



The subject property and surrounding area is zoned "Residential" with a density code of R20. The surrounding locality consists of single dwellings. The site is located on the northern side of Foston Drive, between Glengarry Drive and Doveridge Drive Duncraig. The existing building, approved as a single house in 1983, has four bedrooms, a games room, family/meals/kitchen, lounge/dining and a carport. There is a swimming pool and a garage/outbuilding at the rear of the property.

In April 2006, the City received a complaint alleging that the dwelling at 17 Foston Drive Duncraig was being used as short stay accommodation without having Council approval. The allegation was confirmed following investigation by the City. The owner of the property was subsequently requested to submit a planning application for the unauthorised short stay accommodation.

The application for Planning Approval was submitted and the applicant advised the City that all current bookings had been cancelled until this matter was resolved.

The report on this planning application was considered at the Briefing Session held on the 1 August 2006, however the matter was withdrawn at the Council meeting held on the 29 August 2006 when Council resolved:

*"That consideration of Change of Use from Single House to Residential Building (Short Stay Accommodation): Lot 102 (17) Foston Drive, Duncraig be DEFERRED to clarify any legal issues.'*

This report is a revised report based on discussions with Council's legal adviser.

## **DETAILS**

The proposed use, has the following key characteristics:

- 1 This proposal aims to offer exclusive use of the whole property, fully furnished and equipped as short stay accommodation, specifically designed to appeal to families. It has four double bedrooms.
- 2 The maximum number of permitted visitors will be eight per booking. There will be no "unrelated" visitors sharing the accommodation, as only one booking will be in place at any one time.
- 3 Stays will be for a minimum of 7 days and a maximum of 60 days.
- 4 No additional impact on amenities or traffic volume in the locality is expected and no additions, changes or modifications to the property are necessary.
- 5 The property is situated 200 metres from a bus stop on Glengarry Drive, which is west of the freeway between Hepburn Avenue and Warwick Road, and is less than ten-minute walk from Greenwood Train Station. Access to the Mitchell Freeway via Hepburn Avenue is approximately 1 km distant.
- 6 Bookings will be taken and confirmed in advance using the Internet and/or telephone. The property will be advertised on websites dedicated to short stay accommodation.
- 7 The occupier must agree to terms which stipulate

- The maximum number of permitted visitors
- That parties and functions are not allowed
- That any disturbance caused to neighbours including (but not limited to) noise may result in the termination of their stay and the loss of their bond.

8 There are no building additions or vehicle modifications necessary.

9 The entire property is proposed as short stay accommodation.

The applicant has responded with further justification, which is enclosed as Attachment 3, following objections raised during the public advertising period.

**Link to Strategic Plan:**

The proposal is linked to the following objective and strategy in the City’s Strategic Plan 2003 – 2008:

Objective 3.2 To develop and promote the City of Joondalup as a tourist attraction.

Objective 3.3 To continue to meet changing demographic needs by providing residential living choices.

**Legislation – Statutory Provisions:**

The relevant provisions of DPS2 that control development within this zone and are applicable to the application for planning approval include the following:

Clause 3.3 of the DPS2 states the following:

**3.3 UNLISTED USES**

*If the use of the land for a particular purpose is not specifically mentioned in the Zoning Table and cannot reasonably be determined as falling within the interpretation of one of the use categories the Council may:*

- (a) *determine that the use is consistent with the objectives and purposes of the particular zone and is therefore permitted; or*
- (b) *determine that the proposed use may be consistent with the objectives and purpose of the zone and thereafter follow the procedures set down for an ‘A’ use in Clause 6.6.3 in considering an application for planning approval; or*
- (c) *determine that the use is not consistent with the objectives and purposes of the particular zone and is therefore not permitted.*

The purpose and objectives of the Residential Zone are set out below:

**3.4 The Residential Zone**

*The Residential Zone is intended primarily for residential development in an environment where high standards of amenity and safety predominate to ensure the health and welfare of the population.*

*Residential development is provided for at a range of densities with a variety of housing to meet the needs of different household types. This is done through application of the Residential Planning Codes (R-Codes), and the allocation of a residential density code to an area of land.*

*Cultural and recreational development may be located where the Council considers the same to be appropriate in residential neighbourhoods within the Residential Zone.*

*The objectives of the Residential Zone are to:*

- (a) maintain the predominantly single residential character and amenity of established residential areas;*
- (b) provide the opportunity for grouped and multiple dwellings in selected locations so that there is a choice in the type of housing available within the City; and*
- (c) provide the opportunity for aged persons housing in most residential areas in recognition of an increasing percentage of aged residents within the City.*

The R-Codes define a Residential Building as:

