Short-Term Letting By-Law – How far can it go?

On 1 November 2021, a new statewide policy for Short-Term Rental Accommodation (STRA) including the Environmental Planning and Assessment Amendment (Short-Term Rental Accommodation) Regulation 2021 and State Environmental Planning Policy Amendment (Short-Term Rental Accommodation) 2021 came into effect to introduce a number of important reforms regarding the regulation of Short-Term Rental Accommodation.

Under the new policy, the STRA is separated between:

- hosted STRA, meaning that the host live on the premises during the provision of the short term letting, and
- non-hosted STRA, meaning that the host does not live on the premises during the provision of the short-term letting.

Under the State Environmental Planning Policy (Housing) 2021 (**SEPP**), it will be exempt development where a hosted STRA engages in short-term letting for a maximum of 365 days per year and for a non-hosted STRA a maximum of 180 days per year in Greater Sydney and other nominated regional NSW local government areas and 365 days per year in all other locations.

By making the use exempt development, there is no further requirement for development consent, subject to meeting the requirements in the SEPP.

While the planning barriers to short-term letting have been relaxed with the policy changes, some protections were inserted as a new section 137A in the *Strata Schemes Management Act 2015* to enable an owners corporation to impose certain restrictions on otherwise exempt short-term letting.

Restrictions can be imposed by a short-term letting by-law

As stated in the *Strata Schemes Management Act 2015 section 137A(1):*

> ***"137A Short-term Rental accommodation***
>
> *(1) A by-law made by a special resolution of an owners corporation may prohibit a lot being used for the purposes of a short-term rental accommodation arrangement if the lot is not the principal place of residence of the person who, pursuant to the arrangement, is giving another person the right to occupy the lot.".*

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A short-term letting by-law can prohibit the owner or occupier to use the premise as short-term letting if the premises is not the owner or occupier's principal place of residence.

In other words, if the owner or occupier do not live in the premise as the owner or occupier's home (principal place of residence), a by-law can prohibit the owner or occupier from using the premise as a STRA.

A short term letting by-law cannot restrict the owner or occupier to use the premises as short-term letting if the premises are the owner or occupier's principle place of residence.

This is stated in the *Strata Schemes Management Act 2015 section 137A(2),* which provides:

> *"(2) A by-law has no force or effect to the extent to which it purports to prevent a lot being used for the purposes of a short-term rental accommodation arrangement if the lot is the principal place of residence of the person who, pursuant to the arrangement, is giving another person the right to occupy the lot.",*

In other words, if the owner or occupier do live in the premise as the owner or occupier's home (principle place of residence), a by-law cannot prohibit the owner or occupier from using the premise as a STRA.

Limits of By-law

The ability of the by-law to restrain certain types of short-term letting remains subject to other sections of the *Environmental Planning and Assessment Act 1979*. Specifically 3.16, which states

> *3.16 Suspension of laws etc by environmental planning instruments(cf previous s 28)*
> *(1) In this section, regulatory instrument means any Act (other than this Act), rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.*
>
> *(2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.*

The above effectively allows a consent authority, such as council, to adopt a clause in their environmental planning instrument, that suspends any of the items in (1) – which includes by-laws, where it conflicts with the approval granted.

Most local councils have adopted this clause in 1.9A of the Local Environment Plan, a typical example of this is taken from North Sydney Council's LEP:

> *1.9A Suspension of covenants, agreements and instruments*

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(1) For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a consent granted under the Act, any agreement, covenant or other similar instrument that restricts the carrying out of that development does not apply to the extent necessary to serve that purpose.

What does this mean?

The SEPP makes certain short-term letting exempt development. This means no development consent is required. If, however, an application for development consent permitting short-term letting to the local council is made (e.g. a full DA is lodged) and is granted, this consent will override the short-term letting by-law due to the suspension of such covenants in 1.9A.

Conclusion

The effect of the above is that such a by-law while very useful, will not assist in every instance when taking into account hosted short-term letting.

If you are interested in such a by-law and enforcing such a by-law feel free to contact us for advice, a suitable short-term letting by-law and enforcing of such a by-law.

Related articles:

- New Short-term Rental Accommodation Legislative Regime in NSW
- Don't Believe the Hype: From 10 April 2020, New Section 137A to Enable Owners Corporations to Make By-Laws to Prohibit Short-Term letting Commences
- Short Term Lettings: Will the proposed reform help you?
- Short Term Lettings – New Rules on the Way
- Enforcement of By-Laws

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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