

Our Ref:200622

Chief Executive Officer
Shoalhaven City Council
36 Bridge Road
NOWRA NSW 2535

Email: council@shoalhaven.nsw.gov.au

Dear Sir,

Submission: Objection to Development Application DA20/2172
Property: 8 Homestead Lane, Berry

1. Introduction

This submission has been prepared by Barker Ryan Stewart on behalf of the owner of A15 Princes Highway (185 Queen Street), Berry, located to the south west of the subject site. The submission is in response to the notice of proposed development application issued by Shoalhaven Council for the property at A40 Princes Highway (8 Homestead Lane), Berry (DA20/2172).

The proposed development, located on Lot 101 DP1057897, comprises the proposed alterations and additions and the use of an existing building at "Mananga Homestead" for functions and events. The proposal would support events and functions accommodating 120 persons with a maximum of 50 functions per year.

The submitted Statement of Environmental Effects identifies that the proposed development is prohibited and relies upon the Shoalhaven LEP 2014 heritage conservation incentive provisions of Clause 5.10. It is well documented that proponents are now seeking approval for prohibited development, where possible, under heritage provisions following decisions of the Court which further strengthen the threshold test associated with amenity impacts under temporary use legislation.

A review of Clause 5.10 (10) *Conservation incentives* has been undertaken in Section 3 of this submission.

An extract from the proposed Site Plan is reproduced in Figure 1 below which provides an overview of the development, existing and proposed on the site.

