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CONSIDERATION OF PLANNING PERMISSION IN SHORT-TERM RESIDENTIAL ACCOMMODATIONS

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Abstract

Planning permission may be required if the use of the property for short-term residential accommodations (STRA) services constitutes 'development' in planning terms. In analysing the possible operational aspects of STRA application in the planning system in Malaysia, the experience of STRA implementation in some selected countries is explored. The article concludes that there are different approaches, which are adopted by different regions concerning the need for planning permission. Most jurisdictions that are "friendly" towards STRAs view that planning permission is not necessary if STRA is managed on a small scale. Hence, it can be concluded that if the scale of the STRA business is big, i.e. 'commercial' in nature, planning permission is needed. Alternatively, the local planning authority may consider issuing a provisional or temporary planning permission (TPP), a short-term approval that is only permissible for the transitory nature of the use of land and buildings.

Keywords: short-term residential accommodations, planning permission, local planning authority, material change

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INTRODUCTION

Nowadays, many people are renting out their residences to short-term visitors and operates as short-term residential accommodation (STRAs) operators. One of the debates on permissibility of STRA is whether the nature of use of the building has significantly changed, with the operation of such business in the building. This led to the issue of whether planning permission is needed as this is a requirement in event of material change of use of building. In this article, a summary of the planning system in Malaysia and its connection with the concept of STRA is suggested. This article makes comparative study with selected foreign jurisdictions which have different types of STRAs in recommending the suitable approach in addressing the issue of planning permission in the approval process of STRA operation in Malaysia.

LITERATURE REVIEW

There are very few literatures which discuss on the legal aspects of short-term accommodations (STRA) in Malaysia. Most of the literatures are newspaper reports which give a brief idea on the legal aspects of the short-term accommodation and the STRA online platform for example, the Airbnb (Airbnb considered legal, Penang Property Talk, 29 August 2016). Diane Foo, in the Market News on 19 January 2017, in her article, "Rules on Short-Term Rentals Vary in Malaysia" is the very few literatures on this matter. Currently different states have different treatments on STRA. It was reported that in last July 2017, the Penang Island City Council issued summons to landlords, after receiving complaints that they were leasing their premises for short term residence purposes. The Environment Health and Licensing Department of Penang defines STRA as operating an illegal lodging house without a lodging house licence issued by the local authority. This is again confirmed in the report published in the Penang Property Talk on the 13 August 2019. On 13 April 2024, The Edge Malaysia reported that the Airbnb calls for fair and practical guidelines for STRA. Airbnb is reported to have advocating for a balanced and simple approach to regulate STRA with recommendations, including no cap on booking nights as this severely limits guest travel and undermine ongoing efforts to promote Penang and Malaysia as a digital nomad hub.

Arshad, A. F. in 2012 suggested that the Temporary Planning Permission (TPP) is an option to avoid the complication of the traditional planning permission which is basically a short-range or time-based planning permission. He concluded that the TPP can be expanded or withdrawn by the Local Planning Authority (LPA) at any time. The revocation of the TPP may arise if the LPA thinks necessary for the safety of public interest in the vicinity. Mohammad Yusup, Ahmad Fuzi Arshad, Marlyana Azyyati Marzukhi et.al., in 2018 further emphasised that it is important that provisions regarding TPP in Town and Country Planning Act of 1976 (Act 172) are expanded in detail

especially regarding time frame, type of development, development fees, and so on. The writers also stressed that the provisions related to TPP are also important for the purpose of planning legal system. According to the authors, the process of decision-making, the use of formal and informal instruments and other measures need to be considered and should be uniformly formulated to be implemented by the LPA. In the absence of specific discussion on the need of planning permission in the approval process of STRA business in Malaysia, this article is to fill the gap.

RESEARCH METHODOLOGY

Content analysis of the Malaysian statutes which has relation with approval of planning departments, i.e. the Town and Country Planning Act of 1976 (Act 172) and approval of construction of buildings, i.e. the Street, Drainage and Building Act 1974 (Act 133) and the Sewerage Services Act 1993 (Act 508) are discussed. Comparative study with the statutory provisions of the Irish Planning and Development Act, 2000, which regulates the planning and development of land in Ireland, the Greater London Council (General Powers) Act 1973 and the Deregulation Act 2015 are made. Due reference is also made to the New South Wales (NSW) Guidance on Planning Applications for Short Term Lettings (Circular letter PL 10/2017), issued by the New South Wales Department of Housing, Planning and Local Government.

