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Subject: Self-catering – requirement for planning permission

Date: 2/03/2018

1 Introduction

1.1 You requested advice on the requirement for planning permission for self-catering.

1.2 This advice is general in nature. The individual circumstances of a specific self-catering unit might raise different issues requiring separate advice. For example, the permitted use of a new build property might depend on the terms of the planning permission; a conversion of an existing building will depend on the nature of the previous use, particularly if it was non-residential. If the same operator owns adjacent properties, there could be a debate whether the use is assessed in relation to all the properties together or separately.

2 Requirement for planning permission – material change of use

2.1 There is a statutory requirement for planning permission to be obtained for "development" (Town and Country Planning (Scotland) Act 1997, section 28.

2.2 There are 2 aspects to "development": physical changes (eg. building works) and material changes of use (TCPSA section 26). This Opinion focuses on the use aspect, but it should be noted that any external works to a property might require planning permission.

2.3 There is no statutory definition of "material change of use". Whether any change is material, and therefore requires planning permission, is a question of fact and degree for the planning authority to decide.

3 Planning status of self-catering use

3.1 The planning status of self-catering use is unclear, with conflicting appeal decisions.

3.2 The nub of the issue is whether there is any difference between residential use on the one hand and self-catering use on the other. As the courts have previously indicated that planning powers should only be used for planning purposes, only planning considerations should be taken into account. The commercial element in self-catering use should therefore be irrelevant. Indeed, that commercial element is broadly similar to a residential property being occupied by a tenant paying rent. The principal difference is the nature of the

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occupation, with self-catering use generally involving a series of short stay occupiers.

3.3 The question is therefore whether short stay occupation necessarily has different planning considerations/ impacts. Short stay occupation involves people living in the property, just for shorter periods. However, that does not necessarily mean the nature/ impacts of the occupation are 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 off shore worker might occupy his/ her house for a few weeks and then work off-shore 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 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. From this analysis, it is difficult to identify a planning reason why self-catering use is different in nature from other forms of residential use.

3.4 This is illustrated by the Blackfriars Road, Glasgow planning appeal (ENA-260-2066), in which the Reporter held that a change of use from residential to student accommodation was not a material change of use.

3.5 A different approach is to ask whether short stay occupation is residential use. It is possible that there may be non-planning caselaw which could be relevant - I have not investigated that at this stage. The point would be that a short stay occupier is not living in the property, but is only visiting for a short period. However, as discussed above, it's arguable that there is no planning difference, as the impacts are broadly similar. Even if there is a change of use, it is arguable the change is not material.

3.6 It is interesting to note that the Scottish Government acknowledged that it may be acceptable to use seasonal and holiday occupancy conditions for holiday chalet developments (Circular 4/1998: the use of conditions in planning permissions, para 111-113). The purpose of those conditions is to prevent permanent residential use. The clear implication is that the condition is required because the change of use would not otherwise require planning permission, ie. it would/ might not be a material change of use.

4 Court decisions

4.1 I am not aware of any Court of Session decisions which are directly relevant.

4.2 In the absence of Scottish court decisions, it is accepted practice to refer to English court decisions, as the relevant planning legislation is similar.

4.3 The English Court of Appeal held 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.

4.4 The *Moore* case is helpful because it confirms that use for holiday lettings is not necessarily a material change of use. Unfortunately, it leaves scope for differences of opinion in individual cases.

4.5 The approach of the Court in *Moore* is consistent with the approach taken by the courts to all exercises of planning judgment, in which the courts will only interfere if the decision is perverse or irrational.

4.6 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. Although size is not necessarily determinative, this decision shows that different factors might apply to larger properties.

4.7 It is also useful to note the circumstances of the previous court decisions mentioned in Moore:

4.7.1 *Blackpool Borough Council v Secretary of State for the Environment* (1980) 40 P & CR 104 – no material change of use where a house was used by the owner as a second home for holidays by himself and his family, by members of his office staff, and by "family groups" who paid rent. There were lettings at a rent for 10 out of 18 weeks in the four month holiday season; for the remainder of the year the premises were left empty.

