Dear Sir/Madam,

Short Term Holiday Letting in NSW – Options Paper

Thank you for the opportunity to provide comment in relation to the Government’s options paper concerning short term holiday letting (STHL) in NSW.

To assist the Government in implementing an appropriate whole of Government framework for the regulation of STHL, a submission is attached that provides a background in relation to the formulation of Council’s policy position and detailed comment regarding the various non-regulatory and regulatory options outlined in the Paper. A preferred framework for the regulation of STHL based on Council’s adopted policy position and synthesised from the issues raised in the submission is outlined below.

Background: Council established its policy position on the regulation of short term tenancy when the Hornsby Local Environmental Plan (HLEP) 2013 was made. The policy position was based on the Standard Instrument Local Environmental Plan format and recommendations from the River Settlements and Foreshores Review 2007 which reviewed the issue of the permissibility of short-term and bed and breakfast accommodation in the river settlement areas of the Shire. Given that the Standard Instrument does not define short-term accommodation, Council used the group term “tourist and visitor accommodation (other than hotel or motel accommodation, serviced apartments, bed and breakfast accommodation, backpacker’s accommodation and farm stay accommodation)” to permit short term accommodation in the Shire.

Short term accommodation is permitted with consent via this approach in various rural, residential, business, industrial, special purpose and environmental protection zones under the HLEP 2013. Specifically, short term accommodation is permitted with consent in the RU1, RU2, RU4, RU5, R2, B2, B4, B6, IN4, SP3 and E4 zones under the HLEP 2013. Guidelines for Tourist and Visitor Accommodation development are also included in the Hornsby Development Control Plan (HDCP) 2013 to limit their size to a maximum of 6 guests and require a Code of Conduct to be signed and adhered to by the guests.

Council previously made a submission in response to the Legislative Assembly Committee on Environment and Planning’s inquiry into the adequacy of the regulation of STHL. Council’s submission provided comment including suggestions to introduce terminology and model local provisions for short term rental accommodation to the Standard Instrument LEP, model DCP provisions for council consideration, a mandated Code of Conduct, and a licensing system which makes the State Government responsible for compliance and enforcement matters.

I note that the recommendations provided in the Legislative Assembly Committee’s final report on the Adequacy of the Regulation of the Regulation of STHL in New South Wales are generally consistent with the suggestions provided by Council. Accordingly, I am generally supportive of same and recommend that the NSW Government
should move quickly to implement the recommendations. It is necessary that the Department of Planning and Environment (DP&E) provide an interim direction on how all councils should progress compliance actions on unauthorised uses until such time as the NSW Government releases its formal policy.

**Planning Regulation:** Given that every council requires a different planning response for the regulation of short term holiday accommodation and to provide flexibility in determining their land use strategy, the DP&E should:

- Introduce a mandated definition of, and model provisions for, “short term accommodation” for insertion in the *Standard Instrument*.

To recognise the difference between hosted and un-hosted short-term accommodation, the DP&E should:

- Create sub-terms in the *Standard Instrument* that recognise the difference between hosted and un-hosted accommodation.

The DP&E should also release a State Environmental Planning Policy (SEPP) with a default policy that:

- Permits hosted accommodation as exempt development where it is a principal place of residence and meets strict development standards, including restricting the use to a maximum number of bedrooms, maximum length of stay and maximum number of days of use per year.

- Permits hosted accommodation as complying development where it is a principal place of residence and meets strict development standards, including restricting the use to a maximum number bedrooms and maximum length of stay.

- Permits un-hosted accommodation as complying development (whether it is a principal place of residence or not) and meets strict development standards, including restricting the use to a maximum number of bedrooms, minimum and maximum length of stay, and maximum number of days of use per year.

- Permits other forms of un-hosted accommodation as development requiring consent for consideration on its merits having regard to development standards, including a maximum number of bedrooms.

The DP&E should consider the suggestions identified in Council’s submission when determining appropriate development standards for the various STHL forms, including that they have regard to the restrictions for similar uses in Clause 5.4 of the *HLEP 2013* and be based on good planning practice.

The making of a SEPP would be beneficial as it would provide formal policy and direction on how councils could progress compliance actions on existing unauthorised uses sooner than deferring to Council’s to prepare a planning proposal. Notwithstanding, the Department should provide the opportunity for councils to gain exemption from the SEPP if they submit a planning proposal with an alternate short term accommodation land use strategy that better responds to their local circumstances within a specified time period. To assist councils, the DP&E should release model short term accommodation policy provisions for councils to consider when drafting approval requirements and development standards/guidelines for the various hosted and un-hosted short term accommodation forms for inclusion in planning proposals and Development Control Plans. Any planning proposal prepared by Council must be required to address the capacity of the lands to accommodate such uses and the impact that its alternate short term accommodation land use strategy has on traditional accommodation operators, housing affordability and community viability.

