



Application for a Certificate of Lawfulness

Carlene Macnair
148B High Street,
Dunbar, EH42 1JJ

September 2023



TABLE OF CONTENTS

1. Introduction	4
2. Property Description and Surroundings	5
3. Determining Matters: Certificate of Lawful Existing Use or Development (CLEUD)	6
4. Material Change of Use: Short term Lets.	8
4.1. Relevant Legislation Regarding Material Change of Use:	8
4.2. Use Classes Order Regarding Material Change of Use.	8
4.3. Relevant Planning Case Law Regarding Material Change of Use.	8
4.4. Edinburgh Local Policies	10
4.5. Relevant Appeals and Certificate of Lawfulness Applications on Short-term Residential Letting	9
5. Assessment:	12
5.1. Character of the New Use and of the Wider Area	12
5.2. Size of the Property	12
5.3. Pattern of Activity Associated with the Use	12
5.4 Nature and Character of Any Services Provided	12
Relevant cases	12
6. Conclusion.....	14

1. INTRODUCTION

STL solutions has been asked to provide a planning statement in support of this application to the East Lothian Council (“the Council”) by Carlene Macnair (“the Applicant”) for the Certificate of Lawfulness of Existing Use or Development (“CLEUD”) in respect of the use of the subject property (“the property”) in their ownership at 148B High Street, Dunbar, EH42 1JJ.

The purpose of this application is to demonstrate as described in Section 150(2) of the Town and Country Planning (Scotland) Act 1997 (as amended), (“The Planning Act”), that the use of the property as short-term let visitor accommodation does not constitute development as no material change of use has taken place.

The property is used for short term residential letting purposes and has been used continuously for this purpose since 27th June 2018.

The property is indicated on the Site Location plan and Floor Plan submitted in support of this Application.

2. PROPERTY DESCRIPTION AND SURROUNDINGS

The property is a two-bedroom flat situated on the second floor of a tenement block in the High Street of Dunbar. Access is obtained through a shared main door and a communal stairwell, which is shared with two other privately owned properties. The flat features two bedrooms, one bathroom, a kitchen/diner, and a lounge. It offers a comfortable and well-maintained living space, recently upgraded and kept in good order. The property is ideally located in the town, within walking distance of all local amenities in Dunbar.

The High Street of Dunbar is predominantly commercial, with shops, newsagents, bars, restaurants, and cafes. The vibrant street remains lively throughout the day and evening. Public transport options, including buses to other towns in East Lothian and Edinburgh, as well as rail services to Edinburgh, Berwick Upon Tweed, and Newcastle, are easily accessible. These transportation choices contribute to the property's accessibility and connection to the broader East Lothian area.

The property is accessed through a shared entrance, ensuring convenience and security for guests. Nuisance to neighbours is minimised by providing guests with a key safe located outside the property door. Guests receive a unique code to access the key safe, allowing them to independently enter the property without direct interaction. The check-in time is fixed at 4pm, ensuring guests arrive during sociable hours while minimising any disturbance to neighbours.

The property is used solely for short-term rentals, accommodating varying occupancy levels throughout the seasons. It caters to both corporate stays and tourist-related stays. The property integrates well with the character and activities of the wider area, offering a diverse range of accommodation options for visitors, including self-catering properties, hotels, and B&Bs. This diversity enriches the appeal and character of the area, catering to the needs of both visiting workers and travellers.

Parking for the property is in accordance with street parking restrictions or long-stay car parks. Bag storage is arranged upon special request. Cleaning of the property is professionally scheduled, with thorough cleaning conducted after each stay. For longer stays, housekeeping occurs every seven days. Maintenance tasks are addressed during designated check-out and check-in times, ensuring minimal disruption to guests and neighbours.

3. DETERMINING MATTERS: CERTIFICATE OF LAWFUL EXISTING USE OR DEVELOPMENT (CLEUD)

While a Certificate of Lawful Existing Use or Development (CLEUD) is different from a planning permission, these certificates are nevertheless still governed by The Town and Country Planning (Scotland) Act 1997. (“The Planning Act.”)

The definition of “lawfulness” and the provisions governing applications for a CLEUD are set out in Sections 150-153 of The Planning Act with further guidance provided in Annex F of Circular 10/2009 “Planning Enforcement”.

Section 150 of The Planning Act sets out the provisions for Certificates of Lawfulness.

