

Planning Committee

2.00pm, Wednesday, 24 April 2024

ASSC Proposal on Short-term Lets

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1. Recommendations

1.1 Planning Committee is asked to note:

- 1.1.1 That the Association of Scottish Self Caterers (ASSC) has proposed, as a matter of policy, that any pre-short-term let control area property in existing use for short-term let purposes that is not subject to complaint or enforcement is not considered to be a material change of use and therefore does not require planning permission and a certificate of lawful use can be granted.
- 1.1.2 That, for the reasons set out in this report, the proposals are not acceptable.
- 1.1.3 That as part of a further report to Committee on the Short Term Let (STL) policy implications from National Planning Framework 4 (NPF4) and City Plan, consideration will be given to the concerns raised by the ASSC.

Paul Lawrence

Executive Director of Place

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Planning Committee

ASSC Proposal on Short-term Lets

2. Executive Summary

- 2.1 Planning Committee on 31 January 2024 requested a report on the Association of Scottish Self-Caterers (ASSC) proposal that:
- “as a matter of policy, any property in existing use that is not subject to complaint or enforcement is not considered to be a material change of use and therefore does not require planning permission and a certificate of lawful use can be granted.”
- 2.2 This report sets out the benefits and risks of:
- 2.2.1 The ASSC proposal; and
 - 2.2.2 The current “fact and degree” assessment that is done when deciding whether changes of use are material.
- 2.3 Taking account of the risks and benefits of each of the options explored, it is not proposed to bring into effect the ASSC proposal. However, it is proposed to consider the points raised as part of a wider report to Committee on options in relation to guidance on the applicability of the National Planning Framework (NPF4) and City Plan.

3. Background

- 3.1 The Edinburgh Short-term Let Control Area came into force on 5 September 2022.
- 3.2 The Control Area was brought into force following a consultation which included strong levels of support for its formation.
- 3.3 On 31 January 2024, Planning Committee noted that a letter had been received from the ASSC and requested a briefing on the matters raised and a report detailing this to the next Planning Committee.
- 3.4 The letter arose from the outcome of the Judicial Review (JR) of the Council’s approach to the issue of whether Section 26B (2) of the Town and Country Planning (Scotland) Act 1997 (the “1997 Act”) has any retrospective effect. Section 26B (2) states:

“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 of the dwelling house.”

- 3.5 Lord Braid’s Opinion in respect of the JR clarifies that Section 26B (2) should be read as applying only to a proposed future change of use on or after 5 September 2022. This implies that where the use began before that date, an assessment is required of whether a material change of use has occurred, in terms of Section 26 (1) of the 1997 Act.
- 3.6 Where applications are made for pre-control area changes of use from dwellinghouses to short-term lets, the Planning Authority now needs to consider whether a material change of use has occurred using a fact and degree assessment. Lord Braid refers to two court cases which are relevant to this consideration:

“Whether the use of a dwellinghouse for short-term letting does amount to a material change of use is a question of fact and degree depending on the individual circumstances of the accommodation: *Moore v Secretary of State for Communities and Local Government* [2013] JPL 192; *Cameron v Scottish Ministers* [2020] CSIH 6.”

- 3.7 Prior to the control area coming into force, each short-term let application or enforcement case was assessed on a fact and degree basis to decide whether a material change of use had occurred and therefore required planning permission. In many cases it was concluded for properties being used for short-term let purposes that a material change of use had occurred thereby required planning permission. Often these were secondary lets. Other types of short-term let use such as home letting or home sharing were often found not to involve a material change of use.
- 3.8 In terms of current applications, it remains the case that some pre-control area changes of use will be material changes of use that require planning permission. However, there is potential that some such changes of use may, in terms of the fact and degree assessment, be determined as not being material changes of use. These cases would not require planning permission and a certificate of lawful use could be obtained for short term let (STL) licensing purposes.
- 3.9 The ASSC propose in their letter to the Council leader (Appendix 1) that instead of a fact and degree assessment, “as a matter of policy, any property in existing use that is not subject to complaint or enforcement is not considered to be a material change of use and therefore does not require planning permission and a certificate of lawful use can be granted.”.
- 3.10 The ASSC letter refers to the approach of South Ayrshire Council. This currently sets out that for properties which were operating prior to October 2022 (when the licencing regime came into effect for existing operators) but for less than 10 years, owners will be advised to seek confirmation in writing from the Planning Authority that no planning enforcement action will be taken. South Ayrshire Council state that planning enforcement is a discretionary matter and continue to encourage planning

applications where appropriate. At present, they do not have a short-term let control area in effect. This approach does not go so far as the ASSC proposal.

