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Appeal Decision Notice

Decision by Tammy Swift-Adams, a Reporter appointed by the Scottish Ministers

- Certificate of Lawful Use appeal reference: CLUD-230-2022
- Site address:
- Appeal by against the decision by the City of Edinburgh Council
- Application for certificate of lawful use 22/01410/CLE dated 21 March 2022 refused by notice dated 22 April 2022
- The subject of the application: a certificate of lawful use is sought in respect of the use of the property for short term residential letting
- Date of site visit by Reporter: 10 August 2022

Date of appeal decision: 18 November 2022

Decision

I allow the appeal and grant a certificate of lawful use in the terms set out in the certificate at the end of this notice.

Preliminary

In this notice and in the attached certificate I use the term “short-term letting” to describe the use of the appeal property. This wording differs slightly from the “short-term residential letting” used by the appellant in the appeal form. This is to avoid confusion on whether the now-lawful use is short-term letting or short private residential tenancies.

Reasoning

1. This application for a certificate of lawful use under section 150(1) of the Town and Country Planning (Scotland) Act 1997 (“the Act”) has been submitted on the basis that the use has existed at the site for over ten years and is now immune to enforcement action.

2. The appeal property is a one-bedroomed flat (“the flat”) in a tenement building on the corner of and in the city centre. It is accessed via a common doorway, passage and stair that are shared with seven other flats. To reach the flat, guests must pass the doors to four of the other flats, number 3 which is on the same landing as the appeal flat and numbers 1, 2 and 7 on the first floor.

3. Initial evidence put forward by the appellant to support the application includes:

- Scottish Government guidance for short-term holiday lets during Covid-19
- registration correspondence with Scottish Accommodation and Holiday Lettings
- guest register summarising all bookings since June 2011
- extracts from guest book and online guest reviews
- email pertaining to first booking
- a document entitled R Kellie commission statements

- letter from accountant confirming property income declared to HMRC
- dates since 2011/12 when accounts were submitted to Companies House
- correspondence confirming June 2011 deletion of council tax account
- correspondence confirming June 2011 start of Non Domestic Rates liability
- correspondence pertaining to payment of holiday home insurance premiums
- information pertaining to two extended stays
- Loch Lomond and the Trossachs National Park Authority guidance.

4. Additional evidence put forward in response to two procedure notices includes:

- a response to questions on the impact of COVID-19 restrictions on the use
- Airbnb screenshots on prospective booking anticipating end of second lockdown
- Airbnb screenshots on first lockdown cancellations, anticipating future bookings
- list of short-term let enforcement notices issued by the planning authority
- Airbnb screenshots on cancelled bookings for the second lockdown
- Airbnb screenshots regarding a key worker booking during first lockdown
- a response to questions on wider enforcement work undertaken by the council

5. The reason given by the council for refusing to issue a certificate of lawful use is that the appellant has provided insufficient evidence to demonstrate the flat has been in continuous use for short-term letting for 10 years or more. Its report of handling recognises regular holiday let use from 2011 to 2020 but states there is insufficient evidence to show continuous use beyond that, with significant breaks in use during 2020 and use of the flat for longer term rentals. I note that the breaks and longer lets coincide with time during, between and just after Scotland's two COVID-19 lockdowns.

6. Section 124(3) of the Act sets a time limit of 10 years for taking enforcement action in relation to a material change of use (other than to use as a single dwellinghouse). Whilst its wording does not expressly require the unlawful use to have been continuous, case law in England has established that the identical wording of section 171B(3) in the Town and Country Planning Act 1990 (the equivalent English Act) should be interpreted as requiring the unlawful use to have been continuous for the entire 10 year period for it to become immune from enforcement action. Whether a use has been continuous will depend upon the facts and circumstances in each individual instance, including the intensity and character of the use and any periods of inactivity.

7. I therefore find that the critical issue in this appeal is whether, on the balance of probabilities, the unlawful use in this case continued for 10 years without a break.