*A building or portion of a building, together with rooms and outbuildings separate from such buildings but incidental thereto; such building being used or intended, adapted or designed to be used for the purpose of human habitation:*

- Temporarily by two or more persons; or*
- Permanently by seven or more persons,*

*who do not comprise a single family, but does not include a hospital or sanatorium, a prison, a hotel, a motel, or a residential school.*

The R-Codes define a "dwelling" as follows:

*A building or portion of a building being used, adapted, or designed or intended to be used for the purpose of human habitation on a permanent basis by a single person, a single family, or no more than six persons who do not comprise a single family.*

Clause 6.6.2 requires that Council in exercising discretion to approve or refuse an application shall have regard to the provisions of Clause 6.8, which is shown below:

## **6.8 MATTERS TO BE CONSIDERED BY COUNCIL**

**6.8.1** *The Council when considering an application for Planning Approval shall have due regard to the following:*

- (a) interests of orderly and proper planning and the preservation of the amenity of the relevant locality;*
- (b) any relevant submissions by the applicant;*
- (c) any Agreed Structure Plan prepared under the provisions of Part 9 of the Scheme;*
- (d) any planning policy of the Council adopted under the provisions of clause 8.11;*

- (e) *any other matter which under the provisions of the Scheme the Council is required to have due regard;*
- (f) *any policy of the Commission or its predecessors or successors or any planning policy adopted by the Government of the State of Western Australia;*
- (g) *any relevant proposed new town planning scheme of the Council or amendment or proposed Metropolitan Region Scheme Amendment insofar as they can be regarded as seriously entertained planning proposals;*
- (h) *the comments or wishes of any public or municipal authority received as part of the submission process;*
- (i) *the comments or wishes of any objectors to or supporters of the application;*
- (j) *any previous decision made by the Council in circumstances which are sufficiently similar for the previous decision to be relevant as a precedent, provided that the Council shall not be bound by such precedent; and*
- (k) *any other matter which in the opinion of the Council is relevant.*

**Risk Management considerations:**

The proponent has a right of appeal against Council's decision, or any conditions included therein, in accordance with the State Administrative Tribunal Act 2004 and the Planning and Development Act 2005, if an adverse decision is made.

**Financial/Budget Implications:**

Not applicable.

**Regional Significance:**

Not applicable.

**Sustainability implications:**

Not applicable.

**Consultation:**

The proposal was advertised for public comment for a period of 21-days, from 21 June 2006 to 12 July 2006. A sign was placed on site and an advertisement was placed in the local newspaper, which invited public comment on the proposal. Five submissions of objection were received, including a petition (10-signatures). The various issues raised during the advertising period are outlined below:

- Parking & Traffic concerns;
- Devaluation of adjoining properties;
- Short stay accommodation use of building
- Possible noise & antisocial behaviour;
- Creating a precedent;
- Location of the proposal;
- Use of a website for advertising purposes.

## **COMMENT**

### **Submission of Planning Application for Planning Approval**

The need to lodge an application came as a consequence of a complaint in terms of the use of the site. An application for Planning Approval was made and advertising of the proposal was carried out, which resulted in a number of objections to the current use of the site. These issues are highlighted further in this report.

### **Response to objections**

There were a number of issues raised during the consultation process and these are addressed below:

#### Parking & Traffic

Concerns were raised in regard to the shortage of parking spaces on the site and the traffic impact on Foston Drive.

Comment:

There is no parking standard prescribed for a land use of this type.

#### Devaluation of adjoining properties

No evidence was submitted in support of this objection.

#### Use of building

Concerns were raised that although the accommodation is for overseas visitors/travellers the building could also be used for other uses such as safe houses, prison release rehabilitation and drug rehabilitation.

Comment:

Planning Approval for a land use applies to the land and not the applicant of the proposal. That is, once the land use commences, that use could be operated by any future owner of the land. The applicant has advised that there may be up to eight visitors, all of whom will be related, with only one booking at any one time. However, as outlined above, there is no restrictions proposed that would limit use of the site to single families only. Consequently, the application is being determined on the basis that there could either be a single family or a group of unrelated people occupying the building.

#### Noise & Antisocial Behaviour

Several objections suggest that as the occupiers of the short stay accommodation will be transient, there is an increased risk for security, theft, noise disturbance and anti-social behaviour.

Comment:

The concerns of the adjoining residents are noted, however, the users of the short stay accommodation will have to abide normal laws, which govern any residential premise.

#### Create a precedent

There has been concern that the short stay accommodation will create a precedent, where approval of this proposal could be seen as encouraging other landowners to consider other business opportunities in the area.

Comment:

Although this concern is noted, each application is assessed on its own individual planning merits having regard to the purposes and objectives of the relevant zone and the orderly and proper planning of the locality.

