

25 October 2017

Director, Housing Policy

Department of Planning and Environment
GPO Box 39, Sydney NSW 2001

By Email: STHL@planning.nsw.gov.au

Dear Sir

Re: Submission in response to Short-term Holiday Letting in NSW

I am responding to the NSW Government's *Short-term Holiday Letting in NSW Options Paper* dated July 2017 ('Paper'). In particular, I am responding to 'Section 5 - STHL in Strata Properties'.

By way of introduction, I am the Chairperson and resident owner within Strata Plan 89618 (Lot 1 DP121332) which is a 5 storey residential strata scheme located at 18 Danks Street, Waterloo NSW 2017, consisting of 69 residential lot owners. I am also a former committee member/ property owner in another residential strata complex in Surry Hills NSW which contains 139 residential lots over 8 storeys. Accordingly, with accumulated strata committee experience and strata owner/living experience spanning nearly 15 years I have experienced first-hand the tensions and issues arising from Short-term Holiday Letting ('STHL') within residential strata communities. This response is limited to future direction regarding STHL regulation vis-a-vis residential strata title communities.

I'm concerned for the future of our strata communities. In over 50 years living predominantly in Sydney, I'm concerned about the rate and concentration of residential strata developments. I'm therefore also aware and concerned about developments concerning STHL in strata schemes within inner parts of Sydney and falling within the confines of *The Council of the City of Sydney* ('City of Sydney').

The Paper recognises the general needs for STHL across NSW. Thanks to the Paper, I now know STHL is commonly used throughout NSW for corporate and business trips, annual community events, family reunions, temporary accommodation¹. So I respect the need for our State Government to consider its commitment to providing a 'balanced' regulatory approach to the issue of STHL in strata schemes. However, a balanced approach on the part of State Government must not override the democratic mechanisms that already exist with respect to STHL and within individual strata communities concerning by-law decision making in general.

¹ Short-term Holiday Letting in NSW Options Paper, July 2016, p7

An interesting point to note with our recently emerging disruptive sharing economy (e.g Airbnb) is that the original premise for STHL operators was to foster a 'sharing economy' with the STHL of a room within one's dwelling. However, for many operators, STHL has now become a commercial venture. These commercial operators, who solely invest to derive profits through whole-of-apartment STHL, are attempting to lobby their position as bringing viable economic benefits to our economy. The reality is, commercial investors are selfishly attempting to enforce their commercial interests into residentially zoned strata schemes where residential and commercial interests may simply not be compatible having regard to localised and specific situational factors.

Micro-geographical factors & 'best fit' approach - Strengthen Owners Corporation Powers

STHL is broadly driven across the State of NSW by complex micro-geographical or 'localised' factors, and when combined across broader regions, present the challenges that NSW Government now faces. The outcomes of the 2016 Parliamentary Inquiry² on the adequacy of STHL in NSW made important and valid recommendations. Strengthening owners' corporations' powers to manage and respond to STHL issues in strata properties³ is particularly supported.

Based on the case study presented below, I hope deliberations recognise the real and valid complexities that do arise and which require a localised 'best fit' approach when dealing with strata communities and STHL. This localised 'best fit' approach I refer to is best suited to be dealt with by the individual strata scheme (through its owners corporation) pursuant to legislative mechanisms found within the *Strata Schemes Management Act 2015* (the 'Act') where individual strata schemes can self-determine their community arrangements through registered by-laws.

Local Government strongly figures in the approach to the issue as well. Generally, it is our local government that is hard-wired into our communities and able to best address emerging STHL issues and community tensions through the Development Application and planning consent processes that already exist.

CASE STUDY - LOT 1 DP 121332 (SP 89618) 18 DANKS STREET WATERLOO

The Council of the City of Sydney ('City of Sydney') is a respected and well run local government area. Under Mayor Clover Moore's leadership, councillors of the City of Sydney have clearly taken affirmative action concerning community tension arising from the increasing spread of STHL within strata schemes throughout the City of Sydney. This decisive local planning action on the part of the City of Sydney's leadership team must be commended and supported by NSW State Government.

² NSW Legislative Assembly Committee on Environment and Planning 2016

³ Parliamentary Inquiry Report, October 2016

Pursuant to Section 88E(3) of the *Conveyancing Act* 1919, The City of Sydney registered on the title of SP89618 a restrictive covenant dated 12 October 2011 relating to the conditions of development. SP89618 is a relatively new development (Occupation certificate granted June 2014).

