

Submission to the Inquiry into the Adequacy of the Regulation of short-term holiday letting in NSW

November 2015

Opening:

Local Government NSW (LGNSW) is the peak body for councils in NSW. It represents all the 152 NSW general-purpose councils, the special-purpose county councils and the NSW Aboriginal Land Council.

In essence LGNSW is the 'sword and shield' of the NSW Local Government sector. LGNSW is a credible, professional organisation representing NSW councils and facilitating the development of an effective community-based system of Local Government in NSW. LGNSW represents the views of councils to NSW and Australian Governments; provides industrial relations and specialist services to councils; and promotes NSW councils to the community.

Purpose

This submission is a response to part (e) of the terms of reference of the inquiry on the regulatory issues posed by short term rentals. This is the section that is of relevance to Local Government.

Background

Over recent years there has been a level of debate across the sector on how to manage short term holiday rentals of residential properties, under the current planning and zoning rules. This has arisen due to:

- the limitations of the zoning system, which does not take into account such nuances of use when defining residential activities;
- changing demands and social expectations, both for and against short term rental accommodation being located within residential zones, and
- the growth of interest in the sharing of residential properties as short term rentals.

This debate has to some extent been amplified by the popularity of Airbnb,¹ which facilitates the sharing of residential accommodation internationally, enabling visitors to rent all forms of residential properties, in whole or part, for a short stay. However, from a Local Government perspective the relevant debate is the circumstances in which councils required to regulate these types of activities and if so, what planning controls should be in place.

Some of the issues around short term residential accommodation are relevant to Local Government land use decisions, which identify where certain activities should be located. Councils are interested and have always had a right to provide guidance on activities under the general classification, tourist and visitor accommodation. The more subtle and vexed issue can be the use of homes for part time rental and whether or at what point are they considered to be another use because of this activity.

¹ While this industry is by no means limited to Airbnb the following is a snapshot of this industry that demonstrates the scale and growth of the industry in recent years:

- There are currently 10,800 listings in Sydney, 78% higher than last year;
- There are 5,400 listings outside Sydney- 89% higher than last year;
- 60% of listings are entire homes and 40% are private rooms;
- On average hosts rented their properties for 37 nights per year obtaining \$4,505 in rent and the average stay was around 4.2 days;
- One quarter of users is Australian and the other three quarters are international travellers from Europe (41%) and North America (21%).
- A service fee of 6 to 12% of the cost of the stay is charged by Airbnb.

However, some of the issues around these activities are not land use decisions per se but are around the associated social behaviour issues. For example an increased number of visitors to an area, may negatively impact on the quiet enjoyment of that neighbourhood for the existing residents.

It is not unusual in planning law to manage the diverse interests of the tourist or holiday maker and the local residents. What is important from councils' perspective however is to ascertain what activities require council consent and the thresholds for such a decision.

The scale of the issue varies across the sector

Short term holiday accommodation has always been an issue for Local Government, but varies considerably across the sector, depending on whether the location is popular as a tourist destination and whether residents are generally supportive of tourism or not.

In many locations the ebb and flow of short term accommodation is an integral part of the community's experience and an important factor in local or regional economic activity. Generally these communities support short term accommodation and the debate is more around the management of these properties, so that they do not adversely affect the resident population. Some councils in such contexts have developed planning controls to further manage such activities.² Also some advertising agencies and platforms have put in codes of practice to assist in managing these issues.³

Nevertheless, in other areas that may be generally more densely populated, local residents may have a more negative view of short term accommodation, for example where streets are already congested and concerns around car parking, uncleared garbage bins and intrusive parties are considered to adversely affect the residential amenity of the locale. Also these areas may already have ample provision for tourist and visitor accommodation.

While councils views vary on these matters, often reflecting the local perspectives described above, many adopt a non - interventionist position unless they are required to intervene by an adjoining neighbour.

A small minority of councils have developed specific planning controls such as a Development Control Plan (DCP), sometimes resulting from legal conflicts on specific activities, to clarify expectations and manage potential negative outcomes of these activities in the community.⁴

What is the planning issue?

The key problem from a planning perspective is how to define the range of activities that are generally referred to as term short term rental accommodation. This is challenging because:

1. The activities themselves can be intermittent and vary in degree of intensity that makes them hard to 'characterise', i.e how the activity is legally described for the purposes of defining the activity under the Local Environmental Plan (LEP);

² See Kiama Development Control Plan 2012 <http://www.kiama.nsw.gov.au/planning-and-development/strategic-planning/development-control-plans/kiama-development-control-plan-2012-dcp-2012->

³ Holiday Rental Code of Conduct [http://www.stayz.com.au/uploaded/trade/guidelines/Holiday_Rental_Code_of_Conduct_Version_1.0_March_2012.p](http://www.stayz.com.au/uploaded/trade/guidelines/Holiday_Rental_Code_of_Conduct_Version_1.0_March_2012.pdf)
[df](http://www.stayz.com.au/uploaded/trade/guidelines/Holiday_Rental_Code_of_Conduct_Version_1.0_March_2012.pdf)

