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29 March 2019

**To: The General Manager SCC**

Ref: DA18/2115 171B Strongs Road, Jaspers Brush

**Subject:**AdditionalSubmission re 'Temporary use of land for the purpose of a function centre’

We write in support of more than 140 community members who have made over 80 submissions to Council objecting to this DA. Very serious concerns have been raised by residents on neighbouring properties and many Berry residents who comprehend the dangerous precedent this DA would set, if approved.

An almost identical application has been made for a ‘temporary’ function centre in Tindalls Lane, Broughton, by the same planning firm attempting to invoke Clause 2.8 temporary use of land. In the case of Tindalls Lane, RMS owns a neighbouring property and has made a formal submission, which clearly and dispassionately identifies the major adverse impacts related to DA19/1133, but those impacts apply equally to DA18/2115 for 171B Strongs Road -

*“To allow this DA to proceed is to commence the destruction of the ambience of the area, to open the gates to similar transformation of the use of the land within your boundaries, and to adversely affect your residents in other properties in the district who enjoy their current quality of life. It will also potentially reduce the appeal of their properties and therefore their land values.”*

Key issues relating to noise impacts are –

* Clause 2.8 (3b) states that Council must be satisfied that the temporary use will not adversely impact on any adjoining land or the amenity of the neighbourhood.
* Many residents in the Strongs Road area have already experienced and been adversely impacted by noise from the ‘temporary’ function centre whilst it was being operated without consent. They point out that the ‘amendments’ will make no difference to the adverse impacts they have experienced.
* In the Operational Plan the applicant admits there will be adverse impacts from the function centre, but refers to them as “a temporary inconvenience”.
* The applicant is relying upon an acoustics report prepared by Harwood Acoustics, which claims the noise impacts would be marginally acceptable, but warns that the impacts can only be constrained to ‘allowable’ levels provided all recommendations in the acoustics report are implemented at every function..

As we stated in our previous submission (see below), a clear and unambiguous precedent has been set in the Land & Environment Court for dealing with applications that attempt to invoke Clause 2.8(3b) temporary use of land.

In November 2016, pre-eminent business law firm Hall & Wilcox reported that in the NSW Land & Environment case of *Marshall Rural Pty Ltd v Hawkesbury City Council and Ors [2015] -*

*“the Court held that when a use is prohibited in a zone, that use is fundamentally prohibited* ***irrespective*** *of whether the statutory instrument provides for a “temporary use” of the activity.”*

In this case, Justice Moore, after taking into all the evidence which included acoustic evidence and affidavit material put forward by all parties, concluded that Council failed to have regard to the correct, materially relevant consideration contained in clause 2.8 of the LEP.

His Honour stated that the assessment reports by both experts did not take into account the fundamental nature of the test required, namely that the standards envisaged the absence of adverse impact rather than an acceptable impact.

His Honour went further to state that the test under clause 2.8 “puts a very high hurdle in the path of any such application. The placing of such a hurdle requires that the Council must approach the consideration and determination of any such application with a marked degree of precision and caution.”

In addition to the adverse impacts on surrounding (within 2kms) properties, the loss of business for legitimately approved function centres must also be considered. There are permanent wedding facilities in and around Berry that have, or will need to go through, the full process of planning approval. They will suffer a loss of existing or potential business from this opportunistic development application.

We support the community's view that both this application and DA19/1133 for Tindalls Lane would set a dangerous precedent across the Shoalhaven and should be refused by Council.

**Berry Forum Committee**

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