In particular, the S88(3) instrument for SP89618 provides the following:

“1. **DEFINITIONS**

In this Restriction on the Use of Land

“**Consent**” means the consent granted to Development Application No. D/2010/849 in accordance with the *Environmental Planning and Assessment Act* 1979;

“**Residential Accommodation**” means use as a dwelling by an owner, invitee, licensee or tenant in accordance with the *Residential Tenancies Act* 1987, but excluding use as a short-term accommodation without a residential tenancy agreement as defined in the *Residential Tenancies Act*

2. **RESTRICTION ON RESIDENTIAL DEVELOPMENT**

The accommodation portion of the building (levels 1,2,3,4 and 5) which are constructed pursuant to the Consent will not be used or occupied except for the sole purpose of permanent Residential Accommodation only and not for the purpose of a hotel, motel, serviced apartments, private hotel, boarding house, tourist accommodation or the like other than in accordance with the South Sydney Local Environmental Plan 1998

3. **RESTRICTION ON CAR PARKING**

The on-site car parking spaces, exclusive of service and visitor car spaces, are not to be used other than by an occupant, tenant or resident of the subject building.”

The language expressed within the Section 88(3) instrument is clear and transparent. In a word, ‘commendable’.

All purchasers who either purchased ‘off the plan’, or subsequently, are aware of the restrictive covenant registered on title and affecting all lot owners of SP89618. Indeed, the vast majority of current owners (excepting 1/69 lot owners who is pro-STHL) and prospective purchasers determine this restrictive covenant to be attractive as it offers a reasonably strong degree of protection to the residential community within SP89618 that residents will be able to live in a residential complex free of the tensions existing within other strata plans where similar restrictive covenants do not exist with respect to STHL.

Since the Occupation Certificate was granted by the City of Sydney in June 2014, SP89618 has enjoyed low turn-over of apartment dwellings and higher capital growth (based on sales data) than similar strata plan properties sold within the immediate vicinity of Waterloo 2017. Across Waterloo 2017 there are many apartment blocks where STHL restrictions do not exist by way of by-law restrictions and/or planning instruments similarly restricting STHL.

As Chairperson of our Owners Corporation Strata Committee, we have worked hard and tirelessly as volunteers to protect and improve the quality of life and the general amenity for all residents and owners within our strata plan. Democracy in action has prevailed within SP89618. At the Annual General Meeting held in August 2016 our strata community was asked to consider and pass a special resolution for a 'special by-law' effectively mirroring the restrictive use covenants as set out in the S88(3) instrument above. In fact, the special by-law banning STHL within SP89618 was passed unanimously! So clearly, there are residents-based strata communities across NSW (that rely on democratically run strata communities) which are completely and unreservedly against the STHL industry attacking their residential community environment.

Residential Property Market Forces

There is a dimension that has lacked any attention within the Options Paper of July 2017 by the *NSW Parliament Legislative Assembly Committee on Environmental and Planning* and that relates to the impact on property values and family wealth (when taking into account the asset value of one's residential apartment) arising from uncontrolled STHL within the residential strata scheme environment. In summary, there is an economic case that is both For and Against STHL.

Generally speaking, residential property represents one of the largest asset items forming the family asset base for household wealth statistics. Purchasers enter the residential market and make 'value-based' decisions on whether to acquire a property (either through cash or debt/financing). With transparent planning instruments registered on title, a prospective purchaser is able to evaluate the merits of purchasing into a residential complex that is free of STHL issues. These properties are priced accordingly in Sydney's property market. Indeed, I have attended auctions where auctioneers openly entice bidders to pay a premium due to the very nature of such restrictive covenants and by-laws concerning the banning of STHL being in place. A degree of comfort is therefore felt by those purchasers who have perhaps experienced first-hand the problems arising from living in other apartment complexes where STHL is rife and where quality of life for the resident is compromised. Indeed, people pull up stumps in order to relocate where they feel they are safe from exposure to the problems and threats arising from STHL within strata schemes. They also do this to protect their wealth from falling property values compromised through STHL operators within residential strata schemes.