Case study on Malaysian cases pertaining to public participation in planning permission process i.e. the cases of *Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors* (1997) 2MLJU 204 and *Mentari Housing Development Sdn Bhd & Anor v Abdul Ghapor Hussin & Ors* (2011) MLJU 1009 are discussed in this article.

ANALYSIS AND DISCUSSION

STRAs and Planning System in Malaysia

Many countries placed the STRA scheme under planning system as their STRA management tools. For instance, the Parliamentary Committee of the NSW, Australia has recommended to use planning instruments in regulating and managing STRAs, primarily through exempt and complying planning development. In Malaysia, the same rules apply whereby the Kuala Lumpur City Council and Melaka Local Council for example require the property owner to apply for a STRA permit before running the business. However, prior to issuance of the permit, the STRA property owner can be asked to apply for planning permission and be approved by the local planning authority (LPA) (Ahmad et al., 2013). As implemented by most part of the world, in Malaysia, the Town and Country Planning Act 1976 (Act 172) prescribed several criteria that need to be satisfied before the planning permission is granted. Most local councils do not specifically regulate STRAs, and the use is commonly treated as an ancillary

activity to the residential use of a home, where some local councils may require the property owner who decided to run a STRA business to apply for planning permission under Act 172 before the STRA permit is issued. Why is planning permission required in the process of issuance of the STRA permit?

The general rule is that planning permission is only required if "development" is carried out. This can be either a 'material change of use' or 'works' or both. In considering STRA in the planning perspective, it is assumed that no renovation works is required if the use of the property approved is for residential purpose and if the nature use of STRAs has not changed the nature of the purpose of property. Thus, the only aspect that may cause the STRA services to fall under the designation of "development" is the material change of use. It is about the consideration of whether there is change of use from a private residential property to STRA services which now is commercialised and to a certain extent, represents a material change of use which would require planning permission.

Under the Act 172, if the property owner makes any material change in use on the land and/or building that falls under the definition of "development", then planning permission is necessary. "Development" has been defined by Section 19(1) of Act 172 as the carrying out of any building, engineering, mining, industrial, or other similar operation in, on, over, or under land, the making of any material change in the use of any land or building or any part thereof. Section 19(1) of Act 172 states that before the commencement of any development, an application for planning permission must be obtained unless it falls under section 19(2) of Act 172. Section 19 (2) elaborates on several circumstances where no planning permission shall be necessary. Among others, the provisions which may relate to the STRAs services are as follows:

1. Section 19(2)(a)(i) provides that planning permission is unnecessary for the carrying out of such works as are necessary for the maintenance, improvement, or other alteration of a building, being works that affect only the interior of the building and do not involve any change in the use of the building or the land to which it is attached;
2. Section 19(2)(f) also provides that if the use of any land or building within the structure of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such; and
3. Section 19(2)(g) for the making of such material change in the use of land or building as the State Authority may prescribe to be a material change for which no planning permission is necessary.

In the context of STRA, the above provision clearly specifies that the property owner who converts the land use from a residential purpose for a STRA business may not be subject to the planning permission obtained from the LPA if

it falls under any one of the above circumstances. If the property owner whose application for STRA permit is subjected to the approval of planning permission, he may challenge the imposition of such requirement. He could challenge it if he can prove that he falls under any one of the circumstances in section 19(2) of Act 172 i.e. if he intends to make alteration to the main structure of the building but do not affect the any change of use of the building, or if the use of any land or building for any purpose is incidental to the enjoyment of the house.

Application for planning permission

In the application for planning permission due to material change of land use, section 21(1) of Act 172 provides that it shall be made to the local planning authority and shall be in such form that contains all relevant particulars, accompanied by such documents, plans, and fees as may be prescribed. If the applicant is not the owner of the land on which the development is to be carried out, section 21(2) provides that a written consent of the owner to the proposed STRA shall be obtained and endorsed on the application.