- 3.11 Other councils, including Glasgow City Council (GCC) and the Highland Council (THC) provide general planning guidance on their website in relation to short-term lets. In respect of whether a material change of use has occurred in residential properties operating prior to October 2022 (for GCC) or the short-term let control area within THC's Badenoch and Strathspey area, the guidance highlights the fact and degree assessment approach and does not go so far as the ASSC proposal.

4. Main report

- 4.1 The ASSC proposal is predicated on the assumption that the Council's policy objectives and commitment to regulating the sector are being achieved. This is supported by evidence from licencing applications for secondary lets which currently stands at 1,958. This is then compared against the claim that there was 12,000 such lets in Edinburgh when the control zone was introduced.
- 4.2 This evidence is then used to promote the argument that a capital city, such as Edinburgh, needs a quantum of STL accommodation to allow to cater for ongoing demand. It implies that the current policy regime has had an unintentional consequence of going further than was intended and will eventually create an imbalance by decimating the existing supply that was place pre-control area implementation.
- 4.3 The [report](#) to Planning Committee on 23 February 2022, which sought authority to form the Edinburgh Short-term Let Control Area, indicated that there were 14,000 AirBnB lets listed in 2019 in Edinburgh. Of these, just over 8,000 were whole house lets. Using the same data, that figure has dropped to 7,000 overall listings in December 2023. Of those 7,000 properties, 4,648 were for entire homes/apartments. 1,544 of them were available for 90 or more days per year. The 1,544 figure is similar to the number of applications that have been granted planning permission or certificates of lawful use combined with the number of planning or certificate of lawful use applications that are yet to be determined. On 1 April 2024 this figure was 1,605. Overall, given that during the period between 2019 and December 2023, there has not been a post covid rebound in numbers of STLs operating, this suggests that legislation and policy are having an effect in controlling overall numbers of STLs in Edinburgh.
- 4.4 The ASSC's letter suggests that the numbers are equivalent to approximately 0.7% of the housing stock in Edinburgh.

Potential benefits of ASSC proposal

- 4.5 The ASSC proposal has the advantage of, for existing operators of short-term lets in dwellinghouses (flats or houses) that existed before the control area came into effect, of creating circumstances where certificates of lawful use would be granted for all of them unless there has been a complaint or enforcement action. This would

provide clarity for operators and would mean that those to which this approach applies, could continue their business, subject to obtaining an STL Licence.

- 4.6 If implemented, the proposal significantly reduces the risk of the Council being subject to further legal challenge from those operators that commenced their use prior to the control area coming into effect and who have not had decisions made on their applications.
- 4.7 The ASSC proposal would reduce the administrative burden of having to carry out individual fact and degree assessments for planning and certificate of lawful use applications, which in some instances can be complicated and time consuming. Where the assessment of whether a change of use is material is not contested, there may be a greater likelihood fewer appeals and local reviews. This approach would also reduce enforcement workload as fewer cases would require detailed investigation.