NSW Government must be very mindful that it is disrupting market forces if it decides to over-regulate and override strata scheme democracy relating to decisions concerning STHL. There will be a backlash at the next election if Government gets this wrong, particularly if property owners determine that their property values and quality of living will be eroded through STHL flood gates being left open by State Government. Not a good position for State Government when it has been the recipient of the stamp duty calculated *ad valorem* for property prices paid and set through market forces.

NCAT & Section 139(2) of the Strata Schemes Management Act 2015

SP89618 is now effectively under attack by a disruptive and developing STHL industry represented by the likes of AirBnB etc. As a result of an appalling and brief recent finding of the NCAT relating to the interpretation of Section 139(2) of the *Strata Schemes Management Act* 2015, we now have a lot owner within SP89618 using the NCAT finding (and ambiguity of S139(2)) as legal precedent and insisting that he has the legal right to advertise his lot as an Airbnb property, notwithstanding the existence of a registered Section 88(3) instrument and by-law stating the contrary. The Rule of Law is therefore under attack through operating uncertainty with respect to the interpretation of the law.

Due to the NCAT development above, SP89618's Owners Corporation is now being legally threatened by a lot owner/investor that the Owners Corporation will face a legal cross claim in damages for all future loss of profits should we decide to continue with our stance that STHL is not allowed within SP89618. The lot owner in question has quantified alleged loss of profits amounting to \$15,000 in damages against the Owners Corporation SP89618 plus legal costs - and this is just one contingent liability the Owners Corporation SP89618 now faces thanks to the ambiguity caused by S139(2) and the recent NCAT finding concerning legal rights around STHL.

The potential rise in legal claims, class actions and insolvent owners' corporations

As you will appreciate, with the current uncertainty and potential for over-regulation by State Government, as well as possible removal of democratic process for strata schemes to set their own by-laws having regard to the particular micro-geographical environment, the potential unintended consequence of multiple legal actions being brought against residential strata schemes across NSW is now a burning issue in the strata community. The increased potential of legal actions being brought by STHL investor operators against the Owners' Corporation could effectively render owners corporations being left insolvent through litigation costs and damages claims. The knock on costs to owners corporations through the potential requirement of professional external administration will significantly increase costs to strata scheme lot owners through increased levies. Ongoing ambiguity relating to the ability of strata schemes to self-determine their stance on STHL could in fact give rise to a wave of potential class actions by investors against residential Owners Corporations.

How can this be when one purchases a strata title property on good faith where a transparent planning instrument is registered on title that seemingly offers a degree of protection against STHL?

How can this be where democratically voted by-laws may end up as being potentially unenforceable with respect to STHL?

How can the majority be affected so severely by opportunistic investors/STHL operators (who generally don't even live within the strata scheme to experience the problems and damage their STHL patrons can cause)?

The practical reality is that many owners corporations, via their strata committees, will restrict and/or ban STHL within residential strata schemes if the need arises. The practical reality is that democracy prevails within strata schemes (regulated by the Act) and that owners corporations will from time to time present special by-laws to restrict and/or even ban STHL. The practical reality is that a majority of strata title residents wish to reside in a 'residential' scheme that is free of greedy STHL operators/investors who simply wish to erode quality of life and residential protection for the sake of their STHL profits. There is a miss-match and obvious incompatibility when investors are legally allowed to derive financial returns when STHL impacts will include eroding increasingly compressed inner-city residential community environments (i.e strata scheme residential apartments) and quality of life for permanent residents through increased noise, waste, common property damage, increased insurance premium costs, compliance costs, increased on-site management costs and security measures, crime, and so on.

RECOMMENDATIONS

Give certainly & improve owners' corporations' power to self-determine what is right for their individual residential community

I respect a lot of work has been undertaken by the *NSW Parliament Legislative Assembly Committee on Environmental and Planning*. However, the best regulatory framework for STHL already exists within residential strata schemes; it is the Strata Committee democratically elected on behalf of the Owners Corporation and lot owners that should formulate the rules and regulations with respect to individual residential strata communities they represent. These are best placed to make decisions with respect to STHL as they take into account all relevant micro-geographical factors, the physical environment, security and other practicalities of accommodating STHL scenarios within their residential community. They can also balance the issues against the wishes and needs of residents as a whole, particularly having regard to the proposed increase in costs and lot owner appetite for the potential in increased levies to financially provision for any proposed SFHL operations.