The DP&E should only require Council to be responsible for compliance matters associated with un-hosted forms of STHL. A compliance development system should be developed for Council in relation to the un-hosted forms of accommodation, which includes the use of investigative powers, complying development certificates, a Code of Conduct and party house provisions.
Strata Regulation: It is necessary to provide balance between the rights of owners to deal with their lots and the potential for STHL to impact on the amenity of traditional residential owners/occupants in Strata developments. Accordingly, the DP&E should promote the recommendations of the Legislative Assembly Committee that:

- Strata regulations be amended to give owners corporations more powers to manage adverse behaviour from STHL (including establishing by-laws to enable traditional residential owners/occupants to receive compensation for adverse effects) and the impacts on strata buildings be reviewed (including establishing by-laws to restrict the percentage of STHL units in strata development).

Industry Self-Regulation: The requirement for holiday makers to meet the owner or agent and be briefed on the Code of Conduct before entering the property provides an appropriate control to ensure there is no unruly behaviour. Accordingly, the DP&E should promote the recommendations of the Legislative Assembly Committee that:

- Short-term accommodation guests be required to sign a Code of Conduct before they can enter the property.
- State Government participate in management of the Code of Conduct so that it includes community representation and increased industry coverage.
- Communications be prepared to identify landowner rights and obligations to assist implementation of a community based monitoring program.

Council’s Code of Conduct model should be considered in the preparation of any model Codes for adoption by councils.

Registration: The DP&E should require property owners of hosted forms of STHL to obtain a license, similar to the existing process for other types of government issued licenses. This would enable responsibility for compliance and enforcement of these types of short term accommodation to be overseen by State Government that is better placed to license and regulate these activities. Registration based on national and international best practice should assist manage safety and amenity issues associated with the accommodation form.

I trust these comments assist Government in implementing an appropriate whole of Government framework for the regulation of short term holiday letting.

Yours faithfully

Jason Rawlin
Acting Manager
Strategic Planning Branch

TRIM Reference: F2004/07515
Background

The use of dwelling houses for short-term accommodation in residential areas was first brought to Council’s attention in 2004 by the then Local Government and Shires Associations when it sought feedback from all NSW councils on their policy positions on the regulation of short-term accommodation as a result of a Land and Environment Court decision (Sutherland Shire Council v Foster and Anor [2003] NSWLEC2) and its potential implications. Of particular relevance, the Court noted that the use of a dwelling carries with it a notion of permanency. Short-term tenancies are commercial activities which are prohibited in the residential zoning. The Court found that the owners could not let the unit for less than three (3) months at a time, except to immediate family.

Council advised the Associations that the then governing environmental planning instrument (i.e. Hornsby Shire Local Environmental Plan 1994) did not contain specific provisions to regulate the use of dwelling-houses for the purposes of short-term accommodation or holiday letting. The Associations subsequently advised that all councils in NSW were divided over whether it is appropriate to regulate the use of dwellings for short-term accommodation through the planning system. Some were concerned about the impacts short term accommodation was having on residential areas and others recognised the contribution tourism makes to the local economy.

In response to community angst in relation to the use of several properties on Dangar Island for short term accommodation, Council undertook the Rivers Settlements and Foreshores Review 2007 to (in part) review the issue of the permissibility of short-term and bed and breakfast accommodation in the river settlement areas of the Shire. The Review noted that generally, the use of the dwelling-houses or residential units for short-term accommodation does not, or should not generate environmental impacts additional to that generated by a legally constructed dwelling but that short-term letting can have a number of impacts on residential neighbourhoods that would not be encountered with longer term letting. Council considered the findings of the Review and resolved to permit, with development consent, short term accommodation across all river settlements.

The NSW Government’s Standard Instrument Local Environmental Plan does not specifically define short-term accommodation and at the time the current governing environmental planning instrument (i.e. the Hornsby Local Environmental Plan (HLEP) 2013) was prepared, the Department did not have a preferred approach for regulating short-term accommodation. Council was therefore reliant on using the group term “tourist and visitor accommodation (other than hotel or motel accommodation, serviced apartments, bed and breakfast accommodation, backpacker’s accommodation and farm stay accommodation)” to permit short term accommodation in the Shire.