Potential risks of ASSC proposal

- 4.8 If brought into effect, the ASSC proposal would mean that the Council would no longer consider, by fact and degree, whether material changes of use have occurred. This reduces the case-by-case control that the Council currently exercises over the issue of whether a change of use is material.
- 4.9 The implication of the court decision on the JR is that Section 26 (1) of the 1997 Act should be applied to those cases where the use of a dwellinghouse changed prior to the control area coming into effect. Unlike Section 26B which sets out clear parameters which, if met, result in a material change of use being deemed to occur, Section 26 (1) provides no such certainty. Previous court decisions (the Moore and Cameron cases referred to above) have had the consequence that when applying Section 26 (1) to the question of whether a change of use of a dwellinghouse to short-term let accommodation, there are a series of factors that need to be taken into account. These factors are particular to the circumstances of individual properties. They include such matters as: the pattern of arrivals and departures with associated traffic movements, the number of people, the frequency of activities and the potential disturbance to neighbours and impact on their amenity.
- 4.10 When assessing properties in Edinburgh against these types of factors, many short-term let uses have been found to be so different in character to private dwellinghouses that the STL use is materially different from the use as a dwelling. However, there will also be properties where STL use is similar enough to a property's previous use to not be a material change.
- 4.11 Creating a blanket approach to making decisions under Section 26 (1) could result in cases where material changes of uses have occurred but that, as a result of a procedural policy decision, would be deemed to not involve a material change of use. It would effectively define what is a material change of use in a procedural policy. Such procedural policy as proposed cannot make something that is a relevant consideration irrelevant or an irrelevant consideration relevant.

- 4.12 Furthermore, the current fact and degree assessment is in line with Scottish Government's Circular 10/2009 Annex F 'Certificates of Lawful Use or Development' which states:

"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."

- 4.13 If implemented, the ASSC approach could create the potential for accusations of unfairness for those who have been subject to previous refusals of planning permission or certificates of lawful use.
- 4.14 There is also the potential that individuals or groups could be aggrieved by the change in approach, particularly if housing is being lost and they consider the approach to be legally flawed.
- 4.15 As certificate of lawful uses need to contain a description of the lawful use, it would still be necessary to establish the nature of the use that had been occurring – for example its intensity or frequency. While there would be no administrative burden for assessing the materiality of the change, officer time would still be required to establish the nature of the use.

Potential benefits of continuing fact and degree assessments

- 4.16 Continuing to carry out fact and degree assessments on whether a material change of use has occurred is consistent with the way that the materiality of other types of changes of use are assessed. It is consistent with the Moore and Cameron court decisions. It is also the same method of assessment that was done for STL uses prior to the Control Area coming into effect. This consistency reduces potential accusations of unfairness described in 4.8 above.
- 4.17 The need to carry out individual fact and degree assessments flows from Lord Braid's decision.

Potential risks of continuing fact and degree assessments

- 4.18 If fact and degree assessments continue to be used to determine materiality of changes of use, there will continue to be an impact on resources in the Planning service.
- 4.19 Continuing with the fact and degree assessment increases the likelihood that the applications already underway will be withdrawn by applicants if they consider they are unlikely to obtain planning permission or certificates of lawful use. In these circumstances, withdrawn applications result in there being no formal decision on the applications which in turn means that the planning status is not clear. This would be unhelpful in relation to the STL licensing policy requirement to confirm that either planning permission has been obtained or has been sought or is not required.
- 4.20 There is increased potential for the ASSC and its members to continue to legally challenge the Council's approach in the Courts, with the associated damage to the Council's reputation and impact on the public purse.

Conclusion

- 4.21 Taking account of the risks and benefits of each of the options explored, it is not proposed to bring into effect the ASSC proposal. The current fact and degree approach to assessing whether material changes of use have occurred is consistent with the court decisions on STL uses (including the recent JR). It is also consistent with the way in which other certificates of lawful use are assessed.
- 4.22 If a certificate of lawfulness is refused, planning permission can be applied for and would be assessed against the Development Plan and other material considerations. There will be circumstances where it is not possible to grant a certificate of lawfulness (and therefore that the application is refused) but that planning permission, if applied for, can be granted. There is a right of appeal for certificates of lawful use refusals and a right of appeal or local review (depending on whether the application is decided by Committee or under delegated authority) for planning applications.
- 4.23 While this report offers opinion and advice on the ASSC proposals (as set out in their letter of 17 January 2024), it does not consider the wider suggestion that the policy has had unintentional (negative) consequences by creating an imbalance on the supply and provision for a level of STL accommodation that a capital city needs.
- 4.24 In considering a report on Proposed Changes to STL Guidance in the Non-Statutory Guidance for Business, on 19 April 2023, Planning Committee agreed that further guidance on the applicability of NPF4 and City Plan is likely to be required and requested a report setting out options for consulting on further changes to guidance once City Plan 2030 is adopted.
- 4.25 Consideration will be given to bringing a report earlier and the opportunity will be taken to consider the issues that ASSC has raised further in a policy context.

