



SHORT-TERM LETS AND THE PLANNING SYSTEM

Report by Chief Officer Place

1 PURPOSE OF REPORT

- 1.1 The purpose of this report is to inform the Committee of the role the Planning System has in regulating, or not, short-term lets. The report was requested by the Council's Local Review Body (LRB) at its meeting of 25 March 2024.

2 BACKGROUND

- 2.1 A short-term let is a form of temporary transitional accommodation, usually used for tourist or business visitors, it is not interpreted as being a more permanent form of accommodation or someone's primary residency. It is unusual for short-term lets to be built new and as a consequence they often result from a change of use from a dwellinghouse or flat. This change *may* trigger the need for planning permission.
- 2.2 The Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006 and Planning (Scotland) Act 2019, hereafter referred to as the Act, defines the meaning of development as ... 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 ... (subject to further clarifications and exemptions). The significance of this is that changing the use of a dwellinghouse or flat to a short-term let is considered development triggering the need for planning permission if it constitutes a *material change in the use of any buildings or other land* - this is not a straightforward judgment and is based on a fact and degree assessment of the specific circumstances related to the individual case. In considering such a case officers will weigh up matters such as: the occupation patterns of the property; the occupation impact on neighbours and the local area in terms of traffic movements and disturbance; and physical changes to the property.
- 2.3 The assessment is a matter of professional judgement and would more specifically consider: the type of property; the characteristics of the area it is located in; the number of bedrooms; the maximum number of guests it could accommodate at any one time; parking provision arrangements (if any); self-check in time facility (e.g. 24/7 or late at night); potential noise disturbance and increased comings and goings. If these environmental effects would be considered to be in excess of those that would ordinarily be generated by the sole use of that type/size of property as a dwellinghouse, that change of use

would be material in planning terms and would require planning permission from the Council.

- 2.4 In making that judgement, planning officers also take a precautionary approach. That means the need for planning permission from the Council, or otherwise, is based both on the information initially supplied and any additional information that is considered necessary and requested. The advice provided is also without prejudice - in instances where a planning application is not required, it is made clear that should any details change or complaints be received, the planning position will be re-visited. That approach therefore provides additional planning controls and also raises a risk of enforcement action being taken.
- 2.5 Section 26B of the Act and the Short-Term Lets Control Area Regulations came into force on 1 April 2021. The Control Area Regulations were amended by The Town and Country Planning (Short-Term Let Control Areas) (Scotland) Amendment Regulations 2022. These regulations gave Councils the power, if they wished to exercise them, to establish Control Areas, which in planning terms determines all changes of use to a short-term let are material changes of use requiring planning permission - effectively removing the need to decide if the change of use is material. Such Control Areas were conceived by the Scottish Government to assist Councils in the regulation of such uses where they are collectively causing changes in the character of a particular area, part of a town centre or street. The Council as the local planning authority does not have any evidence of there being an over provision of Short-Term Lets within any of our town centres. Nor is there any evidence of any clusters of Short-Term Lets concentrated elsewhere within Midlothian. As such, there is no current need to designate and implement any Short-Term let Control Areas within Midlothian. However, that position will be kept under review. That being in contrast to, for example, parts of Edinburgh and Glasgow where there are a very large number of concentrated Short-Term lets. That situation has led to considerable noise and disturbance issues for local residents. It has also had negative effects on the provision of properties available for sale and for long term rent. In that type of situation, the implementation of Short-Term let Control Areas would be appropriate. As such, each change of use consideration within Midlothian is treated on its own merits.
- 2.6 Additional guidance on short-term lets is provided in the Scottish Governments Circular 1/2023: Short-Term Lets and Planning.