In obtaining approval for planning permission, one must be aware of the issue whether the proposed STRA building is located within the area with a gazetted local plan or otherwise. This is crucial as the process to get the planning permission differs for both cases. If the proposed STRA building is in an area in respect of which no local plan exists for the time being, then, upon receipt of an application for planning permission, the LPA shall, by notice in writing served on the owners of the neighbouring lands informing them of their right to object to the application. They will need to state their grounds of objection within twenty-one days of the date of service of the notice as specified under Section 21(7) of Act 172. In pursuant to this provision, neighbouring land refers to, inter alia either lands adjoining the land to which an application connects, or lands located within 200 metres from the border of the planned STRA. There is no allowance of time available for any delay to object the application within the said period. Upon receipt of the opposition, the planning authority shall, within thirty days after the end of the objection period, hold a hearing before the planning permission is granted.

Notably, the service of notice to object is obligatory as decided in *Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors* (1997) 2MLJU 204. In this case, the plaintiff claimed that she was not given the chance to oppose as she did not receive any notice about the application for planning permission. On appeal, the Supreme Court recognised the significance of the public to take part in the planning permission procedure and ordered to invalidate the questioned development order. In another case, *Mentari Housing Development Sdn Bhd & Anor v Abdul Ghapor Hussin & Ors* (2011) MLJU 1009, the Court of Appeal upheld the right of public participation in the planning permission process whereby any approved planning permission without the

statutory hearing was null and void. The Court of Appeal decided that the law confers on the residents a statutory right to be heard. As such, the requirement that requires the planning authority to consider the residents' objections before planning permission can be granted is vital. Applying to the STRA development, through this approach, the public will have the opportunity to raise their concern if the proposed STRA activities affect their livelihood in the area. If, however, there is a local plan available, the LPA and property owner for the planning permission are obliged to comply with the diagrams, illustrations, and other information described in the gazetted local plan. It is to be noted that section 21(1) of Act 172 requires the LPA to consult other related government agencies and statutory bodies such as Fire and Rescue Department of Malaysia or Ministry of Health Malaysia to obtain their views, technical advice, and recommendations on a proposed development prior to the approval of planning permission.

Thus, it is clearly specified that Act 172 requires the STRA operators not to commence or carry out any development unless planning permission in respect of the development has been granted to him under section 22 or extended under section 24(3). In the planning standpoint, what is meant by "development" in the STRA evolution must first be evidently determined as it concerns considerably not only on the change of use, carrying of renovation work of the structure etc., but also the surrounding impacts of STRA improvement within the neighbourhood, area, and the strata buildings (Abdul Rahman et al., 2012).

Although the material change of land use may cause it to fall under the term development and planning permission becomes compulsory for the property owner to apply, circumstances laid down under section 19 (2)(a)(i), (f) and (g) imply that in the context of change of land use for STRA services, it may not be a material change of land use as one may argue that the current and future use of the land/and or building are for residential purpose and housing accommodation. As discussed earlier, in the context of STRAs, section 19 (2) clearly specify that no planning permission is necessary for any alteration to the main structure of the building but does not affect the house, or if the use of any land or building for any purpose is subsidiary to the enjoyment of the guests of the house, or if the State Authority itself decided that such material change in the use of land does not require any planning permission. Although the material change of land use may cause it to fall under the term development and planning permission becomes compulsory to apply, circumstances laid down under section 19 (2) (a)(i), (f) and (g) imply that in the context of change of land use for STRA services, the LPA may consider to invoke section 19(2)(g) that the change of land use for STRA is not that material as its current and future use are similar, i.e. for residential purpose and short-term accommodation especially when the STRA is used as a supplementary function of the property, i.e. not used as the sole purpose of the property.

Hence, how any material changes in the use of the STRA services or any part thereof that fall under "development" need to be analysed. In doing so, the operation of STRA in the planning system of some selected countries were explored. In planning and development, the LPA plays a major role in deciding the physical development of its area. For every physical development that took place on land and/or buildings, development control is an essential tool, used by the LPA in monitoring and controlling the development within its administrative area. Thus, about the STRA and development control, any material changes of use from residential to STRA if falls under the definition of development, it is necessary to determine whether the use of the property from a private residential to be let for STRA would amount to "a material change" and thus fall under the definition "development" which requires planning permission from the LPA. In Malaysia, what is meant by "material change of land use" must first be clearly verified as it concerns greatly not only on the physical or massive changes to the land and/or building but also matters such as fire safety, health, service levels and amenity caused by its use.