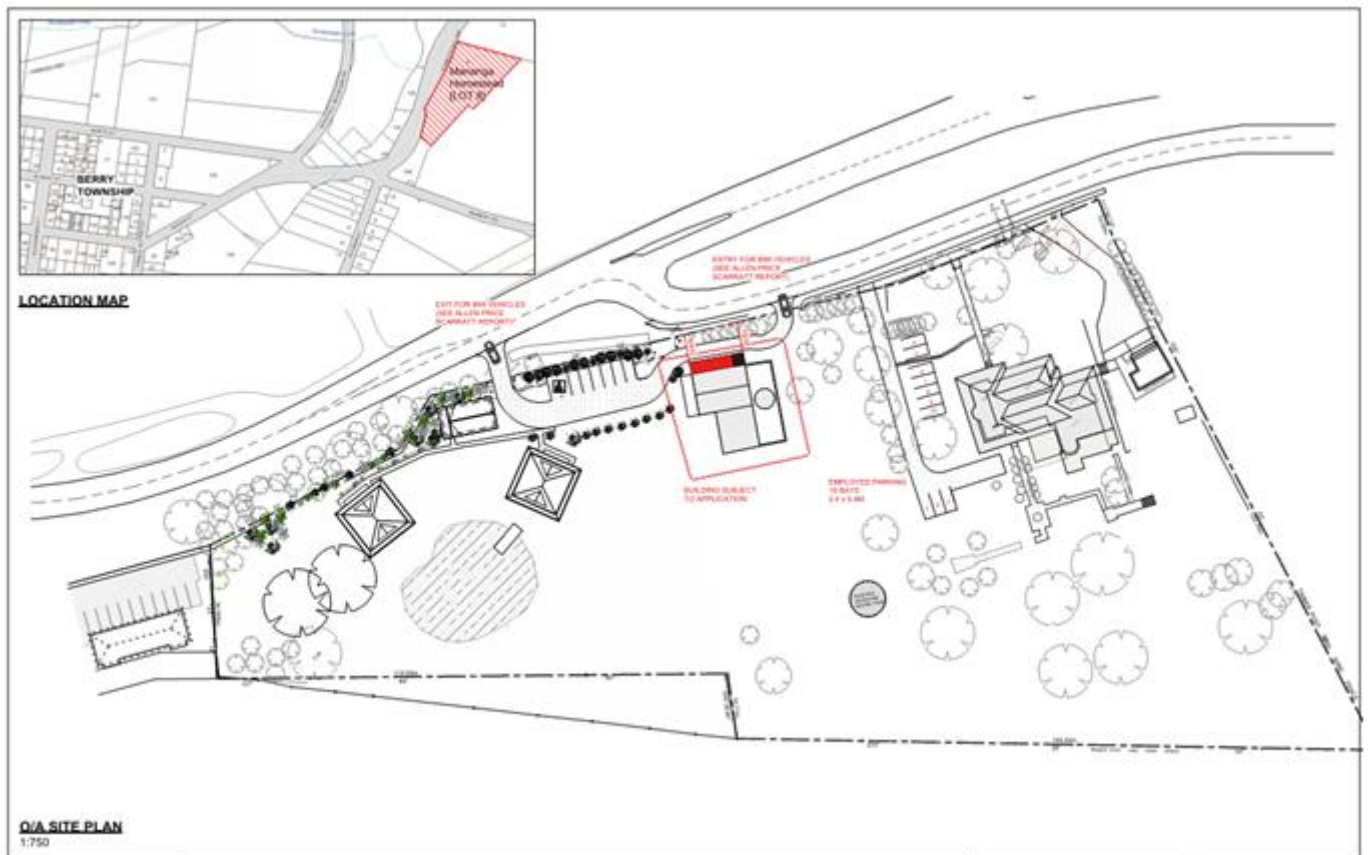


Figure 1: Extract from Proposed Site Plan

2. Site Analysis

Mananga Homestead is sited on the northern fringe of the Berry Township approximately 800m to the north east from the commercial precinct of Queen Street, Berry. The site is in relative proximity to a number of heritage listed properties; the most prominent being the Constables Cottage located at A15 Princes Highway approximately 120m to the south west in the 'Pulman Street Heritage Conservation Area' which supports a number of properties identified for their prominent location at the gateway to Berry.

The Mananga farm and homestead dwelling were constructed in 1894 for John Stewart, a resident instrumental in the early formation of the Municipality of Broughton Creek and Bomaderry - now part of Shoalhaven City Council. The site is listed as local heritage item, number 63 "Mananga - Berry Estate manager's farm complex" pursuant to Schedule 5 of the Shoalhaven LEP 2014. Mananga farm and homestead have an extensive historical and archaeological presence that has been well documented by Navin Officer in a previous assessment and also known by Council's heritage staff and heritage advisor.

Figure 2 below is an aerial view of the site and surrounding locality identifying the property, known as the Constable's Cottage, in relation to the proposed development. Constables cottage is owned by our client, who is concerned about the proposed development and the potential impact on the history of the site, locality and the ongoing amenity issues that will be created by the proposed development.



Figure 2: Aerial view of site and surrounding development (Nearmap)

3. RU1 Zoning

The site is zoned RU1 pursuant to the Shoalhaven LEP 2014 as shown in Figure 3. Function Centres are prohibited in the RU1 zone.

The objectives of the RU1 zone are provided as follows:

- To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.
- To encourage diversity in primary industry enterprises and systems appropriate for the area.
- To minimise the fragmentation and alienation of resource lands.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To conserve and maintain productive prime crop and pasture land.
- To conserve and maintain the economic potential of the land within this zone for extractive industries

The proposed alterations and additions to the shed/ silo and use for a function centre accommodating 120 persons would clearly represent the dominant use of the site. The prohibited land use is inconsistent with the objectives of the Primary Production zone and the heritage conservation provisions are not adequately justified as detailed in the Section 3 discussion below.

In conjunction with the approved and under construction tourist and visitor accommodation, the proposal clearly represents a commercial overrun of one of Berry's most important heritage landmarks. The proposal is inconsistent with the RU1 objectives and the desired 'pastoral landscape' as defined by Council's Heritage Consultant. The Mananga Homestead provides an inherent link with the northern entrance to Berry and surrounding RU1 zoned landscape.

As discussed above, Function Centres are prohibited in the RU1 zone and discussion of the heritage provisions relied upon to support the proposal are included under separate heading below.

