

NOTICE OF REVIEW

Under Section 43A(8) Of the Town and County Planning (SCOTLAND) ACT 1997 (As amended) In Respect of Decisions on Local Developments

The Town and Country Planning (Schemes of Delegation and Local Review Procedure) (SCOTLAND) Regulations 2013

The Town and Country Planning (Appeals) (SCOTLAND) Regulations 2013

IMPORTANT: Please read and follow the guidance notes provided when completing this form. Failure to supply all the relevant information could invalidate your notice of review.

PLEASE NOTE IT IS FASTER AND SIMPLER TO SUBMIT PLANNING APPLICATIONS ELECTRONICALLY VIA <https://www.eplanning.scot>

1. Applicant's Details		2. Agent's Details (if any)	
Title	Mr	Ref No.	I.00532.00001
Forename	Jack	Forename	Elizabeth
Surname	Arundel	Surname	Tainsh
Company Name	Porteous Properties Limited	Company Name	Wright, Johnston & Mackenzie
Building No./Name	12B	Building No./Name	The Capital Building
Address Line 1	Geocrab	Address Line 1	Second Floor
Address Line 2		Address Line 2	12-13 St Andrew Square
Town/City	Isle of Harris	Town/City	Edinburgh
Postcode	HS3 3HB	Postcode	EH2 2AF
Telephone		Telephone	
Mobile		Mobile	07867 188 230
Fax		Fax	
Email		Email	eit@wjm.co.uk
3. Application Details			
Planning authority	Edinburgh City Council		
Planning authority's application reference number	23/05137/FULSTL		
Site address	2 Porteous Pend, Edinburgh, EH1 2HP		
Description of proposed development	Change of use to short term let.		

Date of application

27/09/2023

Date of decision (if any)

28/11/2023

Note. This notice must be served on the planning authority within three months of the date of decision notice or from the date of expiry of the period allowed for determining the application.

4. Nature of Application

Application for planning permission (including householder application)

Application for planning permission in principle

Further application (including development that has not yet commenced and where a time limit has been imposed; renewal of planning permission and/or modification, variation or removal of a planning condition)

Application for approval of matters specified in conditions

5. Reasons for seeking review

Refusal of application by appointed officer

Failure by appointed officer to determine the application within the period allowed for determination of the application

Conditions imposed on consent by appointed officer

6. Review procedure

The Local Review Body will decide on the procedure to be used to determine your review and may at any time during the review process require that further information or representations be made to enable them to determine the review. Further information may be required by one or a combination of procedures, such as: written submissions; the holding of one or more hearing sessions and/or inspecting the land which is the subject of the review case.

Please indicate what procedure (or combination of procedures) you think is most appropriate for the handling of your review. You may tick more than one box if you wish the review to be conducted by a combination of procedures.

Further written submissions

One or more hearing sessions

Site inspection

Assessment of review documents only, with no further procedure

If you have marked either of the first 2 options, please explain here which of the matters (as set out in your statement below) you believe ought to be subject of that procedure, and why you consider further submissions or a hearing necessary.

Please see paper apart.

7. Site inspection

In the event that the Local Review Body decides to inspect the review site, in your opinion:

Can the site be viewed entirely from public land?

Is it possible for the site to be accessed safely, and without barriers to entry?

If there are reasons why you think the Local Review Body would be unable to undertake an unaccompanied site inspection, please explain here:

The site boundary and surrounding area can be viewed unaccompanied. However, the property is locked at all times, and prior notification for access to the internal areas would be required.

8. Statement

You must state, in full, why you are seeking a review on your application. Your statement must set out all matters you consider require to be taken into account in determining your review. Note: you may not have a further opportunity to add to your statement of review at a later date. It is therefore essential that you submit with your notice of review, all necessary information and evidence that you rely on and wish the Local Review Body to consider as part of your review.

If the Local Review Body issues a notice requesting further information from any other person or body, you will have a period of 14 days in which to comment on any additional matter which has been raised by that person or body.

State here the reasons for your notice of review and all matters you wish to raise. If necessary, this can be continued or provided in full in a separate document. You may also submit additional documentation with this form.

Please see paper apart.

Have you raised any matters which were not before the appointed officer at the time your application was determined? Yes No

If yes, please explain below a) why your are raising new material b) why it was not raised with the appointed officer before your application was determined and c) why you believe it should now be considered with your review.