3 WHAT IS A SHORT-TERM LET

- 3.1 Consideration of whether the change of use is material in any particular case may include, but is not restricted to, matters such as the impact on immediate neighbours, the wider local amenity and local infrastructure of the proposed use in the proposed location.
- 3.2 Section 26B of the Act, and the Control Area Regulations define a short term let for the purposes of the control areas (which by default can also be used to

assist in the judgement of whether a change of use has taken place outwith a control area):

Section 26B(3) excludes:

- private residential tenancies under section 1 of the Private Housing (Tenancies) Scotland Act 2016; and
- tenancies of a dwellinghouse or part of it where all or part of the dwelling house is the only or principal home of the landlord or occupier

Regulation 2 of the Control Area Regulations defines a short-term let as provided where all of the following criteria are met:

- a) sleeping accommodation is provided in the course of business to one or more persons for one or more nights for commercial consideration,
- b) no person to whom sleeping accommodation is provided in the course of business is **an immediate family member** of the person by whom the accommodation is being provided,
 - a) the accommodation is not provided under an **excluded tenancy** (see below)
- c) the accommodation is not provided for the principal purpose of facilitating the provision of work or services to the person by whom the accommodation is being provided or to another member of that person's household,
- d) the accommodation is not provided by an employer to an employee in terms of a contract of employment or for the better performance of the employee's duties, and
- e) the accommodation is not **excluded accommodation** (see below)

An **immediate family member** includes parents, grandparents, children, grandchildren and siblings on both sides of a relationship of marriage, civil partnership or where the couple live together as if they were married. This definition also treats children with one parent in common as siblings and stepchildren as children.

Excluded tenancy means a tenancy which is –

- a 1991 Act tenancy
- a modern limited duration tenancy
- a short limited duration tenancy
- a student residential tenancy
- a tenancy of a croft
- a tenancy of a holding outwith the crofting counties to which any provisions of the Small Landholders (Scotland) Acts 1886 to 1931 applies.

Excluded accommodation means a dwellinghouse which is, or is part of—

- residential accommodation where personal care is provided to residents,
- a hospital or nursing home,
- a residential school, college or training centre,
- secure residential accommodation (including a prison, young offenders institution, detention centre, secure training centre, custody centre, short-

- term holding centre, secure hospital, secure local authority accommodation or accommodation used as military barracks),
- a refuge,
- student accommodation,
- premises in respect of which a premises licence within the meaning of section 17 of the Licensing (Scotland) Act 2005(7) has effect and where the provision of accommodation is an activity listed in the operating plan as defined in section 20(4) of that Act.”.

3.3 In determining if a material change of use has occurred the leading court judgement comes from the court case of *Moore v SSCLG* [2012], confirming that whether the use of a dwelling house for commercial letting as holiday accommodation amounts to a material change of use will be a question of fact and degree in each case, with the answer depending upon the particular characteristics of the use as holiday accommodation. There should never be an assumption that the use of a dwellinghouse as holiday accommodation will always amount to a material change of use or that use of a dwellinghouse. Or, that commercial lettings can never amount to a change of use. In *Moore*, the court held that an inspector (English equivalent of a Reporter) had not fallen into the error of assuming that any use for holiday letting amounted to a material change of use and had carefully examined the characteristics of the lettings of a large house rented out through a company for short-term holiday lets and concluded that, as a matter of fact and degree, they were a material change of use from the permitted use as a dwellinghouse. The inspector had noted that “there are a number of distinct differences between the current use and use of the appeal property as a family dwellinghouse. Notably, the pattern of arrivals and departures, with associated traffic movements; the unlikelihood of occupation by family or household groups; the numbers of people constituting the visiting groups on many occasions; the likely frequency of party type activities, and the potential lack of consideration for neighbours”. The court judgment stated that on the facts of the case, the inspector had reached the correct conclusion and as a matter of common sense, this particular use for holiday lettings was very far removed from the permitted use as a dwelling house and a material change of use had taken place.