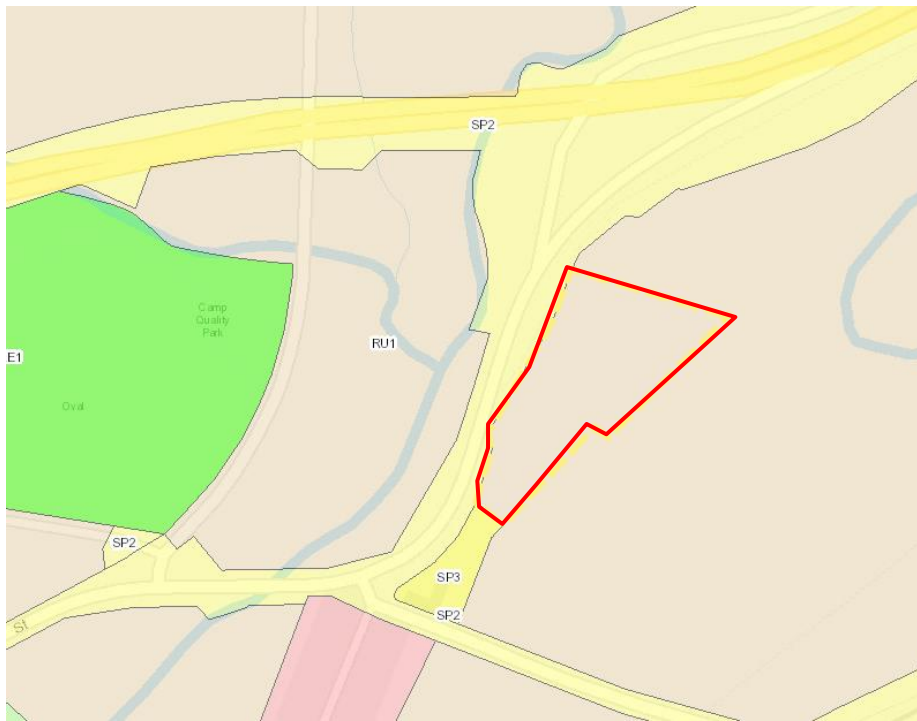


Figure 3: Extract from Land Use Zoning Map - Shoalhaven LEP 2014 (ePlanning Spatial Viewer)

3. LEP Heritage Provisions

Shoalhaven LEP includes heritage provisions within clause 5.10. Sub-clauses (4) and (5) relate to the consideration of the impact of proposed development on the heritage significance of the item or heritage conservation area. These sub-clauses are shown below.

(4) Effect of proposed development on heritage significance The consent authority must, before granting consent under this clause in respect of a heritage item or heritage conservation area, consider the effect of the proposed development on the heritage significance of the item or area concerned. This subclause applies regardless of whether a heritage management document is prepared under subclause (5) or a heritage conservation management plan is submitted under subclause (6).

(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.

A Heritage management document was provided which considers the existing heritage significance of the item, being Mananga but does not include any assessment of the impact of the proposal on the item, its significance, nor on the nearby Pulman Street Heritage Conservation Area.

Sub clause (5) (a) and (c) requires an assessment for land on which a heritage item is located and for land within the vicinity of a heritage conservation area and this has not been provided. Further, as stated above, a review of the Heritage Management Document indicates that an adequate impact assessment of the proposed function centre in accordance with Clause 5.10 (4) and (5) has not been provided. It is unclear how Council can adequately assess heritage impacts based on information submitted, especially given the absence of justification that the function centre will not impact the significance of this important gateway to the Berry town centre.

In addition, and most importantly, Function Centres are a prohibited land use in the RU1 zone therefore the proponent has submitted the DA relying on the permissibility provisions of Clause 5.10 (10) of Shoalhaven LEP 2014. The table below considers the provision of this clause in detail, reasons why the provisions have not and cannot be adequately addressed and therefore the proposed development is unable to be approved as it is prohibited within the zone.

