

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

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Mr Glen Brookes MP – The Chair
Committee on Environment and Planning
Parliament of New South Wales
Macquarie Street, SYDNEY

By email: environmentplanning@parliament.nsw.gov.au

Dear Sir

Re: Inquiry into the adequacy of the regulation of short-term holiday letting in New South Wales

Thank you for your invitation to Randwick City Council to make a submission to the Committee on Environment and Planning's inquiry into the adequacy of the regulation of short-term holiday letting in New South Wales.

The City of Randwick has some of the most sought after tourist destinations in the State. The picturesque beaches, iconic sporting institutions, hospitality facilities and world class tertiary and health care facilities all conveniently located within 10 kms from the Sydney CBD makes many of our suburbs ideal locations for the provision of short-term tourist accommodation.

To give some perspective, in the year ending March 2006 international visitors spent a total of 49,834 nights in the City of Randwick. This number increased to 72,609 in the year ending March 2015.¹ This represents a 45.7% increase in the number of visitors who stayed more than one night during the past 10 years. A significant number of these visitors are staying with their families and friends who live in the City of Randwick.

Whilst the use of residential premises for short-term tourist accommodation is not a novel concept, the advent of 'on-line' accommodation websites has facilitated the listing of and access to short stay accommodation. This appears to have become a burgeoning global 'industry' which has brought about the impetus to examine a method of potential regulation.

In this regard, it is noted that the Committee's inquiry into the regulatory adequacy of this type of accommodation has implications beyond the purview of local government (e.g. business registration, licensing and taxation). Therefore this submission is focused on the current 'Planning system' and includes suggestions on how it can be improved to provide a better 'development control' framework for local government and greater certainty for property owners and the broader community.

The *Environmental Planning and Assessment Act 1979* ("the Act") is the main legislation that controls the use and development of land in New South Wales. There is scope to control and set direction for this type of *development* under both state and local planning instruments made under the Act.

¹ Information collated from Stopover rates (State/Region/SA2) provided by Tourism Research Australia.

Randwick City Council is of the view that short term accommodation as an ancillary use within a residential premises should not require further development consent. Properly characterised, the 'taking-in' of a guest by a proprietor of a *dwelling*, whether for payment or otherwise, does not change the use of a residential premises to require further approval under the New South Wales planning legislation, provided that the short term accommodation remains ancillary to the dominant use of the *dwelling*.

For example, a four bedroom dwelling house that is 'owner occupied' and provides the use of a 'spare' bedroom, either on a temporary or permanent basis, whether or not for a fee or reward, to an unrelated guest does not change the approved use of the premises as a *dwelling house*.

However, in circumstances where the provision of accommodation at a residential *dwelling* takes on a character that is distinct or discrete from what is accepted to be the primary residence or ordinary use of someone's home, then this may not be a use that is authorised by a planning consent to use the premises as *dwelling*. Suffice to say there would be many owners of residential property in New South Wales that permit their premises to be let on a short-term basis without knowing that they are potentially in breach of New South Wales planning law.²

Having regard to the current ambiguity there is a real need for property owners to have greater certainty as to how residential premises may be used without the necessity to obtain legal advice or having to resort to the courts to settle disputes. In this regard the permissibility, or otherwise, in respect to the use of residential premises for the provision of short-term rental accommodation should be clarified within the existing planning framework.

Councils may seek to amend their Local Environmental Plans to provide for the particular circumstances whereby the provision of short-term rental accommodation at residential premises can be conducted.³ Nevertheless, it is Randwick Council officers' view that sensible amendments could be made to the *State Environmental Planning Policy (Exempt and Complying Development Code) 2008* ("the Codes SEPP"), which set the parameters of the circumstances whereby the use of residential premises for the provision of short-term holiday rental accommodation can be considered *exempt development* or *complying development*.⁴

Introducing additional short-term holiday rental accommodation provisions into the Codes SEPP would give State-wide clarity as to the permissibility of this form of residential accommodation at the same time providing the 'development standards' that would permit the small scale, non-intrusive use of approved *dwelling*s and *dwelling houses* to be used for the purpose of providing short-term holiday accommodation.⁵

² Critical of the need to clarify the law in respect to the provision of short-term rental accommodation, Justice Pepper, in *Dobrohotoff v Bennic* [2013] 194 LGERA 17, which concerned the short-term letting of a dwelling house at Terrigal, stated at [13]: "Aware of the equivocal nature of its planning instrument in respect of the use of short term holiday rental accommodation, the council has not sought to resolve the ambiguity by way of amendment, thereby providing a simple and cost effective solution to the current dispute and providing certainty to the great number of persons who find themselves in a similar situation to that of the present parties. Other councils in New South Wales have made such an amendment (for example, Byron Shire Council and Shoalhaven City Council). By clarifying the law in this regard, the council could have avoided the need for this litigation, with all of the attendant legal and emotional costs to the parties."