Section 150(1) states that if any person wishes to ascertain whether:

- a) *any existing use of buildings or other land is lawful,*
- b) *any operations which have been carried out in, on, over or under land are lawful, or*
- c) *any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful.*

He (sic) may make an application for the purpose to the planning authority specifying the land and describing the use, operations or other matter.

Section 150(2) of The Planning Act goes on to clarify that uses and operations may be considered lawful if:

- a) *no enforcement action may then be taken in respect of them (**whether because they did not involve development; or require planning permission;** or because the time for enforcement action has expired or for any other reason), and*
- b) *they do not constitute a contravention of any of the requirements of any enforcement notice then in force.*

In this case under part (a) the first and second criteria (because it did not involve development or require planning permission) are the reasons upon which this application is being made. It is considered that the use of the flat as short term let visitor accommodation (sui generis) does not constitute a material change of use from being operated as a residential flat (sui generis). Further, under part (b) there is no enforcement notice currently outstanding in respect of this property.

The detailed arguments why it is considered that this position holds for the subject property are set out below in section 4 of this supporting Planning Statement ‘Material Change of Use.’

Further advice on the determination of CLEUDs is contained within Annex F ‘Certificates of Lawful Use or Development’ within Scottish Government Planning Circular 10/2009: Planning Enforcement.

The annex helpfully notes at paragraph 4 that the first and second criteria under section 150(2) are to be treated as one and the same. Consistent with the arguments presented in this application (see 3.1.6), paragraph 4 notes the following:

“If no enforcement action may then be taken in respect of them, whether because they did not involve development or require planning permission, or because the time for enforcement action against them has expired, or for any other reason”.

Paragraphs 16 and 21 of the same annex also offer useful commentary on the type of decision-making practices Planning Authorities need to employ when determining applications for CLEUDs.

Paragraph 16 notes the following:

“In determining an application under section 150 the planning authority will have to address the question whether, on the facts of the case and the planning law applicable to the site, the specified use, operational development or failure to comply with a condition is lawful”.

Paragraph 21 meanwhile states:

“Moreover, the applicant’s own evidence does not need to be corroborated by independent evidence in order to be accepted. If the planning authority has no evidence to contradict or otherwise make the applicant’s version of events less than probable, this is not in itself a valid reason to refuse the application”.

As detailed in the next section of this Planning Statement, the recent Scottish Government Planning Circular ‘1/2023 Short Term Lets and Planning’ clarifies that the making of a short term let control area does not have a retrospective effect on existing short term lets within the boundaries of such areas. By contrast, rather than automatically deeming all existing short term lets as material changes of use requiring planning permission, the Planning Authority will still need to assess whether individual existing short term lets are in fact material changes of use on a case-by-case basis.

Paragraphs 16 and 21 of Planning Circular 10/2009 confirm to Planning Authorities that the existence of a short term let control area alone is not justification for refusing to issue CLEUDs when these have been applied for under Section 150(2) and where it is considered by the applicant that no material change of use has taken place.

By contrast, any assessment as to whether a material change of use has taken place in respect of such properties must consider in detail the fact and degree of any change. It would therefore be inappropriate for the Planning Authority to rely upon the formation of a short term let control area to automatically and without further justification deem any change of use within its territory as a material change of use requiring the benefit of planning permission.

4. MATERIAL CHANGE OF USE: SHORT TERM LETS.

4.1. RELEVANT LEGISLATION REGARDING MATERIAL CHANGE OF USE:

Section 28(1) of the Planning Act:

Section 28(1) of the Planning Act is a fundamental clause that states, “planning permission is required for the carrying out of any development of land.” This provision makes it clear that any development activity on land must be approved and guided by the proper planning permission.

Clarification of Development: Section 26(1)

The Act further defines what development means under section 26(1), noting that “‘development’ means the carrying out of building, engineering, mining, or other operations in, on, over or under land, or the making of any **material change** in the use of any buildings or other land.” This comprehensive definition includes various aspects of construction and usage changes and sets the stage for understanding when planning permission is necessary.

4.2. USE CLASSES ORDER REGARDING MATERIAL CHANGE OF USE.

The Use Classes Order indicates that a residential flat falls under a sui generis use and does not fall within Use Class 9: Houses. Sui generis uses are regarded as those that do not clearly fall within any use class and require planning permission for changes of use to or from such uses.

The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (as amended) defines a flat as “a separate and self-contained set of premises whether or not on the same floor and forming part of a building from some other part of which it is divided horizontally.”