Short-term accommodation is permitted with consent via this approach in various rural, residential, business, industrial special purpose and environmental protection zones under the HLEP 2013. Specifically, short term accommodation is permitted with consent in the RU1, RU2, RU4, RU5, R2, B2, B4, B6, IN4, SP3, E3 and E4 zones under the HLEP 2013. Guidelines for Tourist and Visitor Accommodation development are also included in the Hornsby Development Control Plan (HDCP) 2013 to limit their size to a maximum of 6 guests and require a Code of Conduct to be signed and adhered to by the guests.
Subsequent to the preparation of the *HLEP 2013*, there have been nine other council Local Environmental Plans that have been made by the State Government with a different approach for the regulation of short-term accommodation. In summary, there are two approaches. The first approach involves insertion of a local provision which defines short-term accommodation and permits the land use without consent in all zones. This approach has been adopted by the Bega Valley, Eurobodalla, Kiama, Palerang, Port Stephens, Shoalhaven and Wingecarribee local government areas. The second approach involves the insertion of a definition of short term accommodation, and exempt development provisions for the use of dwellings up to 4 bedrooms, and local provisions for the use of dwellings containing 5 or 6 bedrooms, as short term accommodation. This approach has been adopted by Gosford and Wyong local government areas.

In summary, despite the NSW Government introducing the *Standard Instrument* LEP, there are varied policy positions and approaches to the regulation of short-term accommodation throughout local government areas in NSW. Council previously made a submission in response to the Legislative Assembly Committee on Environment and Planning’s inquiry into the adequacy of the regulation of short term holiday letting (STHL). Council’s submission suggested that to provide more uniform approach between councils, the NSW Department of Planning and Environment (DP&E) should consider:

- introducing a mandated definition of, and model local provisions for, “short-term accommodation” for insertion in the *Standard Instrument*;
- creating sub-terms in the Standard Instrument that recognise the difference between hosted and un-hosted short term accommodation and provide councils the flexibility in determining land use strategies;
- releasing model short term accommodation policy provisions for councils to consider when drafting Development Control Plan requirements;
- promoting that short term guests be required to sign a Code of Conduct before they can enter the property; and
- establishing a licensing system for short term accommodation which makes the State Government responsible for compliance and enforcement matters.

I note that the recommendations provided in the Legislative Assembly Committee’s final report on the Adequacy of the Regulation of the Regulation of Short Term Holiday Letting in New South Wales are generally consistent with the suggestions provided by Council. Accordingly, I am generally supportive of same and recommend that the NSW Government move quickly to implement the recommendations.

It is necessary that the DP&E provide an interim direction on how all councils should progress compliance actions on unauthorised uses until such time as the NSW Government releases its formal policy. Councils are faced with the issue of whether to prosecute or not given that change has been mooted in the Legislative Assembly Committee’s Report and NSW Government’s Options Paper. Council may spend lots of time, money and effort to proceed to prosecution only to find that new planning policies come into place which result in the prosecutions being thrown out.

**Planning Regulation**

In the past, holiday makers would traditionally stay in purpose built accommodation forms such as motels, hotels, caravan parks and bed and breakfast accommodation. These accommodation forms have long been regulated by councils, and their location restricted to areas where there is limited opportunity for impact on the amenity of residential areas. A number of councils have also recently sought to regulate the use of dwelling-houses or residential units for short-term accommodation. Traditionally, these forms of
accommodation have been rented directly by the owner or an agent for weekends or longer periods. In most instances, the dwelling-house or unit would be occupied only by the visitors (i.e. un-hosted holiday letting).

Un-hosted holiday letting can have a number of impacts on residential neighbourhoods that would not be encountered with longer term letting. For example, the behaviour of short-term tenants can, in some instances, lead to greater neighbourhood disruptions including noise and inappropriate behaviour. Such land uses can also attract more cars and other holiday activities such as the storage of boats, equipment and rubbish. Accordingly, Council requires development consent and a Code of Conduct to be signed and adhered to by the guests to ensure the use of the dwelling-houses for short-term accommodation does not generate environmental impacts additional to that generated by a legally constructed dwelling.

In recent times, the growth in on-line tourism platforms (such as Airbnb and Stayz) has given rise to the use of dwelling-houses and residential units for both un-hosted holiday-letting and resident hosted short-term accommodation. A cursory review of Air BnB has identified that there are 300+ rentals in Hornsby and surrounds and include a significant number of “private room rentals” where accommodation is hosted or the accommodation is shared (i.e. residents are in residence). Hosted short-term accommodation or shared accommodation is less likely to suffer the problems associated with un-hosted accommodation and may not need to be regulated by councils.