All lot owners have democratic rights and can determine what is best for their communities. Residential strata schemes should not be faced with further State Government interference that aims to introduce 'best practice' controls affecting to what extent individual strata communities are able to introduce reasonable and democratically elected by-laws that aim to protect the residential community's safety, property values as well as their residential property investment nest eggs and quality of life. State Government needs a 'best fit' response and this can only be determined with precision by individual residential communities acting in accordance with the requirements of the Act. It should not be the role of State Government to open the flood gates on

STHL so residents have no choice but to experience an uplift in their levies through STHL activities sanctioned by State Government.

Contrary to the views that operators within the STHL industry might suggest, there are many residential strata scheme communities that simply do not wish to have their residential apartment block turned into a quasi-hotel with frequent travellers of potentially dubious and unknown backgrounds entering freely into their controlled residential common areas. We live in an increasing age of terrorism. Risk management issues will only increase with 'unknowns' freely loitering our common property areas. Some apartment blocks simply do not have the design, physical features or appropriately capitalised sinking fund to retro-fit security measures to protect residents from the potential risks and threats that are posed by the prospect of STHL operations. Accordingly, these considerations and decisions need to be determined at the local level (i.e strata scheme by-laws and Local Government planning laws acting together).

Amend Section 139(2) of the Strata Schemes Management Act 2015 and bring it into the 21st Century

Government's role here is to keep up with the times and ensure the 'Rule of Law' is preserved. What we have here is a historical legacy and ambiguity relating to the wording of Section 139(2) of the *Strata Schemes Management Act 2015* (the "Act") that states:

"(2) No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot"

This sub-section finds its origin in a time of Australian property law history when apartment dwellings and development transitioned from Company Title ownership to the Strata Schemes Title for property ownership. Pursuant to Company Title, the shareholders of the company holding the property were entitled to generally restrict the devolution of a lot or transfer, including lease, mortgage or other dealing relating to the said property. Surely, Section 139(2) was not intended to override the democratic and reasonable rights of Strata Scheme owners in the 21st Century to be able to determine:

- a. What community by-laws they collectively share;
- b. What protections exist for resident safety and welfare; and
- c. What limitations they wish to impose within their residential community relating to the potential adoption of 'commercial' models (e.g. AirBnB, stayz.com etc.) of occupancy, that may be inconsistent with determinations with respect to (a) and (b).

Accordingly, with respect to strata schemes within NSW, it is my submission for your consideration that urgent attention is required to give clarity with respect to Section 139(2) of the Act vis-a-vis the definition of STHL. Sub-section 139(2) is problematic because 'lease' is not a defined term under the Act and the law is unsettled with respect to what extent STHL is thereby covered within the context of Section 139(2), if at all.

To clear up the existing ambiguity, the drafting remedy/amendment to S139(2) of the Act might look like this:

“(2) No by-law is capable of operating to prohibit or restrict the devolution of a lot or transfer, mortgage or other dealing relating to a residential tenancy agreement pursuant to the Residential Tenancies Act 2010”

This proposed draft amendment to Section 139(2) provides the following important benefits:

1. It adds clarity to what is presently referred to in Section 139(2) as a ‘lease’ in terms of what a lease is, and is not. ‘Lease’ is not a defined term under the Act so we don’t know to what extent STHL might or might not be covered given the ambiguity of the drafting of the current Section 139(2).
2. ‘Residential tenancy agreement’ is defined in Section 3 (Definitions) in the *Residential Tenancies Act 2010*. A clearly drafted and unambiguous S139(2) provides certainty and ensures property owners (acting as a Lessor) receive protection pursuant to the *Residential Tenancies Act 2010*.
3. The drafting amendment and definition of a ‘residential tenancy agreement’ adds clarity and protection to the lessee pursuant to lessee rights under the *Residential Tenancies Act 2010*.
4. It allows strata scheme communities flexibility to determine to what extent (if any) they wish to entertain STHL arrangements that do not meet the definition of a ‘residential tenancy agreement’ pursuant to the Residential Tenancies Act 2010. Pursuant to Section 8(h) of the *Residential Tenancies Act 2010*, an ‘agreement’ made for the purpose of giving a person a right to occupy residential premises for a period of not more than 3 months for the purpose of holiday is not covered by the Residential Tenancies Act 2010. Accordingly, strata schemes will retain the power to democratically decide to what extent they wish to entertain STHL, if at all.
5. It allows individual strata schemes to adopt a ‘best fit’ approach to deciding on residential strata community needs and desires, having regard to the nuances and unique factors impacting decisions within the relevant residential strata scheme. Micro-geographical factors can be assessed by the owners corporation strata committee having regard to the needs for STHL against the ability and willingness of the strata community to accommodate STHL arrangements. These factors can also be evaluated by the individual strata community having regard to the costs and budget of the owners corporation to safely accommodate STHL arrangements.
6. Provided a By-Law is consistent with a S88 Planning Instrument registered by a Local Government Authority, and the residential strata scheme’s by-laws goes no further than restrictions imposed by the requirements of the registered planning instrument, there will be no greater restriction with respect to the lot than is already in place by virtue of the