Clause 5.10 Provisions	Comment
<p>(10) Conservation incentives The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that—</p>	<p>Refer to comments below.</p>
<p>(a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent, and</p>	<p>The Heritage Management Document prepared by Edmiston Jones Architects identifies that the owners of Mananga Homestead are compelled to introduce commercial development to the site in order to maintain the heritage significance of the listing. It is acknowledged that DA19/2134 was approved by Shoalhaven City Council on 2/6/2020 for tourist and visitor accommodation and whilst the potential economic returns associated with this is unclear, the development is likely to provide a significant revenue for owners. This is a clear indication that commercial development has already been introduced, with support from Council, which will directly assist with maintenance costs of the site. The Heritage Management Document does not acknowledge the economics associated with the 'under construction' tourist accommodation and Council should therefore substantiate the submitted financial heritage outgoings, taking into consideration the future income stream from tourist cabins.</p> <p>The Heritage Management Document does not specifically detail any conservation works proposed to be undertaken on the site. Maintenance of gardens (many planted by the current owners) does not necessarily contribute to the conservation of the heritage value of the property.</p> <p>In addressing the question of whether the conservation of the heritage item "is facilitated by the granting of consent", as set out in subclause (a), it is noted that the Court has on multiple occasions, referred to the reasoning adopted in the decision of <i>David Fox v North Sydney Council</i> [2016] NSWLEC 1366 at [par. 47]:</p> <p><i>Facilitating conservation requires a higher threshold than just ensuring the proposal does not adversely impact on the identified heritage significance of an item. In order to facilitate the conservation of the heritage item, the proposal must assist in retaining its cultural significance, such as by revealing and interpreting the heritage significance of the item.</i></p>

Clause 5.10 Provisions	Comment
	<p>It is unclear how the introduction of a function centre and additional commercial parking would reveal and interpret the heritage significance of the item. Further, the impact associated with additional parking to meet Council's function centre requirements would generate inherent impacts to the heritage significance of the site, thus rendering the proposal entirely inconsistent with recent case law. The proposal does not facilitate conservation in accordance with the Court's decision in <i>David Fox v North Sydney Council</i> [2016] and any amendments to the design in order to better accommodate the projected number of guests would exacerbate the heritage impact as discussed.</p>
<p><i>(b) the proposed development is in accordance with a heritage management document that has been approved by the consent authority, and</i></p>	<p>A Heritage Management Document has been prepared to support the DA. It is noted that the Document identified no specific heritage conservation measures required to be undertaken.</p> <p>NSW Heritage provides details in their publications about what information should be included within a management document, such as a Conservation Management Plan or Strategy. These documents not only consider the history of the site but also an assessment of the potential impacts of the development as well as identification of conservation requirements and works needed to address these requirements including timing, costs and how they should be undertaken to minimise impacts on the site.</p> <p>The Heritage Management Document provided does in no way assess the impacts of the function centre, including new toilets and car parking on the heritage significance of the property including house, shed and curtilage. It also does not specifically detail the conservation works required to protect the item, it actually suggests no conservation works are required, which is inconsistent with this clause and its intention.</p>
<p><i>(c) the consent to the proposed development would require that all necessary conservation work identified in the heritage management document is carried out, and</i></p>	<p>The Heritage Management Document prepared to support the DA confirms that no specific conservation works are required for the site as follows:</p> <p style="padding-left: 40px;"><i>No specific conservation work is required or identified in this heritage management document. The maintenance required to Mananga is consistent with the care necessary for any residence, but particularly a building of this age. This maintenance, including regular painting, prevention of water penetration and dispersal of stormwater away from the building should be carried out in accordance with Heritage Council guidelines.</i></p> <p>The proponent identified a cost of \$145,000 pa associated with the conservation of the site. Given the costs are itemised and include lawnmowing, gardening, hedge trimming, tree pruning, painting and roof & gutter cleaning, the projected maintenance costs are considered to be grossly inflated with the majority of funds allocated to maintenance of gardens. Aerial imagery also indicates that existing site vegetation afforded heritage significance may have been modified and many species now required to be maintained have only recently been planted. Further discussion is provided in point a) above.</p> <p>Further the fact that the heritage management document specifically states no conservation works are required confirms the proposal does not meet the criteria for use of these incentive</p>