4.7.2 *Gravesham BC v Secretary of State for the Environment* (1984) 47 P. & C.R. 142 - a holiday chalet for which permission for occupation was restricted to the months March to November was a dwelling-house.

4.7.3 *Moore v Secretary of State for the Environment, Transport and the Regions* (1999) 77 P. & C.R. 114 – the outbuildings of a large country house had been converted into ten single self-contained units of residential accommodation for the purpose of holiday lettings – the Court of Appeal held that the only conclusion available to the Secretary of State was that the units were in use as single dwelling houses, notwithstanding the fact they were let as holiday accommodation.

4.8 In *R. (on the application of RLT Built Environment Ltd) v Cornwall Council* [2016] EWHC 2817 (Admin) the English High Court upheld a planning policy requiring new housing to be restricted to occupancy as a principal residence, to address the problem of second or holiday homes. That suggests that self-catering use could give rise to planning considerations beyond amenity impacts. However, it would be difficult for housing shortages to be used as an issue in an enforcement action unless the local development plan contains specific policies acknowledging a housing shortage.

5 Planning appeal decisions

5.1 Planning appeal decisions by Scottish Government reporters are not binding precedents, but can provide useful indications of the approach to be taken. If a more comprehensive Opinion is required, I can undertake a detailed review of planning appeal decisions. I mention below the key appeal decisions that I am aware of.

5.2 Two conflicting appeal decisions, both for properties in Edinburgh, highlight the lack of certainty/ clarity on the planning status of self-catering use.

5.3 Eyre Place, Edinburgh (ENA-230-2107)

5.4 In this case the Reporter held that the use of a flat for short term visitor accommodation involved a material change of use. However, his explanation is largely contained in the following 3 sentences, which does not appear to take into account the frequent arrivals and departures by some permanent residents:

"However other factors indicate the change of use is material. The high density and layout of the block, which requires guests to the appeal flat to share access and a common landing with permanent residents, increases the likelihood of conflict. The apparently short term nature of the lets and frequency of turnover indicates a pattern of use involving frequent arrivals and departures, and a lifestyle dissimilar to that of a permanent resident."

5.5 Pirniefield Grove, Edinburgh (CLUD-230-2003)

5.6 The Reporter granted a certificate of lawful use for proposed use of dwellinghouse as holiday lets, concluding that use for holiday lets did not involve a material change of use. He took account of the various court decisions mentioned above.

6 Use Classes Order

6.1 The Use Classes Order (UCO) is often used in assessing whether there is a material change of use.

6.2 The UCO specifies 11 classes of use. Within each class are listed uses of a broadly similar character. Provided both uses are in the same use class, a change from one use to another does not involve "development" and, therefore, no planning permission is required (TCPSA section 26(20(f)).

6.3 If the uses are not in the same use class, or any use class, planning permission is only required if the change is material.

6.4 Class 9 Houses

6.5 Class 9 refers to:

Use–

(a) as a house, other than a flat, whether or not as a sole or main residence, by–

(i) a single person or by people living together as a family, or

(ii) not more than 5 residents living together including a household where care is provided for residents;

(b) as a bed and breakfast establishment or guesthouse (not in either case being carried out in a flat), where at any one time not more than 2 bedrooms are, or in the case of premises having less than 4 bedrooms 1 bedroom is, used for that purpose.

6.6 Flats are excluded from class 9, and are discussed separately below.

6.7 The wording of class 9 makes it difficult to determine whether a house used for self-catering purposes is a class 9 use.

6.8 Paragraphs (a) and (b) appear to identify different uses. The implication is that a use within either paragraph is a class 9 use.

6.9 Paragraph (a) refers to use as a "house". It explains that need not be "as a sole or main residence", which means that class 9 does not require full time residential occupation. Further flexibility is provided with the statement that the occupier can be a single person, a family, or up to 5 residents living together. If the self-catering use satisfies these thresholds, the issue is whether a self-catering use has separate characteristics from use as a house.