9. List of Documents and Evidence

Please provide a list of all supporting documents, materials and evidence which you wish to submit with your notice of review

Please see paper apart.

Note. The planning authority will make a copy of the notice of review, the review documents and any notice of the procedure of the review available for inspection at an office of the planning authority until such time as the review is determined. It may also be available on the planning authority website.

10. Checklist

Please mark the appropriate boxes to confirm that you have provided all supporting documents and evidence relevant to your review:

Full completion of all parts of this form

Statement of your reasons for requesting a review

All documents, materials and evidence which you intend to rely on (e.g. plans and drawings or other documents) which are now the subject of this review.

Note. Where the review relates to a further application e.g. renewal of planning permission or modification, variation or removal of a planning condition or where it relates to an application for approval of matters specified in conditions, it is advisable to provide the application reference number, approved plans and decision notice from that earlier consent.

DECLARATION

I, the applicant/agent hereby serve notice on the planning authority to review the application as set out on this form and in the supporting documents. I hereby confirm that the information given in this form is true and accurate to the best of my knowledge.

Signature:



Name:

Elizabeth Tainsh

Date:

23.02.24

Any personal data that you have been asked to provide on this form will be held and processed in accordance with Data Protection Legislation.

Statement: Part 8 Notice of Review

Planning Application 23/05137/FULSTL, 2 Porteous Pend, Edinburgh

1. Introduction

- 1.1. This statement sets out a detailed background and the Applicant's reasons for requiring the Local Review Body (LRB) to review this case, in respect of planning permission application 23/05137/FULSTL for '*Change of use to short term let (in retrospect)*' (the Application). In terms of regulation 13(4) of the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013 (2013 Regulations), this Statement thereafter sets out the procedures the Applicant considers would be most appropriate for the handling of the review.

2. Background

- 2.1. The proposed development is in respect of a business presently used as a short term holiday let (STHL) at 2 Porteous Pend, Edinburgh, known as Porteous Studio. It is a main-door, ground floor, one-bedroom studio, award winning property designed specifically for STHL by the Applicant. It has been finished to a very high specification, providing a unique experience to visitors. The property was purchased as a garage in 2017 (DOC10 Design and Access Statement for 2017/00463/FUL). Planning permission 2017/00463/FUL was granted by the Council for a '*change of use and alteration from a double garage to a residential studio apartment*' (2017 Permission, DOC7).
- 2.2. The Applicant's intention has always been to use the property for STHL however there was no guidance on STHL at the time of that application and the Applicant was advised by the Council to apply for a change of use to residential use. This was granted on 13 April 2017 (the 2017 Permission). The Applicant was also advised by the Council to register the property as a commercial unit upon completion. The Council's advice was followed and the property was registered as a commercial unit, specifically as a holiday let, upon completion in early 2018 which remains extant (see DOC16 email correspondence with Non-Domestic Rates department, noting operation as a small business dated 27 February 2018; DOC15 Non-Domestic Rates Application form submitted 30 April 2018, confirming operation as a commercial holiday let; and DOCs 18 & 19 Scottish Assessors Valuation Roll details, April 2023 & 2018 respectively).
- 2.3. Since that time, the proposed development has continued to operate without interruption as a STHL, with all business being run through the Applicant's limited company, Porteous Properties Limited (DOC13 Limited Company incorporation, Company Number 565816, set up for the purposes of renovating the property for use as a commercial holiday let with all works undertaken by the company), and remains a registered business for the operation of the STHL of the property. The first booking through the Applicant's dedicated website was on 20 February 2018 (DOC17 Invoice

for first booking), with Holiday Home Insurance in place since 25 October 2017 (DOC14).

- 2.4. In order to remain fully up-to date with the Council's new STHL guidance, the Applicant applied for a Certificate of Lawfulness in September 2023. Although the property had not been operating for 10 years as a STHL at that point, given that the Applicant had operated as a STHL at all times, they considered they had good grounds for exemption. On the advice of the Council alone, the Applicant withdrew that application and applied for full planning permission as advised, with 'in retrospect' added to the description of development by the Council.
- 2.5. On 28 November 2023, the Application was refused citing STHL as an inappropriate use in the residential area and that the STHL will have an adverse impact on local amenity.