Clause 5.10 Provisions	Comment
	provisions. Clause 5.10(10) is an all-encompassing provision and the proposal must meet all of the criteria, not just part.
<p><i>(d) the proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance, and</i></p>	<p>The Heritage Management Document does not assess the impacts of the proposal on the heritage significance of the item. There is no assessment in accordance with NSW Heritage guidelines or Shoalhaven Council's heritage provisions. Therefore there is no way to determine that the proposal will not have a negative impact on the heritage significance of the item and its setting and therefore cannot meet the provisions of Clause 5.10(10)(d)</p> <p>Further, the proposed development, inclusive of approved tourist accommodation and parking, will incorporate seventeen (17) parking spaces within a heritage listed RU1 zoned site. The site is not zoned for commercial land uses and the visual impact generated by this level of parking supply is considered to be unacceptable and a negative impact on the setting of the heritage item.</p> <p>In the case of <i>George v Parramatta City Council</i> [2017] NSWLEC 1366, the court accepted Council's submissions which held that the appropriate reading of Clause 5.10 (d) is that any degree of "adverse" impact on the heritage item, or setting, would remove the Court's power to approve the DA. The proposed function centre will provide no parking for 120 guests which is considered to be completely inadequate; therefore, it is expected that in order to support the development, Shoalhaven Council would require amendments to the design for integration of sufficient parking to accommodate functions. Should additional parking be introduced, say at least 30-40 spaces to accommodate 120 guests which is considered to be a conservative estimate, the site would need to support formal at-grade parking infrastructure for 47 - 57 vehicles (total). It is considered that no architectural response to the provision of 50 + parking spaces on site could mitigate the impact to heritage in line with the decision in <i>George v Parramatta City Council</i>.</p> <p>This RU1 heritage listed site would be overtaken by vehicle parking should the proponent be required to revisit parking provision. In its current form, the proposal will shift parking issues away from the site to the local road network, which is inconsistent with Council's controls and entirely unacceptable for a town like Berry which is already under significant stress from incoming population growth. Providing compliant relevant parking provision on site will clearly impact the heritage significance of the site, therefore the proposal represents a lose - lose for the Berry township and cannot be supported in accordance with the heritage provision of subclause (d).</p> <p>In addition, the proposed toilets required to be added to the north western side of the shed and silo building as part of the function centre have not been assessed in relation to the impacts on the building and site. These facilities would be visible from the road and would impact the appearance of the building.</p>
<p><i>(e) the proposed development would not have any significant adverse effect on the amenity of the surrounding area.</i></p>	<p>The proposed development will generate adverse impacts by way of increased traffic and congestion, guest vehicles parking on the street, acoustic amplified music impacts and acoustic impacts directed to the street and surrounding development</p>

Clause 5.10 Provisions	Comment
	<p>when music ceases and guests are required to wait for a mini bus to vacate the site.</p> <p>The Acoustic Assessment relies upon the implementation of a number of acoustic recommendations in order to comply with EPA guidelines. Council cannot ensure these mitigation measures will be consistently implemented and the prohibited use cannot be supported.</p> <p>Refer to Section 5 below that confirms that the proposal would have difficulty meeting this criterion.</p>

As detailed in the table above, an application must meet all the provisions of the Heritage Incentive clause within the Shoalhaven LEP to be able to use it to permit a use that may otherwise be prohibited. The assessment detailed above shows that the proposed development is unable to be approved as it has not adequately addressed these provisions and nor will it be able to, based on the information provided with the application.

4. Traffic and Parking

The proposed function centre development is submitted to Council on the basis that ten (10) parking spaces is considered to satisfactorily accommodate all staff servicing the function centre. This is considered to be unrealistic given that a function accommodating up to 120 persons will require the following service staff, at a minimum, who would travel to the site via private vehicle:

- Chefs/ cooks.
- Waitstaff/ Bar staff.
- Events management.
- Hairdressers.
- Security.
- Cleaners.
- Entertainment/ bands.
- Marriage Celebrants.

In addition to the service staff assessment above, the site will need to accommodate vehicle movements and parking associated with wedding cars and photographers. It is also highly unlikely that elderly guests or guests with a disability would be required to travel to the site via mini bus from designated pick up/ drop off points.

