

REGULATING HOME-SHARING IN SOUTH AUSTRALIA: A RESPONSE TO LAZAR

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This commentary responds to Alex Lazar’s article in this volume entitled ‘Home-Sharing in South Australia: Protecting the Rights of Hosts, Guests, and Neighbours’. It concurs with two conclusions reached by Lazar: first, that there is adequate legal protection for hosts and their guests, and therefore no present need for reform in this area; and secondly, that there are few remedies available to neighbours who are affected by home-sharing, which is a problem that may require greater council oversight. Part I discusses home-sharing as a land use by reference to the Development Act 1993 (SA) and Development Regulations 2008 (SA). Part II then proffers some suggestions on how home-sharing could be regulated under the Planning, Development and Infrastructure Act 2016 (SA) or the Local Nuisance and Litter Control Act 2016 (SA).

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The primary article ‘Home-Sharing in South Australia: Protecting the Rights of Hosts, Guests, and Neighbours’¹ deals with a current pressing concern for many councils; namely, the use of residential dwellings for ‘home-sharing’ through AirBnB, Stayz and other similar online platforms. I generally agree with two conclusions in the article: first, that presently there is adequate legal protection of the rights of hosts and their guests, and there is no present need for reform in this area; and secondly, that there are few remedies available to neighbours who are affected by home-sharing and that greater oversight by councils should be considered in this regard. There are two areas of discussion from the primary article that I wish to expand upon from a planning and environmental lawyer’s perspective: the first area relates to home-sharing as a land use; and the second considers whether home-sharing

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¹ Alex Lazar, ‘Home-Sharing in South Australia: Protecting the Rights of Hosts, Guests, and Neighbours’ (2017–2018) 3 *University of South Australia Student Law Review* 49.

could be regulated under the *Planning, Development and Infrastructure Act 2016* (SA) or the *Local Nuisance and Litter Control Act 2016* (SA).

I HOME-SHARING AS A LAND USE

The primary article correctly notes that the regulation of planning and land use in South Australia occurs under the *Development Act 1993* (SA) (*'Development Act'*). I wish to expand upon the role of the *Development Act* and that of Development Plans. The *Development Act* regulates the undertaking of 'development' in the State.² Section 32 of the Act provides that, '[s]ubject to this Act, no development may be undertaken unless the development is an approved development'.³ The term 'development' is defined in s 4 of the *Development Act* to include 'a change in the use of land'.⁴ Section 6 then expands upon the '[c]oncept of a change in the use of land' and specifies the conditions under which those changes occur.⁵ Schedule 1 of the *Development Regulations 2008* (SA) (*'Development Regulations'*) contains definitions which apply in the regulations and in Development Plans, including definitions of particular forms of 'development'.⁶ Of particular importance are the definitions of 'dwelling', 'group dwelling', 'multiple dwelling', 'residential flat building', 'row dwelling' and 'semi-detached dwelling'.⁷

A 'dwelling' is 'a building or part of a building used as a self-contained residence'.⁸ '[G]roup dwelling', 'multiple dwelling', 'row dwelling' and 'semi-detached dwellings' are all particular forms of dwelling buildings which are typically low-rise in scale and are not apartment buildings.⁹ Apartment buildings fall within the definition of 'residential flat building'.¹⁰ A 'multiple dwelling' is '1 dwelling occupied by more than 5 persons who live independently of one another and share common facilities within that

² *Development Act 1993* (SA) s 3 (*'Development Act'*).

³ *Ibid* s 32.

⁴ *Ibid* s 4.

⁵ *Ibid* s 6.

⁶ *Development Regulations 2008* (SA) sch 1 (*'Development Regulations'*).

⁷ *Ibid*.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ *Ibid*.

dwelling’.¹¹ It is this term that encompasses boarding houses, lodging houses and other forms of similar developments. What is important, however, is that for there to be a change in land use from one form of dwelling to a ‘multiple dwelling’, the dwelling in question must accommodate *more than* five persons living independently of one another.¹² The key point in any discussion of the Airbnb model is that the vast majority of the home-sharing arrangements it facilitates will generally accommodate *fewer than* five persons who live independently of one another.

There is an absence of any specific definition of ‘home-sharing’ or the equivalent in Schedule 1 of the *Development Regulations* and an absence of any regulations declaring this form of activity to be a ‘development’.¹³ Furthermore, present case law authorities have determined that small-scale tourism or holiday apartment developments are indistinguishable from ‘dwelling’ land uses.¹⁴ Consequently, the general view in South Australian councils and in the State Planning Commission (all of whom have the ability to enforce breaches of the *Development Act*) is that home-sharing on this basis does not constitute ‘development’ requiring approval under the *Development Act*. This position is reflected in the ‘Advisory Notice’ discussed in the primary article.¹⁵

It is the *Development Regulations*, rather than the *Development Act*, which can influence what activities are and are not ‘development’; the Regulations prescribe ‘additional acts and activities [which constitute] development’ and exempt some forms of development from requiring approval.¹⁶ From the Advisory Notice it appears clear that the State Government has no intention of varying the *Development Regulations* to include ‘home-sharing’ as a form

¹¹ Ibid.

¹² Ibid.

¹³ Ibid pt 2 reg 6, sch 2.

¹⁴ See *Paradise Development (Investments) Pty Ltd v District Council of the Yorke Peninsula* [2008] SASC 139 (22 May 2008); *The Oaks Hotels & Resorts P/L v City of Holdfast Bay* [2010] SAERDC 16 (31 March 2010).