Although a flat and a house do not belong to the same use class, they share some similarities. Use Class 9: Houses includes use for a house (other than a flat) and limited use as a bed and breakfast or guesthouse. Planning Circular 1/1998 states that when paying guests are accommodated in a house on a bed and breakfast or guest house basis within modest thresholds, there is no material change of use as the character and impacts remain unchanged.

There is no specific use class for short-term residential letting, and if it is considered that a material change of use has occurred, it falls under a sui generis use.

4.3. RELEVANT PLANNING CASE LAW REGARDING MATERIAL CHANGE OF USE.

Several court cases and appeal decisions have shed light on the complexities involved in determining a material change of use. The English Court of Appeal Case of Sheila Moore v (1) Secretary of State for Communities and Local Government and (2) Suffolk Coastal District Council (2012 EWCA CIV 1202) and appeal decisions such as 11 Stevenson Drive (CLUD-230-2007) and others have set precedence and provide substantial insight into the decision-making process.

Cameron v Scottish Ministers [2020] is the relevant decision by the Court of Session. This was an appeal against a decision by a reporter in relation to a property which could accommodate up to 30 people in 8 bedrooms. The

reporter held that the provision of short-stay accommodation in those premises amounted to a material change of use from the previous dwellinghouse use. The Court held this was an issue of fact and degree for the reporter.

In Cameron, the Court of Session referred to the decision of the English Court of Appeal in *Moore v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1202, that it was not correct to say either that using a dwelling for commercial holiday lettings would never amount to a material change of use or that it would always amount to a material change of use. Rather, in each case it would be a matter of fact and degree and would depend on the characteristics of the use as holiday accommodation.

In Moore, the Court upheld the inspector's decision that there had been a material change of use (the inspector is the equivalent in England and Wales of the Reporter). However, the key issue for the inspector was the use of the property by non-pre-formed groups of people, for example a yoga group of 15 people, which distinguished it from occupation by single households or larger family groups.

Therefore, in determining the materiality of the change, the question is whether short stay occupation necessarily has different planning considerations. Short stay occupation involves people living in the property, just for shorter periods. However, that does not necessarily mean the nature of the occupation is different. There are not necessarily greater movements of people, or different times of movement. More permanent residents can have vastly different movements depending on their employment, leisure interests, family circumstances, health, etc. For example, an offshore worker might occupy his/ her house for a few weeks and then work offshore for a few weeks; a family with teenage children might enter and leave the house many times during the day and night; a single person with care needs might be visited by carers several times a day. Users of a self-catering property, which use the property for a variety of purposes, including short term residential needs for work purposes, are therefore unlikely to exhibit markedly different characteristics to more permanent residents. Disruptive or anti-social behaviour is just as likely in residential use as self-catering use. Servicing of self-catering accommodation is also not a differentiator, as some residential occupiers use cleaners on a regular basis, especially if the occupier is in poor health.

4.4. RELEVANT APPEALS AND CERTIFICATE OF LAWFULNESS APPLICATIONS ON SHORT-TERM RESIDENTIAL LETTING

Most relevant planning appeals have involved enforcement notices. In those cases, the enforcement notice has been served after the planning authority have investigated and reached the conclusion that there has been a material change of use and that planning permission is required. It is therefore unsurprising that most planning appeal decisions conclude there has been a material change of use given these are normally triggered by complaints.

The need to assess the facts and circumstances of the individual cases is illustrated by the decision in the enforcement notice appeal for *Flat 2, 5 Castle Wynd South, Edinburgh (ENA-230-2193 9 November 2021)*. The Reporter concluded the change of use from residential dwelling to short stay commercial visitor accommodation was not a material change of use:

"Taking all of these matters together, I consider that in this instance, on balance, the number and nature of arrivals and departures to and from the flat, the likelihood of increased noisy activity for neighbouring properties and

activity as a result of servicing would not be at a level materially different to the property in long term use. In my view this does not constitute a material change in use which would require planning permission. Accordingly, I conclude that a breach of planning control has not taken place. The appeal therefore succeeds on appeal ground c)."

This appeal decision is a reminder that, in law, planning permission is not necessarily required for a change of use to short-term holiday accommodation, as it depends on the facts and circumstances of each individual premises.

Other relevant cases are as follows:

108 Crewe Road West - 20/04697/CLP

In December 2020, The City of Edinburgh Council granted a certificate of lawfulness to a flat located on the ground floor with 2 bedrooms, noting *"The property has only two bedrooms and occupancy will be limited, and it has its own direct access to the street. The use as detailed will not be substantially different from the established residential character of the area."* This property had neighbouring properties above and the application was based on a 4-guest maximum and a 2-night minimum. No upper limit on activity in terms of frequency or occupancy levels was required.