4 LICENSING

- 4.1 In addition to the requirements of the Planning System short-term lets are also regulated by license. From the 1 October 2023, all short-term lets require a licence to operate. The Short Term Let scheme was introduced by The Civic Government (Scotland) Act 1982 (Licensing of Short term Lets) Order 2022 and the associated Supplementary Guidance for Licensing Authorities, Letting Agencies and Platforms.
- 4.2 A licence can be granted for up to three years after which it requires renewal. Before accepting bookings, new operators should obtain a licence. They must display a public site notice for 21 days from the date of application and submit the below supporting documentation to the Council for consideration:

- A floor plan;
- A fire safety risk assessment;
- An electrical installation condition report;
- A portable appliance testing report;
- A gas safety certificate;
- A legionella risk assessment; and
- Building and public liability insurance

4.3 The applicant must ensure to comply with all licence conditions throughout the licence period. Midlothian Council apply the standard national conditions (relating to safety requirements, the provision of services and regulation compliance) plus an additional one requiring the prevention and resolution of antisocial behaviour.

4.4 In many cases the need to secure a license for an existing short-term let is triggering the need to apply for planning permission retrospectively on the basis that applicants are being advised of the potential requirement for planning permission.

5 ASSESSMENT OF A PLANNING APPLICATION

5.1 Under Scottish planning legislation (the Act), planning applications are determined in accordance with the development plan (National Planning Framework 4 (NPF4) and Midlothian Local Development Plan (MLDP)), unless there are material considerations that justify a departure from the development plan. Where a change of use from a dwellinghouse or flat to a short-term let is considered material, a planning application will be required.

5.2 What is and is not a material planning consideration is not set out in legislation, although there is guidance in Circular 3/2013 Development Management Procedures and clarification on specific matters can be taken from relevant court hearings and appeal decisions. This means that what constitutes a material planning consideration is a question of what is relevant to the consideration of a particular case. Each planning application is considered on a case-by-case basis; decisions made in other cases are not automatically relevant to consideration of any particular case. Only those material planning considerations that apply to that particular application can be considered in determining whether it is approved or not.

5.3 NPF4 forms part of the statutory development plan against which planning applications are determined. Policy 30 on Tourism sets out at paragraph (e) that development proposals for the reuse of existing buildings for short term holiday letting will not be supported where the proposal will result in: (i) an unacceptable impact on local amenity or the character of a neighbourhood or area; or (ii) the loss of residential accommodation where such loss is not outweighed by demonstrable local benefits.

- 5.4 The MLDP does not have a bespoke policy covering short-term lets and as such planning applications are assessed against general amenity-based policies with the emphasis being on the protection of local amenity.
- 5.5 The Council's LRB at its meeting of February 2024 determined to grant planning permission for a change of use from dwellinghouse (class 9) to short-term let (sui generis) at 27 Eskview Grove, Dalkeith and at its meeting of March 2024 determined to grant planning permission for a change of use from long term let (class 9) to short-term let (sui generis) at 8 Springfield Place Roslin. The decisions were based on the proposition that the use does not have a detrimental impact on local amenity and contributes to local tourist and business needs. Furthermore, the LRB intermated that the Council should consider managing any detrimental impact on amenity via the licensing regime rather than the planning application process and as such the policy should be one of a presumption in favour of the development. In response planning officers will take a position that reflects the presumption in favour of short-term lets unless there is substantial evidence to support a refusal of such applications on the basis of detrimental impact on amenity.

6 RECOMMENDATION

- 6.1 The Committee is recommended to note the contents of the report.

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Background Papers:

1. Scottish Governments Circular 1/2023: Short-Term Lets and Planning.
2. Circular 3/2013 Development Management Procedures.
3. The Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006 and Planning (Scotland) Act 2019
4. The Town and Country Planning (Short-Term Let Control Areas) (Scotland) Regulations 2021 and The Town and Country Planning (Short-Term Let Control Areas) (Scotland) Amendment Regulations 2022.
5. National Planning Framework 4.
6. Midlothian Local Development Plan.
7. The Civic Government (Scotland) Act 1982 (Licensing of Short term Lets) Order 2022 and the associated Supplementary Guidance for Licensing Authorities, Letting Agencies and Platforms.