Noting that any car spaces designated for the approved tourist accommodation would be accounted for given the Statement of Environmental Effects identifies that these dwellings will likely service guests from the function, the proponent has overlooked the requirement for reasonable provision of parking based on the DCP or RMS guide to traffic generating development. The only swept paths and details of parking dimensions provided with the application were associated with previous accommodation approval and no new details have been provided for the additional parking.

A function centre of this size requires reasonable parking provision to ensure the development will not generate unacceptable on street parking impacts to surrounding areas. It is argued however that additional parking design to accommodate vehicles in accordance with the DCP, above the approved seven spaces associated with the tourist accommodation and ten spaces proposed for functions, would generate further significant detrimental impact on the heritage significance of an RU1 zoned site. Should approval be granted for the works proposed in this DA, the heritage listed site, even without additional parking to reasonably accommodate guests and servicing staff, would be transformed into a commercial development totally at odds with the heritage listing and RU1 zoning objectives.

A Traffic and Parking Impact Assessment has not been submitted to review the proposal nor has suitable

justification been provided to confirm the limited supply of parking proposed can accommodate the development without generating adverse impact on the local road network or surrounding development. No provision for onsite parking of the mini bus is provided in design documentation and there are no designated areas identified on site for safe pick up/ drop off of passengers. In addition, any function guests residing or staying outside of the Berry area will be required to park off site and transported to this location by mini bus. This is considered to be a direct shift of the issue associated with guest parking to another location and to the detriment of others. No Plan of Management has been submitted.

In addition to the above, DA17/1359 was approved by Shoalhaven City Council on 14 August 2018 for significant additions to the adjacent Bangalee Motel. Increased vehicle movements associated with guests, service vehicles/ deliveries and staff are likely to have a detrimental impact on traffic congestion in the immediate vicinity of the two sites. Further, a medical centre has also been approved at 1 Pulman Street in close proximity to the site and cumulative impacts associated with the function centre have not been justified in the SEE or a Traffic Impact Assessment.

The development has not provided adequate parking to accommodate the proposed land use and the DA is not supportable based on the inadequate traffic and parking justification submitted. Additional parking provided to comply with Council requirements will generate significant adverse impacts to the heritage significance of the site which cannot be supported.

5. Acoustic Impacts

An Environmental Noise Impact Assessment was prepared to support the DA and whilst BRS can only provide comment on the acoustic recommendations, it is noted that the development was only considered to be supportable from a noise impact assessment subject to the following:

- *All amplified music should be controlled through an in-house sound system with levels pre-set to ensure compliance with the relevant criterion where practicable.*
- *All amplified music should be played exclusively through a sound system owned and operated by the owners of the property. The amplifier can be calibrated and a maximum volume level pre-set so that the maximum allowable sound pressure levels are not exceeded.*
- *The amplifier must be contained in a secured area so that it is not accessible to function guests or entertainers. Any portable media devices may be connected externally into the amplifier via a lead/socket outside the lockable cabinet.*
- *The volume calibration of the amplifier is to allow for the fact that portable media devices have independent volume controls.*
- *A sound level meter may be purchased from an electronics store so that the owner or property manager may 'spot check' for noise compliance during or prior to functions. Whilst the sound level meter will not be a Class 1 or Type 2 instrument, the sound level meter can be calibrated by a suitably qualified acoustical consultant to determine where the level that the meter displays that equates to the levels recommended in Section 7.1 at 3 metres from the loudspeakers.*
- *Alternatively, or additionally, an electronic noise limiting device may be installed inside the building. The device may be calibrated and set to a level that ensures the noise limits are achieved. The device will provide a warning to the management, DJ, or artist via LED sequential lighting that the maximum noise level is close to being reached. If the pre-set noise limit is reached and then exceeded for a period of approximately 10 seconds, the power to the sound system may be disconnected. The option to disconnect the power is optional as the device may be used simply as an indication of the noise levels being emitted. The electronic device can provide an assurance that the noise levels can be controlled without the need to rely on human intervention.*
- *There should be no function activity at the site after midnight on any day.*