3. The reason for refusal

3.1. The reasons for refusal (RfR) are as follows: -

- (i) The proposal is contrary to Local Development Plan Policy Hou 7 in respect of Inappropriate Uses in Residential Areas, as the use of this dwelling as a short term let will have a materially detrimental effect on the living conditions and amenity of nearby residents.
- (ii) The proposal is contrary to National Planning Framework Policy 30(e) in respect of Local Amenity and Loss of Residential Accommodation, as the use of this dwelling as a short term let will result in an adverse impact on local amenity and the loss of a residential property has not been justified.

4. The reasons to overturn the decision

- 4.1. There are several reasons to overturn this decision as detailed below which directly relate to the RfR considering (1) Local Development Plan Policy Hou 7 in respect of Inappropriate Uses in Residential Areas and (2) National Planning Framework (NPF4) Policy 30(e) in respect of Local Amenity and Loss of Residential Accommodation.

Change of Use to Residential Not Implemented

- 4.2. The 2017 Permission was for '*Change of use and alteration from a double garage to a residential studio apartment*'. However noting the brief as detailed in that Design and Access Statement (DOC10), '*The brief is to provide a studio apartment suitable for short holiday breaks...*'
- 4.3. Physical alterations required in respect of the 2017 Permission were undertaken and completed (DOC11 Building Warrant 17/01294/WARR details confirming Completion Certificate issued 22 January 2018) however this was at all times with the intention that the property will be used as a STHL. These alterations do not constitute material

operation of the permission, as defined in S27 of the Town and County Planning (Scotland) Act 1997 (1997 Act).

4.4. S27(1) and (2) state as follows:

- (i) Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated:*
- (a) if the development consists of the carrying out of operations, at the time when those operations are begun;*
 - (b) if the development consists of a change in use, at the time when the new use is instituted;*
 - (c) if the development consists both of the carrying out of operations and of a change in use, at the earlier of the times mentioned in paragraphs (a) and (b).'*
- (iii) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.*

4.5. 1997 Act S27(4) then goes on to state:

(4 In subsection (2) "material operation" means:

- (a) any work of construction in the course of the erection of a building,*
- (b) any work of demolition of a building,*
- (c) the digging of a trench which is to contain the foundations, or part of the foundations, of a building,*
- (d) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (c), (da) any placing or assembly of equipment as is mentioned in subsection (6) of section 26 in waters described in paragraph (b) or (c) of that subsection,*
- (e) any operation in the course of laying out or constructing a road or part of a road, or*
- (f) any change in the use of any land which constitutes material development.'*

4.6. The property has then been used as a STHL since and at no time has the residential use been initiated. On that basis, the most recent use remains as a garage.

4.7. It may be helpful to consider the Appeal decision PPA-230-2446 in respect of *'change of use of the entire property at 31A Chambers Street for use a short-term let accommodation including 9 apartments operated and managed as one unit with independent/main door access from the street'* (DOC 23). Clear similarities can be drawn between that case and the present one. In that case, on the basis that external alterations to the properties had been undertaken, but the properties were never used for residential purposes, the Reporter agreed with the Appellant that that change of use was never implemented, meaning that the lawful use remained as office use. Again similarly to present circumstances, valuation roll details indicated that the

Chambers Street properties were described as 'self-catering units' (DOC 23 paragraph 11, in respect of valuation roll details for the proposed development, see DOCs 18 & 19).

4.8. The Reporter states at paragraph 17:

that the 'long-term' residential use approved by the planning permission was never instituted. After the internal alterations had been carried out at the appeal property, the property was put to use as self-catering accommodation or commercial lets or commercial short-term lets, terms which are used interchangeably in the submissions by the main parties. That use is unlawful. The lawful use is therefore still office use.'

4.9. The relevance of this goes to the heart of the reasons for refusal. RfR2 states that the proposal is contrary to NPF4 Policy 30(e) 'in respect of Local Amenity and Loss of Residential Accommodation'. The property has at no time been used as residential accommodation. Policy 30(e) states that development proposals for the reuse of existing buildings for STHL will not be supported where the proposal will result in (i) An unacceptable impact on local amenity or (ii) The loss of residential accommodation where such loss is not outweighed by demonstrable local economic benefits. Given that the lawful use of the property is as a garage, the second limb of policy 30(e) relating to the loss of residential dwelling is not relevant.