³ For example the *Shoalhaven Local Environmental Plan 2014* has, at Part 7 - Addition local provisions, articulates the circumstances in which the short-term holiday rental can be carried out without consent.

⁴ ss. 76 (2) and 76A (5) of the Act describes what is *exempt development* and what is *complying development*, respectively.

⁵ Subdivision 1 of Division 1 of Part 4A of the Codes SEPP provides for *bed and breakfast accommodation* to be carried out as *complying development* subject to compliance with the 'development standards' contained at

In this regard, we suggest that a new discrete *exempt development* Subdivision can be created within Division 1 of Part 2 of the Codes SEPP. The formulation of a sensible *exempt development* criteria would 'regularise' what has been taking place at residential premises for many years which has minimal environmental impact, does not reduce building occupant safety, does not result in a change to the building classification under the *Building Code of Australia* and if provided in a residential apartment building does not result in the premises being used as a *serviced apartment*.⁶

It is our view that the use of residential premises by persons on holiday where the whole of the premises is occupied as a single dwelling and is not being used as a *place of shared accommodation*⁷ (i.e. the letting out of individual rooms to unrelated persons) is unlikely to result in any adverse amenity or building safety impacts. This would align the provision of small scale holiday accommodation with the existing *exempt* commercial activities permitted at residential premises under the Codes SEPP.⁸ To safeguard against overcrowding a 'persons per bedroom' cap could be adopted by stipulating a limit, either by beds per room or bed to floor space of a bedroom if necessary.

The current requirement to obtain a *complying development certificate*, pursuant to the Part 4A – General development code of the Codes SEPP, for the provision of *bed and breakfast accommodation* should be made *exempt development* so long as the *dwelling house* remains a Class 1a building as classified in the *Building Code of Australia*. This would permit the permanent residents of a dwelling house to provide small scale (e.g. the use of one or two bedrooms) short-term holiday accommodation within the family home without the necessity of obtaining *development consent*.⁹

The other important consideration is the difficulty in regulating activities that are conducted at private residential premises. Residential premises are afforded special protection with respect to the *powers of entry* conferred, not only on council officers, but other law enforcement agencies. The inability to readily access residential premises as part of an investigation into an alleged unauthorised use severely hampers a council's ability to determine the true use and any resulting breach of planning law. Where entry is refused the only alternative is for an investigating council to embark on the onerous and resource intensive task of assembling evidence to obtain a *search warrant*.¹⁰ While the Act has sufficient provisions that can be relied upon to gain entry to residential premises most councils simply do not have the resources to conduct complex investigations relating to the unauthorised use of residential premises. In this regard, mandatory 'licensing' requirement to use residential premises for short-term letting

clause 4A.2. ***Bed and breakfast accommodation*** means an existing dwelling in which temporary or short-term accommodation is provided on a commercial basis by the permanent residents of the dwelling and where:

- (a) meals are provided for guests only, and
- (b) cooking facilities for the preparation of meals are not provided within guests' rooms, and
- (c) dormitory-style accommodation is not provided.

⁶ The *Standard Instrument (Local Environmental Plans) Order 2006* defines a *serviced apartment* in the following terms: ***serviced apartment*** means a building (or part of a building) providing self-contained accommodation to tourists or visitors on a commercial basis and that is regularly serviced or cleaned by the owner or manager of the building or part of the building or the owner's or manager's agents.

⁷ The Act defines a *place of shared accommodation* as a boarding house, a common lodging house, a house let in lodgings and a backpackers hostel.

⁸ The Codes SEPP permits home businesses, home industries and home occupations to be carried out as *exempt development* (see Subdivision 22 of Division 1 of Part 2 of the Codes SEPP).

⁹ A building that is a boarding house, guest house, hostel or the like with a total floor area not exceeding 300 m², and in which not more than 12 person would ordinarily reside is a Class 1b building under the *Building Code of Australia*.

¹⁰ Subdivision 2 of Division 1C of Part 6 of the Act contains the powers of entry and search.

administered at the State level would overcome many of the difficulties that local government face in attempting to regulate what is essentially a commercial enterprise through the NSW Planning System.

It is suggested that changes to the current planning system will bring greater certainty to property owners as to the permissibility and circumstance in which short-term holiday accommodation can be provided. It is envisaged that the provision of this type of accommodation will set acceptable parameters that will permit short-term holiday lettings as *exempt development* in a manner that does not adversely impact neighbourhood amenity or building occupant safety. This coupled with the introduction of a State administered 'licensing' system will provide an efficient regulatory framework whereby this emerging industry can operate as a legitimate commercial enterprise.

We again thank you for your invitation to make a submission to the Committee on Environment and Planning's inquiry into the adequacy of the regulation of short-term holiday letting in New South Wales, and trust this submission is of assistance with the Committee's inquiry. Should you require further information or clarification on Council's submission, please do not hesitate to contact Mr Roman Wereszczynski, Manager, Health Building and Regulatory Services on [REDACTED]

Yours faithfully

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