PO Box 1
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1 March 2023

Response to the NSW Independent Planning Commission
Legal query

Dear Commissioners,

We refer to the question on notice set out in your letter dated 20 February 2023.

> **QUESTION ON NOTICE: Could Byron ASTRA please confirm whether the excerpted text on slide 15 of their PowerPoint presentation to the Commission (copied below) applies to non-hosted short-term rental accommodation covered by the category of exempt development established under Division 2, Part 6 of the *State Environmental Planning Policy (Housing) 2021*, or only to development requiring and approved under a development consent?**
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> *"Where, by reason of an existing development consent, there is an existing right to use a dwelling for short term occupation, the amendments to the ARH SEPP do not legally have the effect of restricting that right. Nor is there anything else in the STRA Initiative that would operate to confine such existing rights of use to any limited number of days per year".*

The answer to that question, with some additional commentary, is as follows:

The statement applies only to development approved under a development consent. The point being that, where such development consent authorises development for the purposes of STRA, the regulatory framework established under Division 2, Part 6 of the *State Environmental Planning Policy (Housing) 2021* (Housing SEPP) does not operate to limit the rights conferred under the consent to carry out that development including by limiting the number of days per year that the development can be carried out.

This is because that development is protected by existing use rights conferred under the *Environmental Planning and Assessment Act 1979* (EP&A Act).

Section 4.66 of Division 4.11 of the EP&A Act relevantly provides that, except where expressly provided in the EP&A Act, nothing in an Environmental Planning Instrument (including the Housing SEPP) prevents the continuance of an "existing use".

An "existing use", according to the definition in Section 4.65, relevantly includes the use of a building, work or land that either:

a. was a use for a lawful purpose that was being carried out at the date of an EPI which would, but for Div 4.11, have the effect of prohibiting that use, or

b. was a use that was carried out under an existing consent, granted before the commencement of an EPI having the effect of prohibiting that use.

For many decades, significant numbers of dwelling houses and apartments (being dwellings in multi-dwelling buildings) throughout the State have been used as weekenders or holiday homes.

Some dwellings have been used by their owners and friends, some have been let out on a short-term commercial basis and some premises have been used for a combination of these uses.

For the whole of this time, it has been commonly assumed, including by Councils and State Government authorities, that development consent for a dwelling includes authorisation for the use of that dwelling for STRA, including accommodation by persons other than the owners of the premises and irrespective of whether the accommodation is or is not "hosted" by the owner, tenant or permanent resident of the premises. It is ASTRA's position that this assumption reflects the correct legal position in this regard.

Having regard to future development for the purposes of STRA carried out within the framework established under the Housing SEPP, there can be no argument that the impacts of that framework are anything but draconian. Indeed, these impacts are far more severe than was contemplated when the STRA regime was formulated.

The STRA regime establishes that STRA which complies with the relevant controls in the Housing SEPP is exempt development (i.e. development which may be carried out without development consent).

In circumstances where proposed STRA does not comply with those controls (eg where any annual letting cap would be exceeded) we understand that it had been assumed by the Department of Planning and Environment, at least at the time the framework was originally formulated, that an application for development consent to authorise that use could be made in the usual way. The merits of the STRA application could then be considered by the consent authority (ie the local council) or the Court on appeal.

It was anticipated that the existence of a means of obtaining development consent for STRA that does not constitute exempt development would somewhat ameliorate the otherwise onerous impacts of the STRA framework. The difficulty with this approach is that in at least some Local Government Areas (LGAs), including the Byron LGA, development for the purposes of STRA is an innominate prohibited use in each of the residential zones (R2, R3 and R5) established under the *Byron Local Environmental Plan 2014*.

This means that, within the Byron LGA, there is no means of obtaining development consent for STRA which is not exempt development. It is a strange outcome that development for the purposes of STRA for up to 180 days per year in a "prescribed area" under the Housing SEPP could be exempt development (ie development with minor impacts: see Section 1.6(2) of the EP&A Act) but that STRA for a single additional day would be prohibited entirely.

If the STRA framework is to be retained in the Byron LGA (which, to be clear, is not ASTRA's preferred position having regard to the issues outlined above) then the Housing SEPP ought to be amended to provide that STRA is permissible with consent within residential zones. This would somewhat ameliorate the harsh impacts of the regime and facilitate a more nuanced approach to determining whether a dwelling should be used for STRA beyond any 180 day per annum letting cap based on an assessment of the particular facts pertaining to that dwelling.

Another difficulty with the STRA framework is that its practical outcomes would likely be the opposite of what it is trying to achieve. Under the Housing SEPP, a dwelling can be used for STRA for up to 180 days per year excluding any periods of 21 days or more when the dwelling is let to a single person. That is, the pattern of STRA letting for a particular year is likely to be piecemeal in nature. A property might, for example, be let for the whole of the summer (say 90 days) and then let out sporadically for another 90 days over the remainder of the year. It is difficult to see how a dwelling used for STRA in this way could practically be used for a non-STRA use for the balance of the year. Any such uses will, of necessity, be short term in nature, and thus directly antithetical to the objectives of the STRA framework.

Yours sincerely

Colin Hussey

Chairman - ASTRA Byron