

# ADVISORY NOTICE BUILDING

04/16

*Advisory Notices are issued to assist in the interpretation of the Development Act 1993*

*March 2016*

## **ADMINISTRATION:**

### **Application of the change in use provisions – dwelling status**

The purpose of this Advisory Notice is to provide advice about dwellings and whether changes to the nature and/or extent of occupation constitutes a change in use for the purposes of the *Development Act 1993* (the Act) and the *Development Regulations 2008* (the Regulations).

#### **BACKGROUND**

The definition of development under *Part 1* of the Act includes, among other activities, a change in the use of land. Dwelling means a building or part of a building used as a self-contained residence as defined in *Schedule 1* of the Regulations. Other forms include group dwellings, a residential flat, semi-detached and row dwellings.

*Section 6* of the Act prescribes the circumstances under which land can be considered to have undergone a change in use or otherwise. The commencement (or revival) of a particular use of the land will be regarded as a change in use if-

- (a) the use supersedes a previous use; or
- (b) the commencement (or the revival) of the use follows a period of non use; or
- (c) the use is additional to a previously established use which continues despite the commencement of the new use

The revival of a use of land after a period of discontinuance will be regarded as the continuation of an existing use unless-

- (a) the period intervening between the discontinuance and revival of the use exceeds two years; or
- (b) during the whole or a part of the period intervening between its discontinuance and revival, the use was superseded by some other use; or
- (c) the Development Assessment Commission or a council has made a declaration that the revival of a use will be treated as a change in use and the declaration remains unrevoked

In addition, *Schedule 3* of the Regulations identifies a number of acts and activities that are excluded from the definition of development including, in relation to the use of land and buildings -

- 5(1) The use of land and the use of any lawfully-erected building which is ordinarily regarded as (and is in fact) reasonably incidental to any particular use of the land and the building, or the land or the building, and which is for the substantial benefit of the person or persons who, in any capacity, are making use of the land and the building, or the land or the building.*

In 2013, a case was brought before the Supreme Court of Victoria in relation to the interpretation of a change of use of a residence and the relevance of the duration of occupancy. As at the date of this notice, the case [2013] VSCA 365 is ongoing.

### DISCUSSION

Concerns have been raised about the change in use provisions in the Act and Regulations and how they apply when the nature and/or extent of the occupancy of a dwelling changes. These concerns appear to have emerged as a result of the increasing use of sharing platforms that facilitate and coordinate the occupancy/rental of a dwelling; and the belief that a dwelling must be occupied for extended periods of time by the same person.

In defining what constitutes or triggers a change in use, the Act and the Regulations make no reference to:

- The length of time a dwelling is occupied or the frequency with which occupation occurs
- Any short or long term leasing or mutually agreed occupation arrangement/s
- Platforms or tools used to facilitate and coordinate occupancy/rental
- Change in ownership arrangements

Accordingly, a dwelling will remain a dwelling if it is occupied sporadically; let out during holiday periods to short term occupants; let for short term use; or if the owner lives overseas or interstate and uses it occasionally and then for relatively short periods. Unless development is undertaken to physically alter the dwelling such that it is no longer a dwelling, it remains a dwelling.

### ADDITIONAL INFORMATION

Information about matters outside the scope of the *Development Act 1993* and *Development Regulations 2008*, such as insurance requirements and lodging complaints, can be obtained from -

- [Consumer and Business Services](#)
- sa.gov.au website - [Forms and fact sheets for private rental tenancies](#)
- Holiday Rental Industry Association, who publish [Holiday and short term rental code of conduct](#)
- [South Australian Civil and Administrative Tribunal](#)

This Advisory Notice is for general information only and should not be relied upon as legal advice or an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations you should obtain independent legal advice.

## Further information

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