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**To: The CEO SCC**

**Submission re DA20/2056 for 275 Bong Bong Rd, Broughton Vale**

We write in support of the owners of more than thirty properties in Bong Bong and Mount Hay Roads who have requested the assistance of the Forum regarding the above application.

The group term 'tourist & visitor accommodation' (TVA) is again being used to obtain permissibility without specifying the exact nature of the accommodation. It would appear that at this stage that details of the exact nature have not yet been requested by staff.

The group term TVA was retained by Council in SLEP 2014 to provide flexibility for approving tourist cabins and other innominate uses. However, it is now being used to circumvent LEP Dictionary definitions and Clause 5.4 scaling controls in rural zones.

The LEP Dictionary definition states that the group term TVA includes -

1. backpackers’ accommodation,
2. bed and breakfast accommodation,
3. farm stay accommodation,
4. hotel or motel accommodation,
5. serviced apartments,

***Farm stay accommodation*** means a place that provides short-term accommodation to paying guests on a working farm as a secondary business to primary production.

In this case, the applicant has vigorously supported his claim that the proposal meets the objectives of the zone by providing no less than **ten** references to Farm stay accommodation -

* t*here is* ***strong demand for farm-style accommodation*** *in the rural area surrounding the village.* ***The proposed development meets this demand*** *without unreasonably affecting the existing agricultural practices undertaken on site.*
* *The proposed cabin 7 and shed reflect the existing landscaping and building style to provide* ***an integrated development******for a working farm***
* *The proposed tourist and visitor* ***accommodation provides an additional income source*** *for the land while allowing the existing grazing activities to continue*
* *The existing* ***agricultural grazing activities are intended to continue*** *over the whole of the site. The tourist cabins will not prevent the land from continuing agricultural grazing*
* ***Grazing activities can continue*** *around the proposed tourist cabins.*
* *The proposed* ***development permits ongoing grazing of the land****, thus preserving the grazing potential of the site*
* *The land over which tourist cabins 1-6 and ancillary structures are to be build has been* ***used for agricultural grazing for many years***
* ***Grazing will continue*** *over the balance of the site as per current practices in this regard*
* ***The agricultural grazing activities are intended to continue*** *over the site*
* *The detached habitable rooms will provide additional space for* ***the owners of the land and their family who conduct cattle farming on the land.***

In February this year, when the Forum Committee raised concerns with Council about exploitation of the group term TVA, Gordon Clark provided the following assurance -

* *The ‘tourist and visitor accommodation ’group term is a land use term in its own right and is a mechanism to capture the forms of tourist and visitor accommodation that are* ***not*** *currently separately categorised in the definition.*
* *A development application should, however, provide further information as to the* ***exact nature*** *of the accommodation and its consistency or otherwise with the land use term.*

In this case, the applicant has clearly described the proposed land use as Farm stay accommodation, which **is** '*separately categorised in the definition'.* Although the applicant has not specified the Farm stay characterisation in requesting permissibility, this does not prevent Council from applying it, as Gordon explained in his email on 27 April -

*“Council does not have to ask the applicant to clarify what the use is. If the application, including relevant reports and plans detail what is proposed, Council as the consent authority is able to apply a characterisation to a development and does this constantly to determine permissibility.”*

Gordon's second point above therefore applies and Council must insist that the applicant -

‘*provide further information as to the* ***exact nature of the accommodation*** *and its consistency or otherwise with the land use term’* (in this case Farm stay*).*

RU1 zone objectives are focused on conserving prime crop and pasture land and a limit applies to the scale of Farm stay accommodation through the requirement that it is ‘a secondary business to primary production’. Thus, the applicant must provide financial estimates of income for the proposed accommodation, together with tax records of income from farming activities.

Gordon also explained that *“Correct characterisation will also ensure Clause 5.4 is triggered, if applicable to the land use*”. In the case of Farm stay, Clause 5.4 states that the maximum number of bedrooms permitted is 7.

The application proposes seven ‘cabins’ with 21 bedrooms and also refers to a further future development that would extend the accommodation up to their claimed 'entitlement' under the DCP of 21 'cabins' and potentially up to 70 bedrooms.

The proposal should therefore to be scaled back to comply with both the secondary business requirement and the Clause 5.4 control.

If the applicant chooses to resubmit the DA with the farm activities removed, the zone objectives would not be satisfied. Given the significant scale of the proposed development it would have to be characterised as a motel (prohibited in the zone).

In other correspondence, Council has referred to guidance on characterisation by the Court. It is clear that the relevant caselaw supports the position espoused by Gordon that we have referred to above. Relevant examples from caselaw are shown in the Attachment.

**The Berry Forum Committee**

<http://berryforum.org.au/>

**Attachment**

**Caselaw Relating to Characterisation When a Group Term is Used**

The relevant caselaw demonstrates that where a group term such as TVA is used, the Court first seeks to determine a specific nominate use. In doing so, the Court first considers whether an appropriate characterisation aligns with a specific nominate sub-term (eg Farm stay), before accepting an innominate use (eg tourist cabin) under the group term or the group term itself.

***Sherman v Newcastle City Council*****(2019)**

Dickson C specifically sought to ascertain whether the nominate sub-term characterisation of 'serviced apartment' was applicable, and only after deciding that the regular cleaning by the owner did not align with that specified in the definition of serviced apartments, chose to accept the group term TVA characterisation as the permitted use. His findings were -

*(57) "I am satisfied that the development sought falls within the broad definition of ‘tourist and visitor accommodation’, a nominate permissible use.*

*(58) Having made this determination, I have turned my mind to whether the purpose of the use sought in the development application is appropriately characterised as a serviced apartment and therefore falls within the nominated prohibited use. I am satisfied it does not:*

*(59)* I find that the use proposed is encompassed by the group term and does not fall within any of the listed subset terms.

***Ardill Payne & Partners v Byron Shire Council* (2019)**

With regard to the class (group) term TVA, Walsh C stated -

* 1. “I take the view that were there a more apposite characterisation available from the sub-class terms then that level should apply. But that if there is no more favourable characterisation available, then there is no forcing into a sub-class term for the purposes of characterisation.”

***Samcourt Pty Ltd v Inner West Council* [2018]**

Gray C concluded that “specific provisions nominating these permissible uses prevail over general provisions” at [43]