24 Royal Mile Mansions - ENA-230-2237 April 2022

The appeal was successful on ground (c) because the appellant demonstrated that the alleged breach did not constitute a material change of use. The property in question was a one-bedroom flat on the second floor being used for short-stay commercial visitor accommodation, and the council argued that this constituted a material change of use, causing disturbance to the established residential character of the building.

The appellant countered the council's argument by pointing out that the use of the property was not materially different from what one would reasonably expect from the lawful use of a one-bedroom flat.

In making the decision, the DPEA considered factors such as the property's character, manner of lettings, frequency of arrivals and departures, and intensity of noise and disturbance. The appellant's evidence showed that the property was let out on average 15 days per month with a maximum occupancy of three guests, making it comparable to permanent or long-term residential use. The property's layout and location also mitigated potential noise and security concerns. Therefore, the authority concluded that the use of the property as short-stay commercial visitor accommodation did not constitute a material change of use.

17/04252/CLE – 1/1 South Gyle Mains, Edinburgh (Appeal Ref: CLUD-230-2004)

The City of Edinburgh Council refused a Certificate of Lawfulness for the short-term letting of a residential flat at South Gyle Mains, arguing that it represented a material change of use. However, the decision was overturned on appeal, and the Certificate of Lawfulness was granted. The Appeal Reporter concluded that the use for short-term letting was not substantially different from that of a residential flat, rendering the Council's reason for refusal unfounded.

18/02508/CLE – 11 Stevenson Drive, Edinburgh (Appeal Ref: CLUD-230-2007)

The City of Edinburgh Council failed to determine an Application for a Certificate of Lawfulness within the statutory period. During the appeal process against non-determination, the Council indicated its intention to refuse the application without providing reasons. Nevertheless, the appeal was successful, and the Certificate of Lawfulness was granted. The Reporter stated that the use of the property for residential letting was in harmony with its character and location and did not amount to a material change of use.

19/02399/CLE – 1 Crichton Place, Edinburgh (Appeal Ref: CLUD-230-2011)

The City of Edinburgh Council refused to issue a Certificate of Lawfulness (existing use) for the use of the property for short term residential letting. This Application related to a ground and basement floor; two-bedroom flat situated on Crichton Place. This decision was again overturned on Appeal and a Certificate of Lawfulness granted. In her decision, Reporter Craggs noted that the property has its own access directly onto the street and there is no direct interaction between the occupants of the property and those of the upper flats.

Reporter Craggs was therefore clear that a private access into the property was a key reason for allowing the Appeal. In her conclusion, Reporter Craggs noted that: *"...I find that the existing use is in keeping with the nature and size of the property and that there is no significant disturbance or impact from the use. I therefore conclude that no material change of use has taken place."*

18/01049/CLP – 103 Restalrig Road, Edinburgh (Appeal Ref: CLUD-230-2006)

The City of Edinburgh Council denied a Certificate of Lawfulness for the proposed use of a dwelling house as a holiday let, citing insufficient information provided. On appeal, the decision was allowed, and the Certificate of Lawfulness was granted. The Reporter determined that the proposed use would not constitute a material change of use and would align with the existing use.

17/02880/CLP – 20 Pirniefield Grove, Edinburgh (Appeal Ref: CLUD-230-2003)

The City of Edinburgh Council refused a Certificate of Lawfulness for the proposed use of a dwelling house as holiday lets. Nonetheless, the decision was overturned on appeal, and the Certificate of Lawfulness was granted. The Reporter found the Council's reason for refusal to be unsubstantiated.

5. ASSESSMENT:

In making this assessment, the Applicant has carefully considered the factors that may constitute a material change of use. The key factors are:

- The character of the new use and of the wider area
- The size of the property
- The pattern of activity associated with the use including numbers of occupants, the period of use, issues of noise, disturbance, and parking demand, and
- The nature and character of any services provided.

5.1. CHARACTER OF THE NEW USE AND OF THE WIDER AREA

The property is accessed through a shared main door, utilising a communal stairwell. While the stairwell is shared with two other properties, both of which are privately owned, the access arrangement minimises any potential nuisance to neighbours. The property is solely used for short-term rentals and is not used for personal purposes by the Applicant. The property integrates well with the character and activities of the wider area, offering a diverse range of accommodation options for visitors. The High Street of Dunbar is known for its lively atmosphere and the property's central location contributes to the accessibility of local amenities and transportation options.

