

ADEQUACY OF THE REGULATION OF SHORT-TERM HOLIDAY LETTING IN NEW SOUTH WALES

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Attachment 1 - Submission to Legislative Assembly into short-term holiday letting in NSW**BLUE MOUNTAINS CITY COUNCIL SUBMISSION TO LEGISLATIVE ASSEMBLY
INQUIRY INTO THE ADEQUACY OF THE REGULATION OF SHORT-TERM HOLIDAY
LETTING IN NSW**

What is short-term holiday letting in the context of the Blue Mountains

There are a range of land uses that fall under the umbrella term of short term holiday accommodation such as:

- Backpackers accommodation;
- bed and breakfast accommodation,
- farm stay accommodation
- holiday lets (of entire dwellings or part thereof);
- serviced apartments;
- hotel or motel accommodation;
- eco tourist facility;
- boarding house;
- caravan parks; and
- camping grounds.

Within the standard instrument LEP framework all the above are defined, apart from holiday lets. The umbrella term 'tourist and visitor accommodation' in the standard instrument includes backpackers, bed and breakfast, farm stay, hotel or motel and serviced apartment.

In addition to the above, the rise of house sharing websites, such as Airbnb, where individual rooms to entire dwelling houses can be rented for a short time, has further complicated the matter. It is understood a major focus of the inquiry is on issues arising from these informal house sharing websites, however broader issues around holiday letting of entire properties remains unclear from a regulatory and planning view point.

Existing Planning Framework and Holiday lets

There are currently three principal LEPs in the Blue Mountains.

LEP 4 and LEP 1991

Under LEP 4 and LEP 1991 short term holiday lets are not defined. However it was recognised that there has been a long history of holiday lets being provided in the Blue Mountains and while exact numbers are not known, a review of web based accommodation sites suggested that numbers would be substantial. In the past, the advice to land owners under the LEP 1991 and LEP 4, has been that a holiday let could be considered ancillary to the use of the dwelling and would not therefore require consent.

This view has since been confirmed by the outcome of a recent Land and Environment Court judgement, (*Dobrohotoff v Bennic* [2013] NSWLEC61). The case is now known as the Gosford case, and concerned the use of a dwelling house for short term accommodation within the Gosford Local Government Area. The case was brought by an adversely affected third party seeking cessation of the use of the property as a holiday let. The owners of the property did not have development consent as the Gosford Planning Scheme Ordinance did not make provision for this land use. The Court found that the use of the property was prohibited development. Furthermore, the Court clarified that the particular use of a dwelling use as a holiday let in that case could not be considered ancillary use to that dwelling and was critical of Gosford Council's handling of the matter, noting that by failing to clearly address the question of permissibility or otherwise of the use in the planning instrument, the Gosford Council had abrogated its duties. While the Court found that, in this particular case, a holiday let was prohibited development, the judgement also acknowledged (paragraph 43)

that 'whether a building is a dwelling house is a question of fact and degree. Subject to any requirement of permanency, there are a number of situations where buildings may be a dwelling house even though they are only occupied infrequently.' Generally, it could be considered that a holiday rental is ancillary to the dominant use of the building as a dwelling house, where the use of the property by the owners predominates, and the period that the property is rented as a holiday let is significantly less than the period that the dwelling is occupied by the owner. However, in the absence of a standard definition for holiday lets the issue remains contestable.

LEP 2005

LEP 2005 is one of a few LEPs in NSW to define holiday lets. It is defined to mean:

'the use of a dwelling house for short-term accommodation where visitors or tourists stay for a period of less than 3 months and have a principal place of residence elsewhere, but does not include a use elsewhere defined in this dictionary.'

The use is currently permissible with consent in all of the Village and Living zones under that instrument.

Prior to LEP 2005, however, holiday lets within the Blue Mountains LGA have been largely unregulated. In light of the judgement on the Gosford case, councils have become aware of the need for an avenue of consent and appropriate regulation. The Council has been proactive in bringing the matter to the attention of the Department of Planning and Environment, advocating without success, that the use 'holiday let' should be included as a defined use within the standard instrument. The lack of clear direction in this policy area from the Department of Planning has led to a range of different approaches from local councils in key tourism areas.