Muirhead and Ors v City of Edinburgh Council

4.10. Notwithstanding what is said above, should the Members consider that residential use has in fact been initiated, following the judgment of Lord Braid in the Outer House of the Court of Session [2023 CSOH 86] (DOC24) in December 2023, it is clear that that the requirement to obtain planning permission does not apply retrospectively to a property being used as a STHL prior to 5 September 2022.

4.11. Given that any change of use of the property to STHL could not have occurred before the Control Area came into force (on 4 September 2022), the property was not being used as a dwelling at that time and therefore the terms of S26B of the 1997 Act do not apply to it. The Court made clear in *Muirhead and Ors* that that Parliament did not intend that Section 26B should have retrospective effect by requiring planning permission to be applied for where a STHL was in operation *prior* to the coming into force of the Control Area i.e. S26B(2) will only apply to changes of use after 5 Sept 2022.

4.12. Another aspect of *Muirhead and Ors* that should be noted is in respect of impact upon Council's Non-Statutory Guidance for Business (April 2023), which is a material consideration in applying the LDP policies. The Guidance was found to be irrational by Lord Braid and has been reduced by the Court- it must be disregarded in consideration of this review. At the time of submission of this Notice of Review, amended Guidance taking account of the Court's decision has been approved by the Committee. This is relevant to this Application in so far as it relates to a change of use from a garage to STHL.

Amenity

- 4.13. The property is a main-door, one-bedroom studio apartment designed specifically for STHL by the Applicant. The Application does not seek to make any alterations to the fabric of the building. As noted by the Planning Officer in the Report of Handling, it complies with section 64 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 as it will preserve or enhance the character or appearance of the conservation area.
- 4.14. The property is a small one bedroom studio (48 sqm) which is likely to be used by one person or couples only. The guests are likely to arrive and stay for only short periods of time, in a manner which would not be too dissimilar to that of permanent residents. The bespoke design and size of this property means it is not possible for large groups of unrelated people to stay there. It is located on the ground floor with private access from the street, minimising any impact due to arrivals and departures. There are no shared or communal spaces such as entrance doors, outdoor amenity spaces, stairs or stairwells between the property and neighbouring properties. Notwithstanding the objection from a neighbour (which appears to have been lodged twice on the Council's planning portal (the terms of the objections are identical and both are signed off by the same individual)), the Applicant is not aware of any complaints that have been submitted to the Council regarding noise arising from the present use of the property as a STHL. In any case, whilst isolated noise incidents may occur, this is something that may arise with any type of property and is not considered to have a detrimental effect on local amenity in this bustling, tourist part of the city.

Reason for Refusal 1 Local Development Plan Policy Hou 7 in respect of Inappropriate Uses in Residential Areas

- 4.15. RfR 1 finds that proposal is contrary to Local Development Plan (LDP) Policy Hou 7 in respect of Inappropriate Uses in Residential Areas. LDP HOU 7 states:

“Developments, including changes of use, which would have a materially detrimental effect on the living conditions of nearby residents, will not be permitted.”

It then notes:

“The intention of the policy is firstly, to preclude the introduction or intensification of non-residential uses incompatible with predominantly residential areas and secondly, to prevent any further deterioration in living conditions in more mixed use areas which nevertheless have important residential functions....”

- 4.16. As stated above, it is not considered as the use of this property is as a residential dwelling in any case and thus does not meet the first strand of RFR1. However, additionally we consider that the position of in the Council's RfR1 that this use as a STHL will have a “*materially detrimental effect on the living conditions and amenity of nearby residents*” is considerably overstated.
- 4.17. The property is located in the Grassmarket area, surrounded by mixed use commercial developments including nearby hotels, hot food shops, pubs and bars.

This is an area where there is a large amount of activity both during the day and at night time and LDP para 264 (DOC22) states that the Grassmarket is a “*defined speciality shopping street*”. It cannot be said that the property is in a residential area. Whilst there are properties on the Pend that appear to be resident owned, this cannot be said to reflect the area as a whole as a ‘predominantly residential area’. It is considered to be very much an area of mixed use, with the Applicant doing all they can to ensure that the area surrounding the property remains clean and well-kept for all users. Furthermore, in order to provide operate as a responsible STHL business within the city, the Applicant has regularly gone out of their way to improve the amenity of the local area. This has included attempting to liaise with the Council in respect of the public bins and the Applicant has employed a private cleaner once a week to clean the public Pend (from June 2020- June 2023), improving the cleanliness and standards of the area.

