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YSP Podcast Transcript: Episode 007. How a strata building can use by-laws to deal with short term letting

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Amanda Farmer: Hello and welcome. I'm Amanda Farmer and this is Your Strata Property. Today, I want to talk a little bit more about short-term letting, and in particular I want to answer a question that was asked by one of our listeners after listening to episode four where I interviewed Karen Stiles from the OCN about how short-term letting led to an extra one thousand residents and a number of illegal brothels in one city building.

So the question that came out of that episode was asked by Michele Hemmings, and Michele is the owner of Exclusively Strata in Wagga Wagga, and I'm sure she won't mind me telling you, Michele is a very passionate strata manager. She's one of our followers in the Women in Strata group and I'm very glad that she's enjoying the content from the podcast and that she's posted a comment on the website. Now, Michele has asked this question and I'll read it out directly from her comment: "Hi Amanda, I just wanted to say that I enjoyed listening to the podcast with Karen Stiles of the OCN. Could you elaborate more on the section in the Strata Schemes Management Act that prohibits any by-law undermining the content of any tenancy or 'dealing' on a lot? That preclusion seems to beg the question: what rights does the owners corporation have on restricting the types of occupants in a building?"

So, great question Michele, and that arises out of a comment that was made by Karen Stiles during our chat. We were talking about whether owners corporations can have by-laws that expressly prohibit, prevent, outlaw short-term letting in a strata scheme and Karen queried whether that was legally possible, and in doing so, she referred to section forty-nine of the Strata Schemes Management Act.

Now, Section 49 of the Act says this: "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."

Alright, now let me just say something about that terminology. 'Devolution'? Any lawyers listening out there may be able to give me a buzz and fill me in, but as far as I'm concerned I think devolution means 'the transmission of an interest in property from one person or entity to another'. I'm not quite sure why our legislation needs to use that word, when they could just as easily say transfer and they do in fact say transfer. And, just a side note, the new law uses the same word, 'devolution', not sure why it needs to stay in there...

Okay, so section forty-nine is telling us that we can't have by-laws that prohibit or restrict the transfer or lease of a lot. So as Michele and also Karen correctly question, does this mean we can have a by-law that prohibits owners, investor-owners from leasing, letting their lots on a short-term basis, on a basis that is less than three months and without a residential tenancy agreement?

Now, here is my take on this. I do draft these kinds of by-laws. I have clients who approach me and say "Amanda we want a by-law prohibiting short-term letting, can you knock it up for us?" The first question that I ask is: "let me have a look at the council planning instruments and let me see what they say". I believe that that must always be your starting point when you're considering whether or not a by-law that prevents short-term letting is going to be valid and enforceable.

Now when I say planning instruments, I'm talking about the original development consent for the building, so the DA and the conditions of that consent that was issued to the developer, and allowed the developer to construct the building however many years ago, including any modifications to that consent. So be aware that the original development consent may have been changed before the construction commenced or during the course of the construction, to permit the developer to add or remove 2 different things within the building. So be aware of whether there have been any modifications to the original development consent.



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Another relevant planning instrument is the council's local environment plan or LEP. If these planning instruments expressly prohibit short-term letting, holiday accommodation, serviced apartments or similar, then I believe you can have a by-law prepared that merely confirms the provisions in the planning instrument. The by-law then is effectively a repetition of rules already laid down by the council. It is then not the by-law that is restricting the lease of the lot, it is the council's planning instrument that is restricting the lease of the lot and the by-law is simply confirming that, and essentially putting the requirement into a form that is perhaps more public for the owners and the residents in your building. They are probably more likely to read the by-laws than to look up council's planning instruments, so if you have the requirement in a by-law, you can probably feel a little bit more confident that people will know that it exists and by extension comply with it, and your by-law is not changing the legal position, so it's not in contravention of any other law. And that's something important to remember when we look at another section of the Strata Schemes Management Act, which is section forty-three, which provides that a by-law has no force or effect to the extent that it is inconsistent with this act or any other act or law. So I believe that if council's planning instruments expressly say serviced apartments are permitted in this building, short-term letting is permitted in this building, holiday accommodation is permitted in this building and bed and breakfast accommodation is permitted in this building, if you then have a by-law saying the opposite, your by-law is inconsistent with another law and I believe that it could be successfully challenged and set aside.