⁴ See Gosford City Councils' website <https://plan.gosford.nsw.gov.au/Pages/Plan/Book.aspx?exhibit=GCCPlanAug2014&hid=2404>

2. The potential impact of the use can also vary significantly, from a minor, virtually invisible use with minimal impacts, to that of a 'party house' that is continually rented out for those purposes; and
3. The activities can fall under or between a number of definitions under the LEP Template that is critical in determining whether the activity is permissible in the zoning and/or whether it needs council consent. These definitions being:
 - dwelling⁵ or dwelling - house;
 - serviced apartment⁶;
 - bed and breakfast⁷; or
 - tourist and visitor accommodation⁸

While a number of matters have proceeded to the Land and Environmental Court, even the court has not been able to provide clear direction on how to apply these definitions and has recognised that there is ambiguity in the law. The court has not been able to provide a definitive position on the vexed problem as to when a dwelling or dwelling house used as a holiday home, becomes another activity, due to the level and regularity of that property being rented for a 'holiday house'. This is partly due to the range of activities that have come before the court and the court's recognition that the matters before it, are often the more extreme cases that are not necessarily typical.

Nevertheless, the court has provided guidance on the issues that includes:

- A dwelling house that is rented out for a holiday home for short period of time is a bone fide use of a dwelling - house and does not change its use per se. The commercial arrangements of the rental of the property are not relevant to the use - see *Dobrohotoff v Bennic* [2013] NSWLEC 61.
- However, the repeated rental of a property **may** change its use; depending on the circumstances - same as above case.
- 90 days has been offered as a reasonable period to determine whether a change of use has occurred - see *Sutherland Shire Council v Forster & Anor* [2003].

5 **dwelling** means a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.

6 **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.

Note. Serviced apartments are a type of **tourist and visitor accommodation**—see the definition of that term in this Dictionary.

7 **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.

Note. See clause 5.4 for controls relating to the number of bedrooms for bed and breakfast accommodation.

Bed and breakfast accommodation is a type of **tourist and visitor accommodation**—see the definition of that term in this Dictionary.

8 **tourist and visitor accommodation** means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following:

- (a) backpackers' accommodation,
- (b) bed and breakfast accommodation,
- (c) farm stay accommodation,
- (d) hotel or motel accommodation,
- (e) serviced apartments,

but does not include:

- (f) camping grounds, or
- (g) caravan parks, or
- (h) eco-tourist facilities.

These cases however must be interpreted in light of the definitions relevant to the zonings of the time and may or may not be generally applicable now that LEPs have been updated and DCPs introduced on these activities.

A number of councils have amended their LEPs and DCPs to resolve these issues locally. A prominent court case, *Dobrohotoff v Bennic* [2013] NSWLEC 61, found the on-going and repetitious use of a dwelling house in Terrigal as a party house as an illegal activity in a Residential 2(a) zone. Subsequently, in 2013/4 Council:

- amended its LEP (by introducing cl 7.6) that requires DA consent for certain size dwellings to be rented for short term stays; and
- inserted section 13 in its Development Control code that provides planning standards to manage short term rentals in dwellings⁹.

We are aware that a number of councils have adopted similar approaches to that of the Gosford City Council.

In summary, councils have in effect been caught in the cross fire of this debate. On one hand, some residents request that these matters be more regulated, with a few requesting they be prohibited as they are considered to be detrimental to the residential amenity of the area. On the other hand, owner or applicants may want to share the property for commercial or other reasons and support the benefits of a 'sharing economy'.

Recommendations

LGNSW's policy position on short term rentals, recently passed at the LGNSW's State Conference 2015 states:

'That LGNSW request the NSW Government to provide clearer rules regarding short-term rentals than can be effectively and efficiently enforced by local councils through their Local Environment Plans'.

To this end, it is suggested that the definitions of the LEP Template need to be amended to provide clarity across the sector in the following ways:

1. Review the definition of dwelling to clarify that:
 - A dwelling can be rented, but the on- going continual rental of a property may change it's use to become 'tourist and visitor accommodation';
 - The number or proportion of rooms that can be rented out within a dwelling, that is allowed under the definition of dwellings;
 - The number of days a dwelling can be rented in total before it constitutes another use, unless it is under a longer term lease.
2. Review the definition of bed and breakfast
 - At what point does the sharing a house constitutes a bed and breakfast; and the relevant issues of consideration to that decisions such as car parking and or fire safety requirements under the Building Code of Australia.

⁹ <https://plan.gosford.nsw.gov.au/Pages/Plan/Book.aspx?exhibit=GCCPlanAug2014&hid=2404>