



Application for a Certificate of Lawfulness Use

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51D High Street, Dunbar, East Lothian, EH42 1EW

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S T L

SOLUTIONS



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1. INTRODUCTION

STL solutions has been asked to provide a planning statement in support of this application to the City of Edinburgh 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 51D High Street, Dunbar, East Lothian, EH42 1EW.

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 purpose and has been used continuously for this purpose since 1st July 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 stylish third-floor 2-bedroom flat located in a tenement block on the High Street in Dunbar. It offers a modern interior and is fully furnished to a high standard. The spacious flat can accommodate up to four people and is within walking distance of all amenities in Dunbar. There are excellent public transport links to Edinburgh and other towns in East Lothian via bus or train.

The immediate vicinity of the property is predominantly commercial, with a variety of pubs, restaurants, cafes, and shops on the bustling High Street. The street is busy during the day and at night. There are convenient public transport options available and Dunbar train station provides connections to Edinburgh, Berwick upon Tweed, and Newcastle.

The property is accessed through a shared main door and a shared stairwell with two other properties. It does not have any special access features. The flat is solely used for short term lets and offers a comfortable and convenient stay for guests. The property integrates well with the character and activities of the wider area, providing a diverse and affordable accommodation option for visitors and temporary workers in Dunbar where there is a shortage of hotel beds.

To ensure minimal disruption to guests and neighbors, guests are provided with a unique code to access the key safe box located at the entrance. There is no direct interaction during check-in, allowing for flexibility and safety. The property strictly adheres to a check-in time of 4pm, and house rules include no smoking, no hen/stag dos, no parties, and no excessive noise to show consideration to neighbours.

The property comfortably accommodates a maximum of four guests in its two bedrooms, and the duration of stays can range from a minimum of 3 nights in low season to a maximum of 28 days. Potential guests are screened through a professional holiday lettings agency, and house rules are enforced through regular check-ins, communication with guests, and seeking their feedback to continuously improve the stay experience. Cleaning and maintenance are scheduled on a regular basis, with a professional cleaning company attending to the property 3-4 times a month.

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 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 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 annexes also offers useful commentary on the type of decision-making practice Planning Authority’s 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 that Planning Authority’s 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 considered in this guidance 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 and stairwell. However, it has a private entrance and is located on the third floor, minimising potential disruption to neighbours. The property is typically used for short-term residential letting purposes and is not occupied all year round. The nature and character of the area and the property align with the appeal decision of 24 Royal Mile Mansions (ENA-230-2237), which concluded that the use of a similar property as short-stay commercial visitor accommodation did not constitute a material change of use. The property's operation and occupancy levels are consistent with a typical residential property.

5.2. SIZE OF THE PROPERTY

The property consists of two bedrooms and spans approximately 84 square meters. The maximum occupancy is limited to four occupants, which is consistent with the typical residential properties in the area. The property's size and maximum occupancy align with the appeal decision of 108 Crewe Road West (20/04697/CLP), where a similar property with two bedrooms and a four-guest maximum was granted a certificate of lawfulness by the Council.

5.3. PATTERN OF ACTIVITY ASSOCIATED WITH THE USE

The property is available for short-term rental for a minimum of three nights and a maximum of 28 days. The average duration of stays is seven nights. The property attracts a mix of holiday and business rentals, with varying occupancy levels throughout the year. The property's use aligns with the appeal decision of South Gyle Mains (CLUD-230-2004), which concluded that the use of a flat as a short-term let is not materially different from using it as a residential flat. The applicant has implemented strict house rules, including no smoking, no parties, and no excessive noise, to manage guest behavior and minimize disruption to neighbors.

5.4 NATURE AND CHARACTER OF ANY SERVICES PROVIDED

Guests are screened through a professional holiday lettings agency, and the property is professionally cleaned and maintained. The property does not have any electronic monitoring devices, but the host actively communicates with guests to ensure adherence to house rules and address any concerns. The property's use and services provided align with the appeal decision of Flat 2, 5 Castle Wynd South (ENA-230-2193), which determined

that the change of use from a residential dwelling to short-stay commercial visitor accommodation was not a material change of use.

RELEVANT CASES

In assessing the property at 51D High Street, Dunbar, East Lothian, EH42 1EW, and considering its eligibility for a Certificate of Lawfulness, several relevant legal cases provide valuable insights and comparisons. Firstly, the property's use as short-term residential letting aligns with the case of *24 Royal Mile Mansions (ENA-230-2237)*. This case concluded that the conversion of a property into short-stay commercial visitor accommodation did not constitute a material change of use. Similarly, the property at 51D High Street, being used for short-term residential letting purposes, is consistent with a typical residential property, reinforcing the argument for granting a Certificate of Lawfulness.

Moreover, the nature and pattern of the property's use, attracting a mix of holiday and business rentals, can be aligned with the case of *South Gyle Mains (CLUD-230-2004)*. This case concluded that the use of a property as a short-term let was not materially different from using it as a residential flat. The implementation of strict house rules, including no smoking, no parties, and no excessive noise, demonstrates the efforts to manage guest behavior and minimize disruption to neighbors, aligning further with the precedent set by South Gyle Mains.

Lastly, the professional screening, cleaning, and maintenance services provided for the property at 51D High Street align with the case of *Flat 2, 5 Castle Wynd South (ENA-230-2193)*. This case determined that the change of use from a residential dwelling to short-stay commercial visitor accommodation was not a material change of use due to the continued adherence to residential standards and the absence of electronic monitoring devices. The property at 51D High Street, without electronic monitoring devices, follows a similar approach, ensuring compliance with residential norms. Considering these relevant legal cases and their similarities to the property at 51D High Street, it is evident that the property's characteristics, use, size, occupancy, nature, and services provided align with precedents supporting the granting of a Certificate of Lawfulness.

Therefore, based on the analysis of these cases, it is recommended that the East Lothian Council issues a Certificate of Lawful Use or Development in favour of applicant for the continued use of the property at 51D High Street as short-term residential letting accommodation.

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 place here when this change was initiated in July 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.