So that's why I say it's so important to look at your planning instruments as a first step and it's something I certainly recommend when I have buildings come to me, and strata managers come to me, asking me to draft these kinds of by-laws.

Now if the planning instruments say nothing, which they often do, then I think the conservative view is probably that short-term letting is permitted with council consent, and if you have a by-law, then I think that's what your by-law should say: "short term letting is not allowed in this building, unless you have council consent and evidence of that consent must be provided to the owners corporation". To be absolutely sure, it's always a good idea to make a direct enquiry with the council, pick up the phone to try and determine their position on the issue, and preferably get them to confirm that position in writing.

Now, I also want to take the opportunity to say a little bit about how the reforms to the Strata Schemes Management Act are trying to deal with this issue. These are reforms that were due to come into force in July 2016 and the latest news is that we probably won't see them in force until at least September 2016. There's potential for that date to be moved back also, so I'll keep you updated on the progress of that legislation through the articles page on the 'Your Strata Property' website.

The new law, in my view, doesn't really do much to deal with the problem of short-term letting. What it does try to do is deal with the problem of overcrowding, and it has a proposed section, section one hundred and thirty-seven which is titled 'Occupancy Limits', and this section expressly permits an owners corporation to have a by-law that limits the number of adults who may reside in a lot by reference to the number of bedrooms in the residence, and that limit may not be fewer than two adults per bedroom. So, for example, you can have a by-law that says: "Owners are only permitted to have a maximum of two adults per bedroom residing in their lot." Now again, this by-law has no effect to the extent that it is inconsistent with any other law, and interestingly enough, this proposed new section expressly says: "The by-law has no effect to the extent that it's inconsistent with any planning approval", so there's some new terminology that we don't have in the current act: planning approval. And the new section also makes clear that 'a bedroom is considered a room approved for use as a bedroom under a planning approval or indicated as a bedroom in any plans that are the subject of the planning approval'.

So I suppose that's an attempt to avoid a situation where you have an owner saying "I've actually got a four bedroom apartment because I have divided my third bedroom by use of the curtain", and I understand that, sadly, is not an uncommon occurrence, particularly in city buildings. So this new section goes to trying to address the problem of overcrowding; an issue that's in the same space, I guess you could say, as short-term letting, but certainly not the same issue, and I think an opportunity has been missed here to empower owners corporations to decide how they want to deal with the issue of short-term letting in their building, and I know that's something that Karen Stiles from the OCN is particularly passionate about. If you haven't listened to her episode four, check it out.

The last thing I want to say in respect to the new law in this episode is that there's an interesting new section being introduced. It's proposed Section 139, which provides that a by-law must not be harsh, unconscionable or oppressive. Now this is brand new, this

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is not something that the current legislation provides. In fact, the current legislation provides very few restrictions on by-laws and you can check out section forty-nine in full to see what those restrictions are – I'll put a link to it in the show notes – but this is an additional restriction on by-laws that's coming in with the new law. "A by-law must not be harsh, unconscionable or oppressive" and the reason I think that's interesting is because who knows what those words mean and how they're going to be applied to strata by-laws? Time will tell I suppose, and I know I'm not the only one who is looking forward to seeing that one play out. Thanks for listening, I'll catch you next time.

Outro: Thank you for listening to Your Strata Property. The podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode by the show notes at www.yourstrataproperty.com.au. You can also ask questions in the comment section which Amanda will answer in her upcoming episodes. How can Amanda help you today?