Enforcement of Non-Compliance STRA

If planning permission is required for the operation of STRAs, any operator who fails to comply with the requirement can be penalized whereby the LPA has the power to impose a penalty for unlawful development of a fine not exceeding RM500,000 or to an imprisonment not exceeding two years or to both and a further fine not exceeding RM5,000 per day for each day such offence is exercised after the first conviction of the offence. It is also an offence under the Street, Drainage and Building Act 1974 (Act 133) to carry out any construction of a building for STRA enhancement without approval from the LPA. In dealing with the request for planning permission, the LPA needs to take note of any matters which in its opinion expedient or essential for proper planning particularly the provisions of the development plan, if any. Further conditions that must also be considered are the direction given by the State Planning Committee, the objections, if any, made under section 21, any development plan under preparation or to be prepared by the LPA, or the proposals relating to those provisions; the provisions of the Sewerage Services Act 1993 (Act 508) and the development proposal report.

Tests for Material Change of Use

In the New South Wales, Australia (NSW), the local authority defines what constitutes "material change to land use". In planning terms, a material change of use entails tests to be considered, i.e. a change of use may deem material if the planning authority would take into account various matters in evaluating a planning application for the proposed use as compared with the original use.

In considering the continuous use for STRAs in NSW, matters that may be considered in assessment of the planning application process as provided under the NSW Guidance on Planning Applications for Short Term Lettings (Circular letter PL 10/2017), issued by the Department of Housing, Planning and Local Government are as follows:

1. For a standard domestic or residential application, the local authority may compel certain development specifications to be applied. Examples of such standards relate to car parking and facility including public and private open space. If the standard of use of these facilities increases for STRA guests, it is determined that a material change of use has occurred.
2. Another aspect that needs to be addressed is if the house is occupied for residential use and the STRA is ancillary to this use, it can be reasoned that no material change of use arises. This means, the conventional residential development standards are still relevant and applicable.
3. If a house or apartment is owned by a landlord and occupied by a tenant under a tenancy agreement, the occasional use of that apartment for a STRA might also not constitute a material change of use because the main use is for normal residential occupation.

With reference to STRA scheme, which is related to apartments, NSW government has also issued some guidelines setting out the qualitative and quantitative criteria to determine whether planning permission should be granted, as follows:

Qualitative criteria:
1. Location or site of the apartment;
2. Quality and condition of the accommodation;
3. Need to make efficient use of housing supply; and
4. Potential impact on residential amenities and conveniences of existing local communities.

The guidelines also state that where planning permission for the use of an apartment for STRA is applied for, a permission is to be approved by the planning authority. The approval may subject to several limitations relating to the intensity or number of the use. There are four limitations known as quantitative criteria to be imposed upon approval of the application as far as the intensity of the use for apartments is concerned. They are as follows:

Quantitative criteria:
1. The STRA is available for less than 60 nights in any one year;
2. No more than five consecutive night in any stay;
3. Max of two rooms per apartment;
4. Max of four guests per apartment.

In addition to the limitations relating to the apartment unit itself, there are also conditions imposed on the apartment blocks whereby a maximum of 20% of apartments are available for STRA services on any floor of the whole building. In Ireland, the Irish Planning Board in 2016 elaborated on the issue of whether the use of an entire residential apartment on a year-round basis for a series of STRA, constitutes a change of use. This matter was raised by Temple Bar Residents concerning an apartment in Dublin, which was being sold on the basis that it generated €79,000 in 2015 from short-term lettings via the Airbnb platform. Section 5 of the Planning and Development Act 2000 was referred to and applied by the residents when raising the matter to the Dublin City Council. The provision spells out as to whether such use constitutes 'development', and whether such development is exempted development. Dublin City Council determined that the use was a material change of use. Disappointed with the decision, the apartment proprietor referred the case to the Irish Planning Board for review. Such change of use creates planning considerations that are materially different from the planning considerations relating to the regular use of a residential apartment. The change of use is a material change of use, and hence amounts to a 'development' under the Planning and Development Act 2000. Accordingly, the apartment owner was required to apply for planning permission from the Dublin City Council.

