

Application for a Certificate of Lawful Use

Sandra Stuart

7 Cromwell Court, Shore street, Dunbar, East Lothian, EH42 1HN

12/2023

Supporting Images





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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 Sandra Stuart (“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 7 Cromwell Court, Shore Street, Dunbar, East Lothian, EH42 1HN. The property is owned jointly by the applicant and Gillian Smith with whose knowledge and permission the applicant makes this application.

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

2 - Property Description and Surroundings

The property is located at 7 Cromwell Court, Shore Street, Dunbar, EH42 1HN. Situated on the first floor, it is the only property on this level, with two properties above and a separate entrance for the property below. The flat is part of a residential area overlooking the historic Old Harbour Dunbar. The property features 2 bedrooms and a floor size of 50m². There is a dedicated parking bay for the flat. The property has been available for let since May 22, 2022.

The surrounding area offers convenient integration with various amenities and attractions. It is a 2-minute walk to Dunbar's East Beach and a short distance from the town's High Street. Local bus and taxi services are easily accessible, and the train station is approximately a 12-minute walk away, providing quick access to Edinburgh and other destinations. The property is also close to Dunbar's golf courses and a short drive from Muirfield and Gullane. Torness power station is approximately a 10-minute drive away.

Notable features include its proximity to the High Street for transportation options, leisure centre, and swimming pool. The property is situated on the Historical John Muir Way, adjacent to Dunbar's historical harbour, and in close proximity to pubs, restaurants, and shops.

The property is consistently occupied, usually by couples, families, or workers supporting local industries such as Torness, the offshore wind farm, and the cement works. Booking durations range from 2 to 58 days, with an average stay of 5 days. The property has a dedicated parking bay. The applicant resides nearby and is available to address any issues that may arise.

Only bookings through Airbnb or Vrbo are accepted, and guests are screened based on their scores on these platforms. The property accommodates a maximum of 4 guests, and guests are expected to be considerate towards their neighbours. The common stair entrance is equipped with an electronic lock for added security. Cleaning and maintenance are carried out with minimal disturbance to the neighbours, and the applicant has a good relationship with them.

The property provides a home-from-home style accommodation, catering to families, couples, and workers who appreciate the separate bedrooms and kitchen dining area. It offers stunning sea views of East Beach and the Old Harbour, allowing guests to enjoy a comfortable stay while supporting the local community.

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:

1. any existing use of buildings or other land is lawful,
2. any operations which have been carried out in, on, over or under land are lawful, or
3. 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:

1. 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
2. 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”.

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:

18 Spring Gardens - ENA-230-2217 - November 2022

This appeal is considered a four-storey townhouse. The property benefited from a separate front entrance door with no communal internal space linked with neighbouring properties. This property was marketed as accommodating up to eight guests. The report quashed this enforcement notice, noting "There is no indication that it has been advertised for or occupied at any point by more than eight guests or as a party or event venue. The current internal layout of the property with three double bedrooms, a single bedroom and a single sofa bed would lead me to conclude that eight guests occupying the property as a family is within the normally designed occupancy of the house."

Of note, this property had already been refused planning permission by the Council, however, the reporter concluded "Even when balanced against the refusal of the planning application my assessment of the level of bookings, associated cleaning activity, self-contained nature of the property and parking arrangements leads me to conclude that this level of activity would not be materially different to that of a normal dwellinghouse of this size. On this basis, the use of the property for short-stay commercial visitor accommodation would not result in a material change to the existing residential character of the dwellinghouse. I therefore conclude that the use of the property for short stay commercial visitor accommodation would be incidental to the use of the property as a Class 9 dwellinghouse."

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 Crighton 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 Crighton 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. Considering whether the property has had a material change of use, the Applicant has considered relevant Planning and Environmental Appeals division appeals. These appeals consider matters that may include the nature of the property, frequency and length of lets, the size of groups and the likelihood or intensity of noise or other antisocial activity.

This assessment below considers these factors:

The property, located at 7 Cromwell Court, Shore Street, Dunbar, EH42 1HN, is a 2-bedroom flat situated on the first floor. The property is accessed through a shared entrance via carpeted communal areas, with only two other properties accessed through the same door. There is no nuisance to the upstairs neighbours as the flat is the only one on the first floor. The property is situated in the historic Old Harbour Dunbar, an area known for its easy access to East Beach, the Harbours, and the local amenities. The property offers sea views of East Beach and the Old Harbour. The property is typically let to couples, families, and workers, with longer stays during the winter months. The average booking duration is 5 nights, with a range of 2 to 58 nights. The property is consistently occupied, contributing to the residential character of the area. The applicant screens guests through Airbnb or Vrbo and ensures they have a good score. House rules are in place to ensure guests are considerate of neighbours, and the property has an electronic lock for added security. The property has its own dedicated parking bay. The property is regularly cleaned and maintained, with no disturbance to neighbours.