8. To assist me in considering this issue, I used two procedure notices to ask the appellant and the council for further written information. The first sought views on whether the short-term letting continued during, between and after the two lockdown periods, and on whether the council could have taken enforcement action during those periods. The second followed up on the information received, seeking evidence on other enforcement cases referred to by both parties and asking the council why, given it had been able to act on three other cases of short-term letting during 2020-21, it considered it could not have taken enforcement action in this case.

9. I used the original submissions and the responses to the procedure notices to consider the use of the flat across the following consecutive time periods from the first recorded short-term let up until the application for the certificate:

- 15 June 2011 to 23 March 2020 (first let through to first lockdown)
- 23 March to 29 July 2020 (first lockdown)
- 29 July to 26 December 2020 (period between lockdowns)
- 26 December 2020 to 26 April 2021 (second lockdown)
- 26 April 2021 onwards (emerging from second lockdown)

Period from 15 June 2011 to 23 March 2020 (first let through to first lockdown)

10. The evidence before me, including the guest register, first booking confirmation and proof of holiday home insurance and registration with holiday letting services, satisfies me that short-term letting at the flat began on 15 June 2011 and continued until 23 March 2020. The lawful use during that time would have been as a residential flat. As this is a sui generis use, any material change of use would need planning permission.

11. The appellant's normal business model invites up to three people to stay for three to 30 nights. Occupancy ranged from 227 nights (62% of the year) in 2013-14 to 302 nights (83% of the year) in 2017-18. Average stays ranged from four nights in 2016-17 to seven nights in 2011-12. I find that this amounts to a material change as the character and intensity of the letting is inconsistent with normal residential occupation by the single person or couple that a one-bedroom flat could reasonably be expected to house.

12. In March 2020 holiday letting was significantly affected by the COVID-19 pandemic. National restrictions on movement and holidays during the pandemic are well documented, and the appellant has provided an extract from a speech by the First Minister of Scotland, dated 22 March 2020, in which it is stated:

> "To our hotels, B&Bs and self-catering holiday accommodation – you should not be accepting visitors. Provide accommodation for your staff and make yourselves available to help essential workers and support essential services – that is all".

13. Evidence submitted by the appellant shows the last pre-lockdown occupant checked out on 23 March 2020. I therefore find that by the start of the first lockdown the appellant had accrued eight years, nine months and nine days towards immunity from enforcement action.

Period from 24 March 2020 and 29 July 2020 (first lockdown)

14. The only evidenced short-term lets at the flat within the first lockdown were two single night stays by a key worker, a locum doctor, on 02 June and 30 June 2020. This means there was a gap of 9 weeks from 24 March when no guests stayed in the flat.

15. However, in response to my first procedure notice the appellant provided evidence of other short-term letting activity undertaken during that period. This evidence includes screenshots showing the Airbnb listing remaining active and the appellant continuing to correspond with potential guests. The appellant states that nine bookings that would otherwise have taken place in the period were cancelled and a that a neighbour was regularly checking the flat to confirm it was secure and look for issues such as leaks.

16. I consider this activity, along with the two stays by the key worker and the fact ordinary residential use was not resumed, stands as reliable evidence that the unlawful use of the flat for short-term lettings continued throughout the first lockdown.

17. The council states that, had short-term letting at the flat been reported to it before the start of the first lockdown, it is likely the case would have been closed on the ground that short-term letting had ceased in response to lockdown restrictions. It lists and provides action reports for 52 such cases. In those cases, whether or not a breach had been identified beforehand, a common thread across the reports was no breach could or should be occurring whilst COVID-19 restrictions were in place. In this case the council's view would have been incorrect as short-term letting had not entirely ceased, as demonstrated by the two lets to a key worker.