In another instance, the STRA lettings in Greater London are subject to a further planning restriction under Section 25 of the Greater London Council (General Powers) Act 1973. It provides that the use of residential buildings as transient accommodation for less than 90 successive nights, amounts to a material change of use that requires planning permission. The objective behind the provision is to protect London's perpetual housing supply. Having said that, the Government introduced an exemption to this restriction in the Deregulation Act 2015 whereby STRA in the municipal areas is no longer deemed a material change of use if:

1. the accumulative number of nights used as temporary lodging does not exceed 90 nights in any one go (or any calendar year); and
2. the STRA owners or operators are liable to pay council tax.

It is further noted that under Building Regulations, such accommodation may nevertheless, be classified as a material change of use which accordingly, enhancement works may still be required to abide by relevant specifications that fit with the STRA scheme.

In Ireland, the Irish Planning Board in 2016 has recognized three issues to be addressed in deciding whether the use of the premises for STRA constituted 'development', and whether such development was exempted development or otherwise:

(a) has a change of use occurred?
(b) if so, has a material change of use arose such as would amount to 'development'?
(c) if development has arisen, is it exempted development?

The Board described that the change of use was a material change of use, mainly due to the distinct planning concerns created by the new use, inter alia:

(a) the extent and rate of recurrence of usage of the apartment by STRA guests and servicing staff,
(b) associated considerations for other residents in respect of security and general disturbance and
(c) the entirely commercial nature of the activity.

It can be established that there are different approaches, which are adopted by different regions in relation to the need for planning permission. Majority of jurisdictions which are "friendly" towards STRAs views that planning permission is not necessary if STRA is managed in small scale. Hence, it can be concluded that if the scale of the STRA business is big, i.e. 'commercial' in nature, planning permission is needed.

The Option of Temporary Planning Permission under Act 172

As the nature of STRA implementation mainly for investment purpose, it indicates that the use of land and/or buildings is for a temporary basis. In other words, the property owner may one day decide to terminate the STRA business and reconvert the use of STRA back to a residential purpose. Hence, the LPA may consider issuing a provisional or temporary planning permission (TPP), which is a short-term approval and is only permissible for this transitory nature of use of land and buildings.

The TPP is a short-range or time-based planning permission, which can be expanded or withdrawn by the LPA at any time. The revocation of the TPP may arise if the LPA thinks necessary for the safety of public interest in the

vicinity (Arshad, 2012). Usually, the TPP period can be up to a maximum limit of five years. The endorsement for this type of planning permission is granted by the LPA for a fixed time and will expire depending on the specified planning requirements. The LPA may approve the TPP because the proposed structure or the use of land and/or buildings is transient. Further, the LPA could also remove the structure or halt the use of land and/or buildings when it is no more needed. In addition, the LPA can also grant the TPP if they are doubtful on the impact of the use of land and/or building and aimed to give the proposed development a 'trial basis'. For instance, the impact of a coastline reclamation can be considered as a 'new land'. As the so-called reclaimed land is still new and the structure is unstable, the entire area should not immediately be developed with permanent development.

As far as Act 172 is concerned, there is no such option as TPP apart from Section 22(5), i.e. on the use of planning conditions. This provision provides that planning permission is granted to the applicant for the use of land or buildings within a limited time. Upon expiry of such period, the use of such land and building will be reverted to its original. This is to ensure that the development of such land will follow the approved layout plan. With this approach, the LPA seems to exercise its controlled method in prohibiting any development that may destroy lands and other negative impacts associated with the environment in terms of physical, natural topography, and landscape. It is to be noted that section 22(6) requires a copy of the TPP to be served to the persons who make oppositions to the proposed development according to Section 21(6) of Act 172.

Applying this option to the STRA arrangement, during the insecure period, the LPA can propose or grant temporary planning permission if so, required on the land on a 'trial basis'. Consequently, after the expiry of the trial period the LPA may discover the strengths, weaknesses, opportunities, and threats of the area to plan for an appropriate term for the STRA's future development.

CONCLUSION

In terms of the different characters and interests that exist in various cities, it is the responsibility of the authorities to ensure that the STRA development within the vicinities is preserved. The roles of town planners to attend and manage the cities require effective collaboration between all sectors in the associated fields such as landscape architecture, civil engineering, and public administration. The tasks of other sub-fields such as land-use planning, zoning, economic development, environmental planning, as well as transportation planning are also very much emphasized. In the context of STRA administration and practice, in the event applications for STRA licences and relevant planning permission are required, then the relevant authorities need to provide special attention at the

approval stage especially if it involves negative impacts to the land use, environment and transportation planning.

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