

REPORT



Report on: Planning requirements for short term holiday letting

Prepared for: The Association of Scotland's Self-Caterers (ASSC)

Date: 10/11/2022

1 Introduction

- 1.1 The requirement for planning permission for short term holiday letting depends on whether the premises are situated in a short term let control area.
- 1.2 The licensing requirements are not made under the planning legislation and are not relevant to determining whether planning permission is required.
- 1.3 The requirement for planning permission only applies to secondary letting, where the property is not the owner/ operator's main residence.

2 Control area

- 2.1 The Town and Country Planning (Scotland) Act 1997 was amended by the Planning (Scotland) Act 2019 to introduce a new power for planning authorities to designate short-term let control areas. In a short-term let control area, the use of a dwellinghouse for the purpose of providing short-term lets is deemed to involve a material change of use and therefore requires planning permission.

[Town and Country Planning (Scotland) Act 1997 section 26B, inserted by Planning (Scotland) Act 2019; Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021]

- 2.2 The 1997 Act does not define "dwellinghouse". The Town and Country Planning (Use Classes) (Scotland) Order 1997 class 9 Houses applies to use "as a house, other than a flat". This creates doubt whether the "use of a dwellinghouse" for the purposes of section 26B includes flats.

3 Other areas

- 3.1 For premises which are not situated in a control area, planning permission is required if there is a material change of use. The courts have held that whether a change of use is material is a question of the facts and circumstances of the individual situation. The planning authority must therefore take account of the specific circumstances of each premises.

- 3.2 Cameron v Scottish Ministers [2020] CSIH 6 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, and detected no flaw or legal error in the reporter's analysis and reasoning.
- 3.3 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.
- 3.4 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.
- 3.5 It is notable that the premises in both these court decisions were large. Although size is not necessarily determinative, these decisions show that different factors might apply to larger properties.
- 3.6 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.
- 3.7 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.

- 3.8 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 occupation, with self-catering use generally involving a series of short stay occupiers. As a general principle, self-catering use does involve a change from residential use (although that is not an absolute rule, as it could depend on the individual circumstances), but that leaves the issue of whether the change is "material".
- 3.9 Development plan policy and other guidance can provide indications of factors which can be relevant to determining the materiality of the change, but it is essential that the individual circumstances are taken into account, ie. policy/ guidance cannot be applied as a "blanket rule".
- 3.10 In determining the materiality of the change, the question is 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.
- 3.11 It is interesting to note that the Scottish Government acknowledge 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.
- 3.12 Some planning authorities have prepared a checklist to assist assessing whether planning permission is required. However, the checklist does not remove the legal requirement to consider the individual circumstances of the premises, even if the checklist derives from development plan policy or other guidance. The checklist questions do not necessarily take into account those individual circumstances: for example, why should the presence of an external hot tub in a predominately residential area necessarily mean there is a material change of use? The specific location of that hot tub in relation to neighbouring properties is the proper issue.

4 Lawfulness

- 4.1 Given the lack of certainty about whether planning permission is required, it might be easier for an operator of short-term holiday accommodation to apply for a certificate of lawful use, if the change of use occurred more than 10 years ago (ie. it might be easier to prove 10 years of use rather than debate whether planning permission was required when the change occurred).

5 Conclusion

- 5.1 The requirement for planning permission for short term holiday letting depends on whether the premises are situated in a short term let control area:
- 5.1.1 In a short-term let control area, the use of a dwellinghouse for the purpose of providing short-term lets is deemed to involve a material change of use and therefore requires planning permission.
- 5.1.2 In all other areas, planning permission is not necessarily required for a change of use to short-term holiday accommodation: whether the change of use is material is a question of the facts and circumstances of the individual situation, which is not necessarily determined by applying development plan policy or guidance or by using a checklist.