18. Evidence from the appellant and the council shows the latter issued three short-term letting enforcement notices following complaints raised within the first lockdown. The council states that the short-term lets in those cases were still operating between the enforcement cases being opened (in July 2020) and the notices being served (in December 2020), and that closure during the time of the first lockdown due to coronavirus restrictions was not a relevant consideration. However, the action reports for these cases, which the council states include the information that satisfied it that it was expedient to take enforcement action, do not specifically refer to those uses continuing during the first lockdown, and there is no other evidence before me that this was the case.

19. Furthermore, the action reports show that two of these cases, 20/00326/ESHORT and 20/00346/ESHORT, were subsequently closed sometime after the notices were issued. This was because:

> “Notwithstanding that the current lockdown restrictions prevent the use of short term letting, except in exceptional circumstances, the listing which was originally provided by the enquirer has now been deactivated and an alternative listing has not been identified. Having regard to the above factors it is concluded that the unauthorised use has ceased and as such the case can now be closed”.

20. In this appeal case, if a complaint about short-term letting at the flat had been made during the first lockdown, and the council had begun to investigate, it would have found the Airbnb listing still active and the appellant still open to receiving booking enquiries, albeit within the parameters of the time. It would have had a justified reason to keep the case open.

21. Had the council chosen not to investigate, on the basis that all short-term letting was assumed to have ceased in response to lockdown restrictions, this would have been a matter of choice and prioritisation for the council. It would not have been the result of, or been able to stand in evidence of, there actually having been a break in the use.

22. There is no evidence before me on the eventual outcome of the third enforcement notice, 20/00327/ESHORT, other than that it was upheld at appeal. However, the fact it was issued and upheld is further evidence that the council was opening short-term letting cases based upon complaints raised during the first lockdown and found it necessary and possible to act on at least some of them, resulting in enforcement notices.

23. For the reasons given above, the facts and circumstances of this case satisfy me that the breach continued throughout the first lockdown and that the appellant continued to accrue time towards immunity.

24. I find that by the end of the first lockdown the appellant had accrued nine years, one month and 15 days towards immunity from enforcement action.

Period from 29 July to 26 December 2020 (period between lockdowns)

25. There is clear evidence the council was able, in general, to take enforcement action in relation to short-term letting during the inter-lockdown period, as the three above-mentioned notices were all served within it. The council nonetheless states it would not have been able to take enforcement action in this case, because of stays that were longer term in nature.

26. Evidence submitted by the appellant shows the flat was let to various people between 29 July and 26 December 2020. I accept that the pattern of letting over this five month period was different from the typical pattern before covid, with fewer very short stays. Nonetheless there were six lettings totalling 132 nights (88% of the available time). The shortest letting was for 4 nights and the longest was for 39 nights, giving an average of 22 nights.

27. I consider that the length of short-term lets will vary over time and that a fluctuation in their length over a given period does not necessarily represent a change of use. I do not agree with the council that longer lets in this period equated to a break in the unlawful use of the flat. I consider that a 39 night stay and a 22 night average stay is still capable of falling within a short-term letting use. Both are much shorter periods than could reasonably be expected to be associated with ordinary residential tenancies, and there is specific evidence in this case that the 39-night let was not a private residential tenancy.

28. For the reasons given above the facts and circumstances of this case satisfy me that the breach continued in between the two lockdowns and that the appellant continued to accrue time towards immunity.

29. By the end of the period between the two lockdowns the appellant had accrued nine years, six months and 12 days towards immunity from enforcement action.

Period from 26 December 2020 to 26 April 2021 (second lockdown)

30. No new lets began within the second lockdown, though submissions from the appellant indicate there was a guest still present for the first 16 nights as a continuation of the last pre-lockdown let. There was then a gap of three and a half months with no guests staying. However, as with the first lockdown, the appellant has provided evidence that the flat continued to be listed on Airbnb during this period and that they continued to correspond with prospective guests and make security and maintenance checks.