registered planning instrument. Accordingly, under the 'draft' S139(2) above, the by-law will not operate to 'restrict' beyond what is already restricted.

Democracy can only prevail when government gives certainty to the legislative instruments it creates. When times change (as we increasingly find in the modern age, particularly with increasing disruptive technologies and emerging industries) Government is required to address the needs of its voters and to determine legislative reform that best suits the needs of the issue in question and with a reasonable degree of 'balance' so democracy can continue to prevail.

The backlash - Social Impacts & degradation to Quality of Life

What we have here is a looming social issue; if this Government gets this wrong, an open door policy with respect to STHL within residential strata schemes will lead to erosion of quality of life within the strata scheme environment, increased community and social tensions, and increased potential for crimes against the person (e.g. personal assaults) and other crimes against property (e.g. malicious injury and vandalism) and erosion of property values. Examples of these already exist through tensions and stresses that STHL operators and their patrons bring to residential strata communities. STHL clients are here for a '*good time, and not a long time*'perhaps that is about to change to '*a good time and a long time*' and to the detriment of the quality of life and social cohesion within our residential communities.

Strata scheme committees are run by volunteers. These volunteers do not need further ambiguity and regulatory overlays with Codes of Conduct and an open door for STHL operators moving into existing well run and cohesive residential strata communities.

Caveat Emptor applies to STHL operators/property purchasers. Where residential communities have democratically voted on the issue and transparency exists with respect to registered by-laws, a STHL operator should know well in advance to what extent STHL is either tolerated within the strata community, or not! Likewise, when the City of Sydney acts with wisdom and foresight to appropriately register a Section 88(3) covenant, a potential purchaser/investor will know well in advance (assuming they do appropriate pre-purchase due diligence) that they can't commence a commercial operation with STHL within a residential strata scheme that is reserved for resident owners as well as other residents who are subject to the protection of a residential tenancy agreement (with all rights attaching thereto).

Sydney is increasingly becoming a vertical city with 'Postcode blocks of apartments' only increasing in development scale throughout its landscape. Market forces should dictate when and where STHL should operate and this has always been based on the tolerance for such activities being determined by the individual strata scheme in question. Some residential strata schemes have no problem with STHL. That's great! Others have micro-geographical issues and property-related practical restrictions that determine STHL to be simply impractical to consider.

In summary, give clarity to Section 139(2). Re-draft it to the benefit of all strata schemes throughout NSW. Let strata schemes determine how they wish to develop and under what by-law rules residents wish to live under. Individual strata communities are best placed to determine

what is democratically as practically appropriate for their individual residential strata community, NOT State Government!

Do not open the flood gates for STHL based on the commercial interests of short-term investors. Act on behalf of the interests of residents that increasingly look to retreat to their safe sanctuaries of peace and quiet and to recover from a day's hard work. We all live within an increasingly compressed and stress-laden city space. Let democracy within the strata schemes residential space continue to operate where democracy-based outcomes are determined as 'best fit' solutions for the community concerned. Individual strata communities have always been best suited to analysing the specific nuances, financial costs and legal/social/financial impacts of proposed STHL within the relevant community, NOT State Government!

So please ensure the power of decision making with respect to STHL is clarified and where power continues to reside within the relevant strata scheme so the relevant strata community can democratically determine whether it wishes to have STHL commercial operators within the residential community.

Yours sincerely,

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