5. Next Steps

- 5.1 A report will be presented to Planning Committee, as set out in paragraph 4.24 above, as early as possible. This may be for Autumn 2024 or before.
- 5.2 Regulatory Committee will be updated on this report.

6. Financial impact

- 6.1 If there are further court proceedings, there could be an impact on the public purse, which is heightened in circumstances where the Council is not successful in defending its position.

7. Equality and Poverty Impact

- 7.1 As the report is not making recommendations which have equality or poverty impacts, there are no impacts on equality arising from this report.
- 7.2 Should the ASSC proposal be adopted, this is likely to result in planning applications being withdrawn for cases which may be a material change of use. This would remove the ability to consider equality impacts in each planning application.

8. Climate and Nature Emergency Implications

- 8.1 As the report is not making recommendations that have climate or nature emergency implications, there are no impacts on these matters arising from this report.

9. Risk, policy, compliance, governance and community impact

- 9.1 Adoption of the ASSC proposal reduces risk of further legal challenge from it or its members. However, this may increase risk of legal challenge from those who consider they have been treated unfairly or from those aggrieved by the change of approach.

10. Background reading/external references

- 10.1 Judgment: [Moore v Secretary of State for Communities and Local Government \[2013\] JPL 192](#);
- 10.2 Judgment: [Cameron v Scottish Ministers \[2020\] CSIH 6](#)."
- 10.3 South Ayrshire Short Term Lets – [Planning Position Briefing Note](#)
- 10.4 Glasgow City Council Online Guidance [Planning Guidance for Short Term Lets](#)
- 10.5 The Highland Council Online Guidance [Is planning permission needed for a short term let?](#)

11. Appendices

- 11.1 Appendix 1 – ASSC Proposal Letter to Council Day dated 17 January 2024.

Appendix 1



Cllr Cammy Day
The City of Edinburgh Council
City Chambers
High Street
Edinburgh EH1 1YJ

cc Paul Lawrence
Peter Watton

17th January 2024

Dear Cllr Day,

The City of Edinburgh Council has agreed to request a report be considered by the Planning Committee to specifically address:

The implications of the Judicial Review and what outcomes this will have on Short-Term Let Planning Policy and the assessment of Short-Term Let Planning applications, what implication this may have for the Council's Short-Term Let Licensing Scheme, and potential amendments to the 'Guidance for Businesses' which comply with the judgement. This report should also be sent to the Regulatory Committee and the Short-Term Lets Working Group for information.

We understand that this report will be heard at the Planning Committee on 31/01, when the matter will be discussed in public. We understand that the Report may be an opportunity to deliver new guidance or update policies. We commend an appetite to amend guidance to reflect the outcome of the two Judicial Reviews and an understanding of the urgency to give clarity and reassurance to legitimate businesses that are vital to the city.

Successful Implementation

You and other members of the Council committed to regulate and control short-term lets in the city. Despite challenges to the legality of parts of the legislation, we believe the Council has now delivered on these commitments. A robust regulatory regime is now in place with Short-Term Let Licensing, ensuring all operators are operating safely under the control of the Council. In addition, a Planning Control Area is in place that will require planning permission for all new STLs. This should be seen as a huge success in terms of the Council's aspirations to regulate the sector.

We further note that there have been just 1,842 secondary let short-term let licence applications (at 1st October 2023). This represents a dramatic 85% reduction in the 12,000 short-term lets claimed in Edinburgh, all now under the direct visibility of the Council as licenced operators. This should be seen as another quantifiable success in terms of the Council's policy objectives and commitment to regulating the sector.

