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15 March 2018

Mayor Councillor Tom Tate

City of Gold Coast

PO Box 5042

Gold Coast Mail Centre QLD 0729

Dear Mayor Tate,

LAWFUL USE OF PREMISES

I acknowledge letter from Dyan Currie of July 17 2017 on your behalf as attached, dealing with lawful use of premises. I further acknowledge that Ms. Currie has left the City of Gold Coast, and it was important that her letter be responded to. This response has been delayed due to perceived sensitivities of council and its Commonwealth Games obligations.

We have had a matter referred to our Association by a UOAQ member who has raised his concerns as to his complaint lodged with council as attached, and the response letter from Kathryn Sarikas of 7 August 2017, that seems inconsistent with the advice Ms. Currie provided.

Ms. Sarikas has advised that a Development Compliance officer from Council "has marked the request as completed because no breach was found." Ms. Sarikas goes on to state that "because the use of 'short term accommodation' was initiated prior to the commencement of the City Plan it has the benefit of existing lawful protection under s260 of the Planning Act, which states that an existing lawful use is protected".

Claiming that "Uses established prior to 2 February 2016 'continue' to be lawful ..." is flawed because 'continuance' of a use cannot be lawful unless that use was established lawfully. The 'Non-Residential Use' for 'Accommodation (short term)' is diametrically opposed to 'Residential Use' and is indisputably unlawful in the absence of a Material Change of Use approval.

Ms. Sarikas and the Development Compliance officer have clearly assumed that the usage prior to the commencement of the City Plan was lawful usage, for they have not confirmed that Material Change of Use approval has been provided by council to the lot owners complained of, to establish lawful usage. This prerequisite would be readily available to council officers to confirm as applications for Material Change of Use are made directly to Council and the lack of essential council approvals establish the breach that forms the basis of this complaint.

To the contrary, the Body Corporate records show no approval to any application of owners in support of any Material Change of Use application and as the Body Corporate has authority and responsibility for the common property, this approval is essential.

In the 4th and 5th paragraphs of Ms. Currie's letter, she made it patently clear that the process to establish lawful usage is through an approval from council. Ms. Sarikas has provided no evidence that approval was sought or provided.

It is therefore clear that lawful usage has not been established either prior to the commencement of the City plan or since, and the continued usage of lots at 220 The Esplanade Burleigh Heads for short term accommodation must be a breach of council regulations and subject to enforcement action.

UOAQ would seek that enforcement notices for unlawful use of premises be issued by Council to all offending unit owners at the Mediterranean BUP 104532. Failure of council to enforce these regulations would appear to put it in breach of S257 of the Building Act and expose its officers to the penalties prescribed in these provisions.

Why should UOAQ have safety concerns over building misuse

The Lacrosse building fire (Melbourne 2014); the Grenfell Tower tragedy (London 2017) with more than 80 lives lost; The Palace Hotel fire (Childers 2000) with 15 lives lost to name but a few. In each of these examples, mismanagement, overcrowding and failure of local government authorities to enforce regulatory compliance has been at the cost of the owners and occupiers of the buildings. 'Party House' regulation is also violated.

Bodies corporate and their committees are powerless to act to protect their interest with regard to unlawful use other than to rely upon their local government authority to uphold its duty of care by enforcing compliance with regulations when breached.

The executive liability provisions of the Building Act 1975 s257 as they apply to s115(1) of that legislation, may expose individual committee members of a body corporate to being personally liable if use of a building does not comply with its BCA classification of use.

Many strata schemes are BCA Class 2 buildings, consisting of sole occupancy units for use as residential dwellings only. Short term accommodation requires a BCA Class 3 building classification. It remains the responsibility of the Gold Coast City Council to enforce such BCA compliance and Council has a 'Duty to enforce' compliance upon all building owners and occupiers when a complaint is lodged, that an individual owner defies the provisions of the Building Act. [Ref. Building Act 1975 - s115 as relating to section s257 and s114, s117, s118 and s119].