In this instance, it is recommended that the proposal be refused on the basis that the proposed unlisted land use is inconsistent with the purpose and objectives of the Residential Zone and would be contrary to the orderly and proper planning of the locality.

#### Location of the proposal

There have been concerns raised about the suitability of the proposal within the residential area.

Investigation of the surrounding area has revealed that the prevailing land use is residential. The predominant density coding is R20, which is considered to be a "low density coding" under the RDC. The nearest commercial centre is located approximately 1 km away (Glengarry Neighbourhood Shopping Centre) with the Glengarry Primary School approximately 500 metres away.

The use of a property for the purposes of short stay accommodation is considered to be a purely commercial undertaking. Unlike a bed and breakfast, where the owners of the property reside in the dwelling, this dwelling is vacant unless it is being used for short stay accommodation purposes.

Comment:

It is considered that the proposed unlisted land use is inconsistent with the purpose and objectives for the Residential Zone. Such a use would be more appropriate in mixed use zones or commercial zones.

#### Use of a website

The issue of advertising the short stay accommodation on the Internet has raised doubts about the potential client base.

Comment:

This issue is noted, however, the method of advertising the short stay accommodation is not a planning consideration.

## Proposed Use

The City undertook a review of its position in relation to the proposed use of No. 17 Foston Drive for short stay accommodation based on the likelihood that families may be staying at this property. In considering the correspondence submitted by the applicant in support of the application, the following points were noted:

- (a) the MRS Form 1 – Application for Approval to Commence Development identified the proposed land use as "Short Stay Accommodation";
- (b) wording used in the "Standard Terms & Conditions" contract which is to be signed by visitors, as identified in the applicant's letter dated 19 June 2006, does not place any restriction on the users of the building - that is, for families only;
- (c) the only restriction in the contract is that the maximum number of people that can be accommodated in the building is restricted to eight; and
- (d) advertising of the site on the web makes reference to a maximum of eight people only, with no restriction indicating that only families are permitted to stay there.

Legal advice was sought in relation to the consequences of a single family occupying the building rather than a group of up to 8 unrelated people. Having regard to this advice, the proposed use of the site was seen to be similar to a "Residential Building" but cannot be categorised as a "Residential Building". Therefore, it is considered that the application should be treated as an unlisted land use, as it cannot be reasonably determined as falling within any of the use categories identified in Table 1 – The Zoning Table of the DPS2.

If Council accepts that position, then Clause 3.3 of the DPS2 requires to the Council to make a determination on the suitability of the proposed use within that Zone, having regard to the objectives and purposes of that zone as follows:

*If the use of the land for a particular purpose is not specifically mentioned in the Zoning Table and cannot reasonably be determined as falling within the interpretation of one of the use categories the Council may:*

- (a) determine that the use is consistent with the objectives and purposes of the particular zone and is therefore permitted; or*
- (b) determine that the proposed use may be consistent with the objectives and purpose of the zone and thereafter follow the procedures set down for an 'A' use in Clause 6.6.3 in considering an application for planning approval; or*
- (c) determine that the use is not consistent with the objectives and purposes of the particular zone and is therefore not permitted.*

## Purposes and Objective of the Residential Zone

The purpose and objectives of the Residential Zone are set out in Clause 3.4 of the DPS2. For ease of reference, that clause has been reproduced below:

*The Residential Zone is intended primarily for residential development in an environment where high standards of amenity and safety predominate to ensure the health and welfare of the population.*

*Residential development is provided for at a range of densities with a variety of housing to meet the needs of different household types. This is done through application of the Residential Planning Codes (R-Codes), and the allocation of a residential density code to an area of land.*

*Cultural and recreational development may be located where the Council considers the same to be appropriate in residential neighbourhoods within the Residential Zone.*

*The objectives of the Residential Zone are to:*

- (a) maintain the predominantly single residential character and amenity of established residential areas;*
- (b) provide the opportunity for grouped and multiple dwellings in selected locations so that there is a choice in the type of housing available within the City; and*
- (c) provide the opportunity for aged persons housing in most residential areas in recognition of an increasing percentage of aged residents within the City.*

The purpose of the Residential Zone is intended primarily for residential development. Residential Development is to be provided for with a variety of dwelling types to meet different household types. This is to be achieved through the application of the R-Codes which provide for a range of densities (R10-R160) and dwelling types (single house, grouped dwellings, multiple dwellings, aged or dependent person dwellings and single bedroom dwellings).