Whether 1,800 entire property STLs is enough to reflect the many great events, workers and visiting relatives that require temporary residential accommodation remains to be seen. Taking the festivals as an example, there are an estimated 18,000 workers at festivals (excluding tourists) requiring 400,000 bed spaces.

Short-term let accommodation is vital for the city to thrive, not just for tourists, but for business professionals, corporate relocations, families being rehomed following flood or fire, people visiting relatives in hospital, festival production staff and performers, and many other reasons where a hotel does not provide the required home from home facilities and independence. 1,800 STLs represent just 0.7% of all residential accommodation in Edinburgh. This is already significantly lower than other comparable cities across Europe. This relatively small percentage of housing stock would appear to be an entirely reasonable allocation to meet the demand for temporary residential housing needs that will always exist in a thriving city like Edinburgh. This demand cannot be solely met by the planned development of hotels or ‘apart hotels’ for a variety of reasons. Any further reduction may lead to a ‘black market’ to meet this demand, which would undermine all attempts to regulate the sector.

Way Forward

However, to allow the sector to move on from here, the judicial review leaves a legacy planning issue and a large degree of uncertainty for existing operators who are still unable to plan forward with their STL. (Those who commenced operating pre-PCA designation date of 5 September 2022). We understand that there are approximately 1,100 Planning / Certificate of Lawfulness Applications awaiting determination related to secondary let licences. The judicial review now put the requirement for these applications (and the related fees) into question. Processing each of these applications on their merit will be resource-intensive. Should they be rejected by the planning department, the only route of appeal for all Certificate of Lawfulness applications is directly to the DPEA. These appeals will be costly for the Council given the administration costs and the possibility of awarding expenses. In addition, regrettably, there is a growing appetite for compensation claims in light of the second judicial review.

This is a ‘point in time’ issue, that only affects the approximately 1,100 applications for existing operators. Going forward, any new operator will require a full planning application under the Planning Control Area. We believe that there is a workable, legally robust solution to safeguard City of Edinburgh Council’s clear intention to robustly regulate STLs, whilst protecting the small number of professional operators that the city relies on to provide short-term accommodation.

We would therefore propose a mutually beneficial solution for both City of Edinburgh Council, and the professional self-catering community which serves the needs of our capital city.

To mitigate against further legal challenges, and to reduce the resource required to consider every existing property on a case-by-case basis, we set out the following recommendation to amend the planning policy to reflect that for properties operating pre-designation date of a PCA (5th September 2022):

‘as a matter of policy, any property in existing use that is not subject to complaint or enforcement is not considered to be a material change of use and therefore does not require planning permission and a certificate of lawful use can be granted.’

We have sought legal advice from Neil Collar, Brodies LLP who advises that this is legally robust and sound and would limit any form of potential challenge. This allows the planning authority to take a different stance in exceptional circumstances but offers a general acceptance that existing operators pre-PCA can continue to operate and that their licence applications can progress unhindered. We note that South Ayrshire Council have adopted a similar approach through a policy statement, and we understand other councils are also taking a pragmatic approach for existing operators in relation to planning.

Should an existing operator fail to operate within best practices and/or a property negatively impacts on residential amenity, this can be addressed by the licensing regime and allows action to be taken. For example, we understand licencing has the power to limit the term of the initial award of a licence (such as 6 months) where there are concerns over potential amenity impacts.

This would offer a balanced, reasonable, proportionate and lawful solution to the current challenge and provide reassurance to legitimate businesses that find themselves in an impossible situation currently. We see this as an opportunity to draw a line in the sand and move forward with STL legislation, which can still be viewed as a success for all parties involved, whilst evidencing some much-needed reflection and pragmatism on achievements the Council has already made regulating the sector.

The ASSC believes that the Council now has the necessary tools to fairly and effectively regulate short-term lets and it should update its policies and guidance as soon as practically possible to reflect the recent legal judgements. As ever, the self-catering industry, which contributes so much to the local economy, stands ready to work with you in a constructive and positive manner and would welcome any further dialogue in preparation for upcoming meetings.

Yours faithfully

Fiona Campbell
Chief Executive
Association of Scotland's Self-Caterers