The property is a 2-bedroom flat with a floor size of approximately 50 square metres. The maximum occupancy is advertised as 4 guests, which is consistent with a typical family unit living in a property of this type in the area.

The property has been available for short-term let since 22/05/2022. It is accessed through a shared entrance, with the flat being the only property on the first floor. Therefore no other properties' doors are passed when access the property. The property is typically occupied by couples, families, and workers, with longer stays during the winter months. The average booking duration is 5 nights, with stays ranging from 2 to 58 nights. The applicant lives nearby, has good relationships and open communication with neighbours and is therefore readily able to enforce house rules and immediately address any issues. Cleaning and maintenance activities are carried out with minimum disturbance to neighbours.

As stated, guests staying at the property are screened through Airbnb or Vrbo, increasing the likelihood that reasonable behaviour and compliance with house rules will occur at the property during bookings. The property has house rules in place to promote a peaceful and respectful environment, with a maximum occupancy of 4 guests and an emphasis on being considerate of neighbours. The applicant personally cleans the property to minimise disturbance to neighbours and maintains a good relationship with them. The property offers a dedicated car parking bay, reducing amenity issues for neighbours due to guests' cars and making arrivals and departures swifter and quieter whereby guests do not need to bring luggage long distances along adjacent footpaths etc.

5.1 - Relevant Cases

When considering the property at 7 Cromwell Court, Shore Street, Dunbar, EH42 1HN, it is important to reference relevant cases that have similarities and implications for determining potential material change of use.

The case of Flat 2, 5 Castle Wynd South (ENA-230-2193) provides valuable insights when assessing a short-stay commercial visitor accommodation for a potential material change of use. In this case, an enforcement notice was quashed upon appeal, highlighting that the change of use did not constitute a material change. The Reporter took into account factors such as arrivals and departures, potential noise and disturbance levels, and activities associated with servicing the property. The decision in this case serves as a reminder that a material change of use will not always follow where a property being operated as a short-term let. It reinforces the significance of assessing the specific circumstances of each property and its impact on the surrounding area when evaluating the suitability of a Certificate of Lawfulness. The property in the present case is operated in a modest manner, in keeping with its general residential character. The use respects the designed occupancy limits of the property, is overseen personally by the applicant, and is sympathetic to the needs of neighbours, many of whom are known to the applicant personally. The property is located in a part of the town close to the harbour and High Street which feature many commercial establishments and visitor attractions. This makes it less likely that any noise generated by arrivals or departures of guests would be noticeable given the general character of the area. Pavements adjacent to the property will already generate a level of disturbance from numbers of visitors and local residents using that route on a daily basis; some of whom may be transporting luggage to and from nearby transport links.

For properties with a shared entrance, the case of 17/04252/CLE (1/1 South Gyle Mains, Edinburgh) provides essential insights. Initially, The City of Edinburgh Council refused to grant a Certificate of Lawfulness for short-term letting of a residential flat in that case, citing a material change of use due to the shared entrance. However, the decision was overturned on appeal, with the Appeal Reporter determining that the use for short-term letting was not substantially different from that of a residential flat. This case highlights the significance of evaluating the specific characteristics and contextual elements of a property when assessing material change of use, irrespective of any shared entrance. It establishes a precedent for properties with shared access and emphasises that a Certificate of Lawfulness can be justified in some cases. The subject property is located within a shared stair, but owing to its location no other properties' doors need to be passed in order to access the property. The ground floor property below has its own entrance and the subject property does not share its landing with any other property.

Moreover, the case of 24 Royal Mile Mansions (ENA-230-2237 April 2022) is pertinent, as the appellant successfully established that the use of the property was not materially different from what would be expected lawfully, considering factors such as frequency of lettings, occupancy levels, and the property's layout and location. In particular, noise mitigation measures were found to potentially prevent there being a material change of use, especially where aspects of the property's construction or management address noise or security concerns. The subject property is well-managed and operates under strict house rules to mitigate the risk of noise or disturbance. Communal areas are carpeted, reducing noise transmission within these areas and mitigating noise concerns. There are no other properties within line of sight of the subject property's door. The building features a secured entry, and robust management and guest vetting practices ensure that short-term letting use does not

give rise to any materially different security concerns than any other lawful use would. The applicant is well placed to ensure that house rules are enforced, owing to them residing directly behind the subject property and having good relationships with neighbours who are known to them personally.

Lastly, the case of 17/02880/CLP (20 Pirniefield Grove, Edinburgh) is worth considering when assessing the use of a dwelling as a holiday let. In this case, the Council's initial decision to refuse a Certificate of Lawfulness was overturned on appeal, highlighting the importance of fair and consistent decision-making in determining material change of use. The case emphasises that a material change of use may not always universally occur when a property operates as a short-term let. It reinforces the significance of evaluating the specific circumstances of each property and its impact on the surrounding area when assessing the suitability of a Certificate of Lawfulness. The subject property creates no disturbance, is personally managed by the applicant and is operated in a manner consistent with general residential use.

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 on 22/05/2022.

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.

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.