6.10 The mention in paragraph (b) of bed and breakfast/ guesthouse use further confuses the situation, as neither bed and breakfast or guesthouse is defined. Although the intention might have been to include only buildings with live-in operators, that is not mentioned explicitly in paragraph (b). However, the numeric limits achieve that objective, as those prevent use of all the bedrooms for short stay purposes – if there are less than 4 bedrooms, only 1 can be used for short stay purposes; if there are more than 4 bedrooms, only 2 can be used.

6.11 It could be argued that paragraph (b) is intended to include an element of commercial use which would otherwise be excluded from paragraph (a), but paragraph (a) does not explicitly exclude commercial use. A contrary argument is that paragraph (b) was required because a family renting out a room for bed and breakfast would fall outwith paragraph (a), as the house would no longer just be occupied by a family, but might not necessarily be described as residents living together.

6.12 This analysis of class 9 might be a red herring: even if self-catering use is not within class 9, a change of use from class 9 to self-catering use only requires planning permission if the change is "material".

7 Flats

7.1 As mentioned above, class 9 does not include flats. However, the principal issue is whether there has been a material change of use.

8 Conclusion

8.1 The decision in *Moore* confirms that whether or not self-catering use involves a material change of use depends on the facts and circumstances of each case. Although there was a material change of use in that case, that related to the large size of the property. The other court cases involved situations where there was no material change of use. The recent reporter's decision in Pirniefield Grove, Edinburgh also held there was no material change of use; the earlier reporter's decision in Eyre Place, Edinburgh held there had been a material change of use. Reasonable arguments can therefore be made that self-catering use does not involve a material change of use.

9 Procedural issues

9.1 Generally the planning status of self-catering use will arise as an issue where a council threatens enforcement action in response to complaints from neighbours. If an enforcement notice is served, an appeal

can be submitted to the Scottish Ministers on the grounds that there is no breach of planning control as there has been no material change of use. The Eyre Place case is an example of an unsuccessful appeal.

9.2 The property owner can apply for a certificate of lawfulness, either to confirm that a proposed self-catering use does not require planning permission, or that the existing use is lawful because there has been no material change of use (or that the change occurred more than 10 years ago and cannot be the subject of enforcement action). If the council refuse to grant the certificate of lawfulness, there is a right of appeal to the Scottish Ministers. The Pirniefield Grove case is an example of a successful appeal.

9.3 In general councils will not serve an enforcement notice while a certificate application/ appeal is in process. A certificate application can therefore be a pro-active response to a threat of enforcement action, although the same arguments can be used in an appeal against an enforcement notice, so there is no necessity to apply for a certificate.

9.4 If there is no threat of enforcement action, an application for a certificate is unlikely to be necessary, unless the property is being sold and some certainty is required. An unsuccessful certificate application/ appeal might result in enforcement action which would otherwise not have occurred unless/ until a complaint by a neighbour.

9.5 A reporter's decision on an enforcement notice appeal or certificate appeal can be challenged in the Court of Session. However, it seems likely that the Scottish judges would follow a similar approach to the English Court of Appeal in *Moore*, and refuse to provide any additional guidance on when self-catering use is a material change of use, leaving it to a case-by-case decision. Legal action is therefore unlikely to result in a useful test case.

10 Summary

10.1 In my view, reasonable arguments can be made that self-catering use does not involve a material change of use from residential use. That has been the outcome in individual cases decided by appeal reporters/ inspectors and upheld by the courts. It is also impliedly supported by the statements in the Scottish Government Circular 4/1998. However, it does depend on the individual circumstances, and there are decisions to the contrary by appeal reporters/ inspectors.

10.2 If a property does not have express planning permission for self-catering use, there is no necessity to obtain a certificate of lawfulness, unless the planning authority proposes to take enforcement action.