DLEP 2015 and short term tourist accommodation

Given the lack of a clear direction in policy from the Department of Planning, the approach to holiday lets taken by Council in DLEP 2013 (now referred to as DLEP 2015) was to exhibit a specific local clause as below:

6.31 Holiday Lets / Short Term Rental Accommodation

- (1) *The objective of this clause is to ensure that a dwelling-house may be used for certain short-term tourist and visitor accommodation without requiring development consent.*
- (2) *Despite any other provision of this Plan, development consent is not required for the use of a dwelling-house for the purpose of tourist and visitor accommodation (except bed and breakfast accommodation and farm stay accommodation) if the use is only short-term, does not involve more than 8 overnight guests per dwelling-house and does not interfere generally with the amenity of the neighbourhood in any way, including by noise or traffic generation.*
- (3) *In this clause, short-term means a situation where any guest stays for a period of less than 60 days in any 12 month period and has a principal place of residence elsewhere.*

Following a review of submissions received during public exhibition, and a review of the approach of other councils, a two fold approach was subsequently proposed and is with the Department of Planning for review.

The first component of this approach, is that certain classes of holiday let are proposed to be Exempt Development and included in Schedule 2 of the DLEP 2015 as below:

Holiday Lets/Short Term Rental Accommodation

Holiday Lets/Short Term Rental Accommodation is exempt development where the following applies:

- (1) It does not involve more than 8 overnight guests per dwelling house, and*
- (2) The dwelling house must be connected to a reticulated sewerage system, and*
- (3) The dwelling house is not located on land shown as Bush Fire prone land on the Bush Fire Prone Land Map, and*
- (4) A guest stays for a period of less than 60 days in any 12 month period and has a principal place of residence elsewhere, and*
- (5) The use does not include more than 3 guest cars at any one time, and*
- (6) Noise emissions must not be audible inside any adjoining dwelling between 10:00pm and 7:00am on weekdays and between 10:00pm and 8:00am on Saturdays, Sundays and public holidays. At all other times, noise levels must not exceed 5Dba above ambient background noise level measured at the lot boundary.*

The second part of the approach is to include a mechanism requiring consent for those holiday lets which do not meet the requirements to be Exempt Development.

6.29 Holiday Lets / Short Term Rental Accommodation

- (1) The objective of this clause is to require development consent for the use of a dwelling house for certain short-term tourist and visitor accommodation.*
- (2) Despite any other provision of this Plan, development consent is required for the use of a dwelling house for the purpose of tourist and visitor accommodation (except bed and breakfast accommodation and farm stay accommodation) if:*
 - (a) the use involves more than 8 overnight guests per dwelling house, or*
 - (b) the dwelling is located in an unsewered area of the Sydney drinking water catchment, or*
 - (c) the dwelling is located on Bush Fire Prone Land.*
- (3) In this clause, short-term means a situation where any guest stays for a period of less than 60 days in any 12 month period and has a principal place of residence elsewhere.*

The intention of this clause is to address the circumstance where a house ('dwelling house') is to be used, either partially or wholly, as a holiday let. The clause specifically does not refer to a 'dwelling' as this would include apartments, units or flats under the Standard Instrument.

Key Issues for consideration**Need for a standard definition and policy approach**

As noted above, Council has prepared a two fold approach to holiday lets in draft LEP 2015. The first component of this approach, is that certain classes of holiday let are proposed to be Exempt Development and included in Schedule 2 of the DLEP. The second component is a mechanism requiring consent for those holiday lets which do not meet the requirements to be Exempt Development. There would be benefit however to having a clear direction in policy from the Department of Planning, such as a new land use and clause within the Standard Instrument template. Other Councils in key tourism areas, such as Gosford, Wyong and Byron Bay have also developed other approaches that are of value in this area.

In terms of Airbnb that use would clearly fall within the approach given above to holiday lets when a rental is for the whole of house rental.

The scenario around individual room rentals under Airbnb is more difficult to define. If no food is prepared then the use of the room would most likely fall within the definition of holiday let above or it may even be ancillary. However, the preparation and supply of food

would mean that the definition of bed and breakfast would then apply. If this was the case, and the requirements of the General Development Code for bed and breakfast accommodation are met, then the use may be complying development for the purposes of the State Environmental Planning Policy (Exempt and Complying Development codes) 2008. This does not negate other legislative requirements for approvals, licences, permits and authorities which would still apply.

Management of short term holiday lets

A key difference between holiday lets and other types of tourist accommodation is that a 'holiday let' is intended to be used by families or groups of friends, where guests provide for themselves and are therefore self-regulated through a voluntary 'code of conduct'. Generally other types of tourist accommodation, such as bed and breakfasts or hotels and motels, have an on-site manager.

Amenity issues with holiday lets generally arise from larger groups utilising a property, and include noise, parking and rubbish generation. Number of guests and noise complaints issues are addressed separately below.