The site and the surrounding locality are zoned Residential with a density coding of R20. The Zoning Table – Table 1 of the DPS2 identifies single dwellings as a "P" or permitted land use. Grouped Dwellings, Multiple Dwellings, and Special Purpose Dwellings (Ancillary Accommodation, Aged or Dependant Persons' Dwellings and Single Bedroom Dwellings) are only permitted within this zone at Council's discretion.

All these dwelling types are "dwellings", which are required by the R-Codes definition to be:

*"...used for the purpose of human habitation on a permanent basis..."*

The R-Codes or the DPS2 do not define what habitation on a "permanent" basis is. Several decisions made through the State Administrative Tribunal have sought to clarify this matter. In the hearing between The Owners of Strata Plan 18449 and City of Joondalup [2006] WASAT 101, the following statement was made in the decision:

- 23 *Similarly, in this instance, "residential" must be taken to mean the **use of a building for one's usual place of abode on a permanent basis or for a considerable time.** Therefore, the term "extended stay residential", is in itself a definition promoting the use of buildings as the occupier's usual place of abode for a considerable period of time. This is further reinforced by the temporal cap of up to two years, which is **considerably longer than some residential leases offered in Western Australia for buildings categorised as "single house", "grouped dwelling" and "multiple dwelling"....***

Note: emphasis added for this report.

The standard residential lease varies, but is generally for three months or longer. The proposal before Council seeks to provide accommodation on a short term basis, for a period of between

7 days and 60 days. It would be expected that neither the occupants of the building nor the residents of the locality would see the use of this building being:

*"for ones usual place of abode on a permanent basis or for a considerable time."*

Therefore, it is considered that the use of a site for temporary accommodation would not meet the primary purpose of the Residential Zone, which could be interpreted to mean the provision of housing for human habitation on a permanent basis or a considerable period of time.

In terms of objective 3.4(a) of the Residential Zone, the proposed change of use will not change the character of the dwelling and as such, the locality. However, the short stay nature of the use of the site may affect the amenity of the established residential area. This would be in terms of the surrounding residents expectations of the:

- perceived character of the locality; and
- effect of the proposed use on the amenity of the area.

In relation to Objectives 3.4 (b) and (c) of the DPS2, these are not relevant in this matter as they relate to other forms of residential development that are covered by the R-Codes.

Having regard to the requirements of Clause 3.3 of the DPS2, it is considered that the proposed development is not consistent with the purposes and objectives of the Residential Zone and therefore, should be treated as a use which is not permitted within the Residential Zone.

Although Council may resolve that the use is not permitted (prohibited use) in the Residential Zone, such a resolution is still subject to review through the State Administrative Tribunal (SAT). On that basis, it is considered that the refusal should also address the issue of location of the proposed use, as discussed in the main report.

## **CONCLUSION**

The proposed use has the potential to have a local impact on the surrounding properties. However, the nature of the proposed operation when measured against the purpose and objectives of the Residential Zone results in a proposed use that would be inconsistent with the purpose and objectives of the Residential Zone. Consequently, the application for Planning Approval should be refused.

Having regard to the legal advice that has been sought, comments received and the intent of the zone as described in the DPS, a revised recommendation is presented for consideration by Council which:

- (i) *identifies that the proposed use is an unlisted land use;*
- (ii) *determines that the unlisted land use is not consistent with the objectives and purposes of the particular zone and is therefore not permitted; and*
- (iii) *identifies that the location of this type of unlisted land use is inappropriate for this location.*

## **ATTACHMENTS**

- |              |                                    |
|--------------|------------------------------------|
| Attachment 1 | Locality Plan                      |
| Attachment 2 | Development Plans                  |
| Attachment 3 | Applicant's response to objections |

## **VOTING REQUIREMENTS**

Simple Majority

## **RECOMMENDATION**

**That Council:**

- 1 DETERMINES under Clause 3.3 of District Planning Scheme No 2 that:**
  - (a) Short Stay Accommodation is deemed to be an unlisted use; and**
  - (b) The proposed use does not meet the objectives and purpose of the Residential Zone, and therefore, is not a permitted land use.**
- 2 Subject to Part 1 above, REFUSES the application for planning approval received on 26 April 2006, submitted by Karen Hope for the proposed change of land use from a Single House to an unlisted land use on Lot 102 (17) Foston Drive Duncraig as:**
  - (a) the proposed unlisted land use is not a permitted land use under clause 3.3(c) of District Planning Scheme No. 2 as the proposed use is not consistent with the purpose and objectives for the Residential Zone;**
  - (b) having regard to the orderly and proper planning of the locality, the proposed unlisted land use is considered inappropriate having regard to the proposed use and its location within a single residential area.**
- 3 Advises the submitters of its decision.**

*Appendix 16 refers*

*To access this attachment on electronic document, click here: [Attach16agn190906.pdf](#)*