Given that every council requires a different planning response for the regulation of short term holiday accommodation and to provide flexibility in determining their land use strategy, the DP&E should:


To recognise the difference between hosted and un-hosted short-term accommodation, the DP&E should:

- Create sub-terms in the Standard Instrument that recognise the difference between hosted and un-hosted accommodation.

The DP&E should also release a State Environmental Planning Policy (SEPP) with a default policy that:

- Permits hosted accommodation as exempt development where it is a principal place of residence and meets strict development standards, including restricting the use to a maximum number of bedrooms, maximum length of stay and maximum number of days of use per year. The DP&E should consider the following suggestions when determining the appropriate development standards.

The bedroom limit should be less than that specified for the three bedroom maximum for “bed and breakfast accommodation” (B&Bs) and “farm stay accommodation” under Clause 5.4 Controls relating to miscellaneous permissible uses of the HLEP 2013. Such uses require development consent in specified zones under the HLEP 2013, it being noted B&Bs may form complying development under State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP), and permitting equal to or more than competing tourist accommodation without development consent would provide STHL an unfair advantage. The maximum number of consecutive days of use and days per year limit should be no more than 90 days per year. The 90 day timeframe is so that it could not form a tenancy which may be required to be dealt with under the Residential Tenancies Act 2010 and is consistent with various examples of national and international best practice.
• Permits hosted accommodation as complying development where it is a principal place of residence and meets strict development standards, including restricting the use to a maximum number of bedrooms and maximum length of stay. The DP&E should consider the following suggestions when determining the appropriate development standards.

The bedroom limit should be less than the three bedroom maximum for “bed and breakfast accommodation” and “farm stay accommodation” specified under Clause 5.4 Controls relating to miscellaneous permissible uses of the HLEP 2013. Such uses require development consent in specified zones under the HLEP 2013, it being noted B&Bs may form complying development under the Codes SEPP, and permitting equal to or more than competing tourist accommodation without development consent would provide STHL an unfair advantage. The maximum number of days of use limit should be no more than 90 consecutive days so that it could not form a tenancy which may be required to be dealt with under the Residential Tenancies Act 2010. There is no need to limit the maximum number of days of use per year given tourists would cohabitate in a similar way to traditional share house tenants and the Codes SEPP does not limit the maximum number of days of use per year for B&Bs that form complying development.

• Permits un-hosted accommodation as complying development (whether it is a principal place of residence or not (i.e. family holiday or investment property)) and meets strict development standards, including restricting the use to a maximum number of bedrooms, minimum and maximum length of stay and maximum number of days of use per year. The DP&E should consider the following suggestions when determining the appropriate development standards.

The bedroom limit should be no more than the three bedroom maximum for “bed and breakfast accommodation” and “farm stay accommodation” specified under Clause 5.4 Controls relating to miscellaneous permissible uses of the Hornsby Local Environmental Plan (HLEP) 2013. Such uses require development consent in specified zones under the HLEP 2013, it being noted B&Bs may form complying development under the Codes SEPP, and permitting more than competing tourist accommodation without development consent would provide STHL an unfair advantage. The minimum length of stay should be similar to that of many serviced apartments (eg. 3 days) to seek to address the issues associated with very short stays such as noise and social impacts. The maximum consecutive length of stay should be no more than 90 days so that it could not form a tenancy which may be required to be dealt with under the Residential Tenancies Act 2010. The maximum number of days of use limit should be no more than 90 days per year. The River and Settlements Foreshores Review 2007 identified that un-hosted short term letting can have a number of impacts on residential neighbourhoods that would not be encountered with longer term letting or hosted short term letting. Whilst Council currently requires development consent for such uses, a limit of 90 days per year is consistent with various examples of national and international best practice and would ensure that the predominant use remains a traditional place of residence.

• Permits other forms of un-hosted accommodation as development requiring consent for consideration on its merits having regard to development standards, including a maximum number of bedrooms. The DP&E should consider the following suggestions when determining the appropriate development standards.

The bedroom limit should be no more than that specified for the three bedroom maximum for “bed and breakfast accommodation” and “farm stay accommodation” under Clause 5.4 Controls relating
to miscellaneous permissible uses of the *HLEP 2013*. Such uses require development consent in specified zones under the *HLEP 2013*, it being noted B&Bs may form complying development under the *Codes SEPP*, and permitting more than competing tourist accommodation would provide STHL an unfair advantage.

