape outcome in consideration of the PLEP objectives of C4 Environmental Living zone where the bulk and scale of development shall appear as secondary to the landscape setting and is not predominantly building mass and hard paved surface for the majority site; and that otherwise the current overall landscape scheme is not aligned with the principle landscape objectives of the C4 Environmental Living Zone, to "provide for residential development of a low density and scale integrated with the landform and landscape." [Ex 3, page 6, para 23]

- 87 I am not satisfied that the impact of the significant non-compliance with the landscaping PDCP controls can be remedied by a few adjustments at the edges to the landscape plans [Ex B], to be embodied in conditions of consent. These changes mainly concern planter boxes which do not meet the PLEP definition of 'landscaped area' as they are not deep soil. It is noted that the tennis court is a hard sealed surface although it was a grass court when first installed.

Contention 7 – Public Interest

- 88 This has also been dealt with in determining the cl 4.6 request in accordance with the provisions in cl 4.6 of the PLEP. For completeness I find that the Contention that the proposal is not in the public interest has been made out. The inconsistency with the controls and objectives of the C4 zone and the PDCP A4.3 Bilgola Locality Statement, particularly the express words that ‘strict development controls’ shall apply including on height, that this development cannot meet, are among serious concerns of both Council and the community that are well founded and reasonable.
- 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. Mr Galasso SC took the Court to s 4.15(3A)(b) of the EPA Act that states the consent authority is to be ‘flexible and allow reasonable alternatives’ when considering a development that does not comply with provisions in a DCP. I have looked at s 4.15(3A)(b) EPA Act and do not consider it is engaged in the facts and circumstances of this case. I note the decisions of the NSW Court of Appeal that reinforce relevant provisions of a Development Control Order, although not determinative, must be considered as a fundamental element and given sufficient weight in the decision making process when determining a development application: *Zhang v Canterbury Council* (2001) 51 NSWLR 589, per Spigelman CJ at [75], Meagher and Beazley JJA agreeing; *Deancliff Developments v Hornsby Shire Council* (2005) 141 LGERA 362; [2005] NSWCA 271 at [30].

Summary and Conclusions

91 In summary pursuant to clause 4.6(4)(a) of PLEP 2014, I am not satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (a) *that compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) *that there are sufficient environmental planning grounds to justify contravening the height of buildings development standard.*

92 I am not satisfied pursuant to cl 4.6(a)(ii) of PLEP 2014 that the proposed development will be in the public interest for reasons set out above and my finding that the proposed development will be inconsistent with the objectives of the standard and of the C4 zone. As stated by Preston CJ in *Initial Action* at para [27]:

“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)”.

93 I find that the Applicant has failed to satisfy the Court of the matters in Clause 4.6 PLEP to permit the non-compliant height standard in the proposed development. Accordingly, the Court has no power to grant development consent to No DA2022/1494 under cl 4.6(2) PLEP and the appeal must be dismissed and consent refused.

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.

95 I note that even if I was satisfied the clause 4.6 request should be allowed, the Court as consent authority retains a discretion to not grant development consent to the DA by the words in clause 4.6(2) “Development consent **may**, subject to this clause, be granted”. On an overall merit assessment basis I consider there are sufficient grounds to refuse the consent which is hypothetical in this matter because the Appeal has failed on a jurisdictional basis.

Orders

96 The Court orders that:

- (1) The Appeal is dismissed.
- (2) Development application No DA2022/1494 for demolition of existing dwelling and construction of new dwelling and swimming pool incorporating retention of existing tennis court on land at 2A Allen Avenue, Bilgola Beach, NSW 2017, being Lot 20 in DP 11978 and Lot A in DP 379490, is refused.
- (3) Exhibits returned except Exhibit H.

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L Byrne

Acting Commissioner of the Court

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