Another key issue in relation to on-line platforms is often that they do not have a direct onsite contact point and therefore the ability to monitor and address amenity issues is limited.

A recent example of the management and amenity issues associated with a holiday let in the Blue Mountains can be found as Item 21 of the Business Paper for the 28 August 2012 Ordinary Council Meeting on Council's website (www.bmcc.nsw.gov.au).

Number of guests

The underlying principle of allowing a maximum number of 8 overnight guests in a holiday let, is that this is a similar intensity of use of a site as a Bed and Breakfast accommodation which allows for 3 bedrooms, that is two guests in each bedroom and 2 managers/owners being a total of 8 people on site. In the DA context however, problems have arisen with 'party houses' and adverse impacts are associated with holiday lets over 8 guests. It is not uncommon for some holiday lets to have multiple rooms of 4 bunks or more, resulting in capacities exceeding twelve people in a three bedroom house. Limiting the number of overnight guests which could be accommodated gives Council an avenue for compliance action if there are significant amenity impacts on neighbours as a result of the number of guests. Setting the guest limit can form part of the letting agreement.

Such person based limits are already used within the Standard Instrument format for other land uses.

- *Child care centre* does not include services "provided for fewer than 5 children"
- *Home-based child care* is not to "exceed 7 children.....including no more than 5 who do not ordinarily attend school"
- *Health consulting rooms* are not to be used by "more than 3 health care professionals"
- *Home business* cannot include "more than 2" employees who are not residents of the property
- *Home occupation (sex services)* restricts the provision of sex services to "no more than 2 permanent residents of the dwelling"

Similarly to short-term rental accommodation, the number of persons in these definitions does not correlate directly with the number of rooms, offices, or facilities in the building. Although an operator may be able exceed these numbers without modification to the building, the definitions provides grounds for compliance action by Council to protect the amenity of neighbours.

Noise impacts

This is an important provision given the prevalence of short-term rental accommodation in residential areas in the Blue Mountains and the potential for this use to generate more noise, and have a greater impact on the amenity of neighbouring properties, than a dwelling used for residential rather than tourist accommodation use.

There are other land uses in the Standard Instrument format which refer to amenity impacts as below:

- *Home business "interference with the amenity of the neighbourhood by reason of the emission of noises....traffic generation...."*
- *Home industry "interference with the amenity of the neighbourhood by reason of the emission of noise....traffic generation..."*

Council believes wording similar to these other defined land uses could be used instead of the currently proposed decibel limit. It is considered that the use of similar wording appropriate because, like *short-term rental accommodation*, both *home business* and *home industry* are operated in a residential neighbourhood typically from a standard dwelling house.

Drinking water catchment.

The Sydney Catchment Authority raised concerns during public exhibition of DLEP 2013 (now DLEP 2015) that un-sewered sites in the drinking water catchment may contain wastewater systems that would not be capable of dealing with the extra wastewater generated, over the long term, by occupancies of up to 8 people without regularly failing. Their concern is for the impact this could have on the quality of drinking water and requested that consent be required for the use in unsewered areas of the drinking water catchment. This change was introduced as discussed above. This issue is also considered in the State Environmental Planning Policy (Exempt and Complying Development codes) 2008 for bed and breakfast accommodation to be complying development.

Bushfire regulations

The recent bushfires in the Blue Mountains have highlighted the impact that bush fires have on the community and discussions have been held with the Rural Fire Services (RFS), with regards to the Rural Fires Act 1997 section 100B, and the establishment of potential approaches to regulation of holiday lets, which would be more aligned with the risk and benefit conveyed by regulation. As a type of tourist accommodation, under section 100B(6)(b) of the Rural Fires Act 1997, a holiday let would be defined as a Special Fire Protection Purpose (SFPP). Uses defined as SFPP's are considered higher risk developments by the RFS. On the 25 February 2014, council officers met with the RFS to discuss a number of risk weighted options in relation to SFPP's and the requirements for a bush fire safety authority (BFSA), however the RFS has yet to confirm that this is an acceptable approach.

In the interim, the approach taken by Council is to make any holiday let on the Bush Fire Prone Land Map require development consent. There is further work required on this issue in relation to short term holiday accommodation generally.

In general, while unrecognised as a defined use within the Standard Instrument, holiday lets are well established and growing use across the state. A consistent approach, with some capacity to accommodate local provisions would ensure that standards regarding such issues, as noise, parking and rubbish collection are transparent and consistent for both operators and residents.