Sections 256 and 257 clarify that individual executive officers of the GCCC would also fall within such liability provisions through tacitly permitting such misuse by being aware of yet failing to "take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence."

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What cannot be disputed is the obligation of council to ensure compliance with the Australian building codes as provided for in the Building Act 1975 with regards to both construction and use of buildings for their approved classification.

Responsible council officers are fully aware that a Class 2 building (such as The Mediterranean Towers) is – 'A building containing 2 or more sole-occupancy units each being a separate dwelling'. While both the QPP definitions and the Macquarie Dictionary (council's alternative reliance) both clearly define dwelling as being a long-term or habitual residence, the definition of sole-occupancy should not be overlooked either.

Definitions at law hold that 'sole-occupancy' provides the right of 'exclusive possession' to the property as is generally arranged under a lease of premises. A lease is a written contract between the property owner and the tenant as occupier that provides the tenant protections of privacy, security of tenure, required periods of notice for any encroachment upon peaceful enjoyment along with avenues for remedy should lease conditions be breached by either party to the lease.

By contrast a simple 'right to occupy' as arranged when booking holiday accommodation is merely a licence to occupy and provides very few protections or rights for the occupier – to the point the occupier can be evicted without notice, generally involves no bond with no fixed term binding the parties. The arrangement is usually not made for any specific premises and is more akin to the provision of an accommodation service rather than the renting of premises. The terms and conditions as listed on Airbnb, Stayz and the plethora of similar online accommodation booking sites make this distinction (i.e. the arrangement being merely one of a licence to occupy) very clear.

Therefore, apartments in Class 2 buildings used for short-term accommodation are in breach of their classification of use as they are being used for neither sole-occupancy nor as dwellings. The BCA provisions for a Class 2 building are clearly breached and thereby, through s115(1) of the Building Act being an executive liability provision, exposing bodies corporate and individual committee members to enormous risk of loss, damage, and potential charges of criminal negligence.

Councils own Land use categories provide definitive evidence on pages 11 to 12 of "Council of the City of Gold Coast Charges Resolution (No. 2) of 2016" where '78 Short-term accommodation' is categorised 'Non-residential' use. The Mediterranean Towers is an approved Class 2 development and not developed to the more stringent Class 3 specifications for use as a Resort/Hotel as both the 'Non-Residential' land use category and the Building Codes of Australia state is required.

According to council's own documentary evidence, any short-term accommodation use in a class 2 building, whether before or after the city plan, is and always has been, by all definitions of Council planning schemes, the Building Act, the Planning Act, the Queensland Planning Provisions, and the Building Codes of Australia - 'Unlawful Use'.

Greater clarity on the enforcement responsibility of council and its officers is provided by Section 3 – 'Duty to enforce' of the Queensland Building Work Enforcement Guidelines as published by the Queensland Government Department of Infrastructure and Planning. These guidelines specifically addresses achieving compliance of building work with the provisions of the relevant Building and Planning Acts.

If any hint of doubt remains in the mind of any council officer surrounding their duty to act to remedy the unlawful use of residential apartments for short-term accommodation to safeguard the interest and wellbeing of the local community and public at large, attention is drawn to the Sustainable Planning Act 2009 Section 3 – Purpose of Act, and Section 4 – Advancing Act's purpose.

Yours faithfully,

Wayne Stevens

President

Cc.
Mr. Dale Dickson, Gold Coast City Council-Chief Executive Officer
Cr. Gary Baildon AM, Gold Coast City
Hon Mick de Brenni MP, Minister for Housing and Public Works and Minister for Sport.
Mr. Brett Bassett, QBCC Commissioner
Hon Yvette D'Ath MP, Attorney-General, Minister for Justice and Minister for Training and Skills
Mr. Chris Irons, BCCM Commissioner
Mr. David Reardon, Director, Office of Regulatory Policy