If the acoustic recommendations provided above are not adhered to every Friday or Saturday night (the SEE identifies opportunity for 50 functions per year), the land use will be operating above EPA acoustic levels and will therefore interfere with the amenity of neighbouring development. Given the land use is prohibited in the RU1 zone and relies upon heritage conservation incentives for permissibility, Council

cannot be certain that the proposal will function in accordance with EPA guidelines. Any departure from the guidelines would render the amenity impact as 'adverse' therefore representing a development proposal that is entirely inconsistent with the Court's decision

It is noted the Noise Impact Assessment did not include recommendations for use of the outdoor grounds to the east of the premises. This is considered to be unacceptable given the aerial image provided below identifies an existing maintained grass space suitable for outdoor activities. The Noise Impact Assessment is limited to review of the Floor Plan of the proposed development (refer to Figure 2 in the report) which tends to rely on the use of the internal building as the primary entertainment area to meet recommended acoustic levels. The manicured gardens to the east can support breakaway activities which, in the evening, would be likely to generate the most interference to nearby residents.

The Statement of Environmental Effects identifies that a mini bus with capacity for 12 persons will service the functions. Following the completion of the function at the prescribed time, patrons/ guests are likely to exit the building and wait for the mini bus in the car park. Based on the SEE (page 39), some guests will be required to wait for the tenth mini bus trip within this car park area. The timing associated with ten mini bus trips is considered to be significant and the following statement provided in the SEE, "*For those functions undertaken of an evening, all music is to cease by 10.30 pm in order that all guests vacate the site by 11.00 pm*", considered to be generally unachievable. Even where trips will begin prior to the cessation of music, bus trips are likely to take at least 10 minutes, if not longer, for a return trip therefore guests are likely to be waiting considerably longer than the 11pm deadline identified in the SEE.

An aerial mark-up of potential outdoor entertainment areas is provided in Figure 4.



Figure 4: Aerial view identifying suitable outdoor entertaining areas to the east

6. Conclusion

The proposed development is highly inconsistent with the existing and future character of the RU1 zone and approval by Shoalhaven City Council is likely to set a precedent for incorrect use of the LEP heritage conservation incentives.

Maintenance costs projected for conservation of the Mananga site are considered to be grossly inflated, with reasonable costs to be comfortably accommodated by income from the recently approved tourist accommodation on site. The Mananga Homestead has recently undergone extensive renovations which were clearly above and beyond what can be classified as maintenance for conservation. The proponents conclusion that further commercial development of the site is required to facilitate maintenance costs is therefore questioned. Further the incentive provisions are not able to be used to recoup retrospective costs.

It is evident that the proposal represents an overdevelopment of a landmark heritage site and the commercial impacts associated with large scale events will generate significant long-term amenity impacts on surrounding RU1 zoned land, neighbouring residents, council infrastructure and the Berry township. The Acoustic Report relies on the introduction of a number of ambitious recommendations to meet EPA Guidelines. Council would be well aware of the acoustic impacts, above and beyond those documented in technical reports, generated by evening weddings.

The proponent is attempting to utilise heritage provisions as a shield; even where it is clear that the intent of Clause 5.10 (10) heritage conservation incentives is not to facilitate profits in excess of that required to maintain the heritage listings. It is expected that Council will review the intent of the clause and recent case law when determining this DA.

No formal heritage 'impact' assessment of the site and nearby Pulman Street Heritage Conservation Area has been provided in accordance with Clause 5.10 (5) of SLEP.

Further the income from the accommodation and the previously approved uses (DA19/2020 which the SEE identifies will be continuing) should adequately provide the funds needed for any garden maintenance and other works for the everyday operation of the property. There is no adequate justification for the additional income from the function centre to support these works on the site.

The proposed development should be refused on grounds of insufficient parking, adverse heritage impacts that have not been assessed or considered, acoustic impacts and absence of a formalised Plan of Management.

It is clear that the site cannot support functions and events of this scale without impacts to heritage. The proposed development is incompatible with the existing, desired and future character of the RU1 zone and surrounding locality and approval would set a concerning precedent for the destruction of Berry's heritage.

Yours faithfully,

Ben Miller | Town Planner
Barker Ryan Stewart Pty Ltd

Lisa Wrightson | Planning Manager & Heritage Advisor
Barker Ryan Stewart Pty Ltd