The making of a SEPP would be beneficial as it would provide formal policy and direction on how councils could progress compliance actions on existing unauthorised uses sooner than deferring to Council’s to prepare a planning proposal. Notwithstanding, the Department should provide the opportunity for councils to gain exemption from the SEPP if they submit a planning proposal with an alternate short term accommodation land use strategy that better responds to their local circumstances within a specified time period. To assist councils, the Department should release model short term accommodation policy provisions for councils to consider when drafting approval requirements and development standards/guidelines for the various hosted and un-hosted short term accommodation forms for inclusion in planning proposals and Development Control Plans. Any planning proposal prepared by Council must be required to address the capacity of the lands to accommodate such uses and the impact that its alternate short term accommodation land use strategy has on traditional accommodation operators, housing affordability and community viability.

There are various arguments over whether it is appropriate to regulate the use of dwellings for short-term accommodation through the planning system. However, it is generally accepted that the enforcement of controls for all forms of short-term accommodation would be difficult as it is resource-demanding and difficult for councils to regulate. Council has received two recent complaints regarding short-term rental accommodation non-compliances in the Shire, including one in Mount Colah and one in Singleton's Mill. However, a cursory review of AirBnB has identified that there are a significant number of rental properties. Accordingly, the number of complaints recently received is just the tip of the iceberg.

The Department should only require Council to be responsible for compliance matters associated with un-hosted forms of STHL. This is due to Council not having the resources to monitor the minimum and maximum length of stay, and maximum number of days of use per year required to ensure hosted forms of STHL remain minor development and do not have inappropriate impacts on the amenity of the neighbourhood. Accordingly, a compliance development system should be developed for Council in relation to the un-hosted forms of accommodation, which includes the use of investigative powers, complying development certificates, a Code of Conduct and party house provisions.

**Strata Regulation**

It is noted that under current Strata Laws, owner’s corporations can adopt model by-laws which in theory may be used enable them to manage some of the impacts associated with short-term rental accommodation. However, given that short term holiday occupants may not have the same interest in by-laws and the difficulty for owner’s corporations in initiating legal proceedings, it is necessary to provide balance between the rights of owners to deal with their lots and the potential for STHL to impact on the amenity of traditional residential owners/occupants.

This is particularly salient given that corporations can purchase a number of units in a strata development and obtain control of the body corporate by holding the majority of unit entitlements and establish STHL unhampered. This is understood to be a problem in a number of residential flat buildings in local government areas located closer to the city and other areas with high tourist patronage. This is tantamount to permitting more recognised forms of tourism accommodation (eg. serviced apartments) in zones where they are not
ordinarily permitted. Accordingly, the DP&E should promote the recommendations of the Legislative Assembly that:

- Strata regulations be amended to give owners corporations more powers to manage adverse behaviour from STHL (including establishing by-laws to enable traditional residential owners/occupants to receive compensation for adverse effects) and the impacts on strata buildings be reviewed (including establishing by-laws to restrict the percentage of STHL units in strata development).

Industry Self-Regulation

The requirement for holiday makers to meet the owner or agent and be briefed on the Code of Conduct before entering the property provides an appropriate control to ensure there is no unruly behaviour. However, an on-line environment may not provide this opportunity for un-hosted short term accommodation. It could be argued that dealing directly with a person raises a holiday maker’s sense of responsibility to adhering with a Code of Conduct. Accordingly, the DP&E should promote the recommendations of the Legislative Assembly that:

- Short-term accommodation guests be required to sign a Code of Conduct before they can enter the property.
- State Government participate in management of the Code of Conduct so that it includes community representation and increased industry coverage.
- Communications be prepared to identify landowner rights and obligations to assist implementation of a community based monitoring program.

Council currently requires that a Code of Conduct be signed and adhered to by guests should be prepared and submitted with the development application. At a minimum, the Code of Conduct requires the following responsibilities of guests during their stay to be addressed:

- Maximum guest numbers;
- Contact number of the property manager, including an after-hours number;
- Noise and lighting restrictions for activities after 10pm;
- Instructions concerning recycling, garbage services and special requirements relating to the disposal of garbage; and
- Procedures in case of an emergency.

Council’s Code of Conduct model should be considered in the preparation of any model Codes for adoption by councils.

Registration

The DP&E should require property owners of hosted forms of STHL to obtain a license, similar to the existing process for other types of government issued licenses. As previously identified, this is due to Council not having the resources to monitor the minimum and maximum length of stay, and maximum number of days of use per year required to ensure hosted forms of STHL remains minor development and does not have
inappropriate impacts on the amenity of the neighbourhood. This would enable responsibility for compliance and enforcement of these types of short term accommodation to be overseen by State Government that is better placed to license and regulate these activities. Registration based on national and international best practice should assist manage safety and amenity issues associated with the accommodation form.