5.2. SIZE OF THE PROPERTY

The property has two bedrooms and can comfortably accommodate a maximum of 4 occupants. This maximum occupancy is consistent with a residential property of its size in the area, ensuring that the property does not exceed the typical capacity of similar dwellings.

5.3. PATTERN OF ACTIVITY ASSOCIATED WITH THE USE

The property has a minimum stay requirement of 3 nights, which mirrors traditional residential activity and discourages potential disturbances associated with high turnover short-term lettings. The property attracts a mix of corporate stays and tourist-related stays, with varying occupancy levels depending on the seasons and local events. The check-in time is set at 4 pm to ensure guests arrive during sociable hours. There are no devices to monitor use, but the Applicant maintains an active role in screening and vetting potential guests, as well as conducting regular check-ins to ensure adherence to house rules. The property's operations align closely with those of a residential property, offering a quiet and comfortable environment for guests.

5.4 NATURE AND CHARACTER OF ANY SERVICES PROVIDED

The property does not provide any special services, such as concierge or management services. However, guests are thoroughly screened and vetted through professional booking agents and channels prior to booking. The property has house rules in place that are communicated to guests during the booking process and upon arrival. These rules include no smoking, no parties, no pets, and respect for neighbours. The Applicant maintains a proactive approach in ensuring minimal disruption to guests and neighbours by conducting regular check-ins and

seeking guest feedback. Cleaning and maintenance activities are scheduled during check-out and check-in times to minimise interference with guests and neighbours.

RELEVANT CASES

This property shares similar features to several appeal decisions help regarding flats seeking a Certificate of Lawfulness. One such case is that of *1/1 South Gyle Mains, Edinburgh, (Appeal Ref: CLUD 230-2004)*. Here, the City of Edinburgh Council refused a Certificate of Lawfulness for the short-term letting of a residential flat at South Gyle Mains, arguing that it represented a material change of use. However, the decision was overturned on appeal, and the Certificate of Lawfulness was granted. The Appeal Reporter concluded that the use for short-term letting was not substantially different from that of a residential flat, rendering the Council's reason for refusal unfounded.

Furthermore, the case of *24 Royal Mile Mansions (ENA-230-2237)* is relevant here as the Applicant has taken reasonable steps to mitigate unreasonable noise. Here, the property was a one-bedroom flat on the second floor being used for short-stay commercial visitor accommodation, and the council argued that this constituted a material change of use, causing disturbance to the established residential character of the building. The appellant countered the council's argument by pointing out that the use of the property was not materially different from what one would reasonably expect from the lawful use of a one-bedroom flat. In making the decision, the DPEA considered factors such as the property's character, manner of lettings, frequency of arrivals and departures, and intensity of noise and disturbance. The appellant's evidence showed that the property was let out on average 15 days per month with a maximum occupancy of three guests, making it comparable to permanent or long-term residential use. The property's layout and location also mitigated potential noise and security concerns. Therefore, the authority concluded that the use of the property as short-stay commercial visitor accommodation did not constitute a material change of use.

Additionally, the case of *103 Restalrig Road, Edinburgh (appeal ref: CLUD-230-2006)* is relevant. Here, the City of Edinburgh Council denied a Certificate of Lawfulness for the proposed use of a dwelling house as a holiday let, citing insufficient information provided. On appeal, the decision was allowed, and the Certificate of Lawfulness was granted. The Reporter determined that the proposed use would not constitute a material change of use and would align with the existing use.

These cases demonstrate that a Certificate of Lawfulness for short-term visitor accommodation should be granted when the property's use aligns with the established residential character of the area, there are no significant changes to the property's use, and proper consideration is given to the specific characteristics and contextual elements of the property.

6. CONCLUSION.

Given the fact and degree of the change that has taken place here is minimal when compared with a permanent residential use, it is the view of the Applicant that 'development' as set out in section 26 of the Planning Act did not take place here when this change was initiated in 27th June 2018.

It follows that if no material change of use has taken place, no development has taken place, and the Planning Authority can confirm this by issuing a certificate of lawfulness confirming its existing use as short- term let visitor accommodation. By contrast, the Planning Authority is required to consider matters of fact and degree in determining whether a material change of use here has in fact taken place.

As explained in appendix F of Planning Circular 10/2009, unless the Council has reason to reach a different conclusion on those matters assessed in section 5 of this planning statement, the logical outcome of this application is that a CLEUD should be issued in the Applicants' favour.

It is therefore respectfully requested that this Certificate of Lawful Use or Development be granted.