31. The council's response to my second procedure notice shows that, whilst no short term letting enforcement notices were issued during the second lockdown, 10 were issued shortly thereafter. Three notices were issued within one month of it ending and seven more within three months of it ending. These cases were opened following complaints raised within or before the second lockdown. This satisfies me that the council was opening short-term letting cases based upon complaints raised during the second lockdown and found it necessary and possible to act on at least some of them, resulting in enforcement notices.

32. For the reasons given above, and consistent with my findings relating to the first lockdown, the facts and circumstances of the case satisfy me that the breach continued throughout the second lockdown and the appellant continued to accrue time towards immunity.

33. By the end of the second lockdown the appellant had accrued nine years, 10 months and 12 days towards immunity from enforcement action.

Period from 26 April 2021 onwards (emerging from second lockdown)

34. The 10 enforcement notices mentioned above provide clear evidence the council was investigating short-term letting cases in this early post-lockdown period and found it necessary and possible to act on at least some of them, resulting in enforcement notices. The council nonetheless states it would not have been able to take enforcement action in this case, because of a stay that was longer term in nature.

35. The first post-lockdown let was a four night stay from 26 April 2021. That was followed by a 53-night stay ending on 02 July 2021. Short-term letting at the flat then broadly returned to its pre-pandemic pattern and continued thus until (and beyond) the application for a certificate of lawful use was submitted on 21 March 2022.

36. As with my reasoning on the period between the lockdowns, I do not agree with the council that the 53 night stay resulted in a change of use back to mainstream residential occupancy. The length of short-term lets in any period will vary, and I consider that a stay of 53 nights is still capable of falling within a short-term letting use. 53 nights is still a much shorter period than could reasonably be expected in association with an ordinary residential tenancy. Furthermore, the appellant has provided specific evidence that this letting did not constitute a private residential tenancy and that it was initially booked for less than one month but was twice extended.

37. For the reasons given above, the facts and circumstances of this case satisfy me that the breach continued after the end of the second lockdown and became immune from enforcement action on 14 June 2021, this being ten years after the appellant began to use the flat for short-term letting.

38. The appellant went on to apply for a certificate of lawful use on 21 March 2022. I find that, by that date, the flat had been used continuously for short-term letting for 10 years, nine months and seven days.

Other considerations

39. In my first procedure notice I referred to case law, including an England and Wales High Court Case, Miles v National Assembly for Wales, 2007, EWHC 10 Admin. The facts and circumstances of that case meant that restrictions on movements during the 2001 foot and mouth outbreak were found to have led to an unlawful use ceasing and the 10 year's continuous use required for immunity from enforcement action not being accrued. The court upheld the appeal inspector's decision to refuse to issue a certificate of lawful use.

40. The facts and circumstances of the break in the Miles case meant that, once the use had ceased, there would have been no need or opportunity for an enforcement notice to be issued. I consider that in some other situations it may be proper, and in the public interest, for a planning authority to take enforcement action where there has been an unlawful use that is likely to resume.

41. However, in light of the evidence provided in response to my procedure notices, I have found the unlawful short-term letting use in this case did not cease and that the

appellant did accrue the necessary ten years to become immune from enforcement action and eligible for a certificate of lawful use. As such, it is not necessary for me to determine whether the planning authority could have taken enforcement action in this case if the unlawful use had appeared to have ceased, or if it couldn't prove it was ongoing.

Conclusion

42. I therefore conclude that, on the balance of probability and for the reasons given above, the use of the flat for short-term letting had been taking place on a continual basis for over 10 years before the date of the application for the certificate. I find that lawful use has therefore been established.

43. I have considered all of the matters before me, including council information on difficulties encountered during the pandemic in investigating and establishing breaches, but find none that would lead me to alter my conclusions.

44. Section 154(3) (a) of the Act requires a certificate to be issued on appeal if the decision maker is satisfied that the council's refusal is not well-founded. Based on my findings, I conclude that the council's refusal is not well-founded and that a certificate should therefore be granted.

Tammy Swift-Adams
Reporter