¹⁵ Lazar, above n 1, 55, quoting Government of South Australia: Department of Planning Transport and Infrastructure, *Building: Application of the Change in Use Provisions — Dwelling Status*, Advisory Notice 4/16, March 2016.

¹⁶ *Development Act* s 4; *Development Regulations* schs 2, 3.

of ‘development’ distinguishable from ‘dwelling’ land uses and, therefore, requiring development approval under the *Development Act*.¹⁷

The role of the Development Plans must be clarified because they do not offer an opportunity for reform. While each and every council has its own Development Plan, these plans are not ‘council documents’. Development Plans can only be amended with the approval of the Minister for Planning.¹⁸ If a council initiates a Development Plan Amendment, the amendment only has effect if approved by the Minister. The Minister has a very broad discretion to approve and refuse Development Plan Amendments.¹⁹

The only Development Plan that defines particular activities constituting ‘development’ requiring approval under the *Development Act* separately from the *Development Regulations* is the Adelaide (City) Development Plan. This Development Plan does not distinguish between dwellings and home-sharing activities. All other Development Plans rely upon definitions in the *Development Regulations*, which, again, do not distinguish between dwellings and home-sharing activities. On this basis, dwelling owners are able to operate home-sharing activities from their dwellings provided that no more than five people who live independently from one another reside in the dwelling. Given the Advisory Notice and the current implementation of the *Planning, Development and Infrastructure Act 2016*, it is unlikely that home-sharing will ever be regulated under the *Development Act 1993*.

II REGULATING HOME-SHARING UNDER CURRENT LEGISLATION

The *Planning, Development and Infrastructure Act 2016* (SA) (*Planning Act*) will, by 1 July 2020,²⁰ wholly replace the *Development Act*. This *Planning Act* retains a similar definition of ‘development’ requiring approval under that Act (including changes in land use) as well as provisions for

¹⁷ See Government of South Australia: Department of Planning Transport and Infrastructure, *Building: Application of the Change in Use Provisions — Dwelling Status*, Advisory Notice 4/16, March 2016.

¹⁸ *Development Act* ss 24–6.

¹⁹ *Ibid* s 25. See also *Town of Gawler v Minister for Urban Development and Planning* [2011] SASC 26 (25 February 2011).

²⁰ *Planning, Development and Infrastructure Act 2016* (SA), Schedule 8, cl 9(1). This is the date upon which the Planning and Design Code (the document which underpins the new planning system in this Act) is required to come into full operation.

regulations to prescribe additional activities of development and to exempt development from requiring approval.

The *Planning Act* will replace Development Plans with a single Planning and Design Code. The Code will contain definitions of land uses and establish land use classes,²¹ and will specify when a change of use does not constitute ‘development’ under the *Planning Act*. The Planning and Design Code will be drafted by the State Planning Commission and approved by the Minister. The processes applying to the amendment of the Code are similar to those applying to Development Plans in the sense that persons other than the Minister can initiate amendments to the Code, but only the Minister can approve amendments.²² For this reason, regulation of home-sharing activities will not occur under the *Planning Act* without the support of the Minister for Planning. Again, the Advisory Notice suggests that such support will not be forthcoming.

One piece of legislation not considered by the primary article, is the *Local Nuisance and Litter Control Act 2016* (SA) (*‘Local Nuisance Act’*). This legislation, which commenced full operation on 1 July 2017, requires that councils manage ‘local nuisances’ in their areas. The definition of ‘local nuisance’ includes:²³

- any adverse effect on an amenity value of an area that—
- (i) is caused by—
 - (A) noise, odour, smoke, fumes, aerosols or dust; or
 - (B) animals, whether dead or alive; or
 - (C) any other agent or class of agent declared by Schedule 1; and
- (ii) unreasonably interferes with or is likely to interfere unreasonably with the enjoyment of the area by persons occupying a place within, or lawfully resorting to, the area.

Schedule 1 of the *Local Nuisance Act* excludes certain activities from constituting a ‘local nuisance’.²⁴ Presently, ‘noise principally consisting of music or voices, or both, resulting from an activity at domestic premises’ is excluded from constituting a local nuisance.²⁵ There is no legislative definition of ‘domestic premises’; but its common usage definition includes private dwellings. On this basis, noise from home-sharing cannot be

²¹ Ibid s 66(2)(c).

²² Ibid s 73.

²³ *Local Nuisance and Litter Control Act 2016* (SA) s 17(1)(a).

²⁴ Ibid.

²⁵ Ibid sch1 cl 5(m).

considered a nuisance under the *Local Nuisance Act*, but other forms of nuisance such as dust, smoke and odours could.²⁶

Section 51 of the *Local Nuisance Act* provides that regulations may amend Schedule 1 of the Act; and this provision allows the list of activities that do and do not constitute local nuisances to be expanded or contracted relatively simply. Given that the objects of this Act include ‘to protect individuals and communities from local nuisance’, it is respectfully suggested that the regulation of nuisance impacts from home-sharing activities — particularly noise — could more easily, directly and effectively be achieved through reforms under this legislation, rather than through the *Planning Act*. The additional benefit of adopting this approach is that it would provide neighbours with a more speedy and less expensive remedy than is currently offered by the law of private nuisance, which, as Alex Lazar explains, does not appear to offer an adequate avenue of redress for aggrieved neighbours who might suffer from the income-earning activities of Airbnb hosts.

²⁶ Ibid s 17(1).