RfR2 NPF4 Policy 30(e) in respect of local amenity and Loss of Residential Accommodation

4.18. Within the Policy 30, Criterion (e) states 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 economic benefits.”

4.19. Referring to RfR2, noting the terms of NPF4 policy 30(e) (ii), given that the residential use as approved by the 2017 Permission was never instituted, the proposal would not result in a “*loss of residential accommodation*” and therefore the second limb of policy 30(e) relating to the loss of residential accommodation is not relevant.

4.20. Considering the first limb of policy 30(e) as part of RFR2, as noted above, the nature, considerate design and size of the property along with its location are all favourable in leading to a conclusion that the Application will not give rise to an unacceptable impact on local amenity.

Further Development Plan Considerations

4.21. Fundamental to these policy considerations, as the change of use to residential use has not taken place, it will therefore not result in the loss of any residential dwellings. Due to the nature, scale and design of the property, coupled with its location in a busy, mixed use tourist centre, leads to the conclusion that there is no conflict with LDP Policy Hou7 or NPF policy 30 (e). It is not considered that there are any adverse effects (as material considerations) that outweigh the proposed development’s compliance with these policies.

- 4.22. Furthermore, there are additional key policies with which the proposed development accords with, including LDP Policy Del 2 and NPF4 Policy 27. The property is located within the defined city Centre in the LDP. Paragraphs 108 and 109 of the LDP state:

"[108] Edinburgh's city centre is the vibrant hub of the city region – it's the regional shopping centre and an important tourist destination with a wide range of entertainment and cultural attractions. ... [109] The plan aims to ensure that development in the city centre achieves the right balance between a number of competing priorities – from realising its economic potential, to protecting its built and natural heritage, from promoting its role as a capital city to making it an attractive place to live".

- 4.23. The Application positively contributes to this objective. Policy Del 2 seeks the retention and enhancement of the city centre's "*character, attractiveness, vitality and accessibility and contributes to its role as a strategic business and regional shopping centre and Edinburgh's role as a capital city*", with NPF Policy 27(a) having a similar objective with "*Development proposals that enhance and improve the vitality and viability of city, town and local centres, including proposals that increase the mix of uses, will be supported.*"

- 4.24. The Application is supported by these policies.

5. Further Procedure

- 5.1. The Applicant considers that it is appropriate for the Review to be conducted by (i) holding one or more hearing sessions on the specific matters raised in this Statement; and (ii) a site inspection. We reserve the right further written submissions on specific matters.
- 5.2. We consider it vital that the Members visit the property in order to fully appreciate the exceptional high design and specification of the property for use as a STHL and importantly the local amenity of the Pend and character of the surrounding area.

6. Conclusion

- 6.1. As detailed in this Statement, a change of use only occurs when the use is instituted (i.e. actual occupation by residents). Residential use of the property approved by the 2017 Permission has not been instituted, its extant use therefore remains as a garage. Whilst works were carried out, these do not fall within the definition of "*material operations*" and therefore did not lead to implementation of the Permission (see s27(2) 1997 Act.) . This is key when reviewing the respective reasons for refusal- in conjunction with local amenity considerations as detailed in this Statement, leads to the conclusion that there is no conflict with LDP Policy Hou7 or NPF policy 30(e). There are no material considerations that outweigh the development's compliance with these policies.
- 6.2. On this basis, Members should grant the planning permission.

Documents Inventory

Notice of Review

Planning Application 23/05137/FULSTL, 2 Porteous Pend, Edinburgh

Planning Application Documentation

DOC1 Edinburgh City Council Decision Notice 23/05137/FULSTL dated 28 November 2023

DOC2 Report of Handling for 23/05137/FULSTL dated 28 November 2023

DOC3 Application form in respect of 23/05137/FULSTL

DOC4 Location Plan

DOC5 Floor Plan

DOC6 Planning Statement in respect of 23/05137/FULSTL

DOC7 Edinburgh City Council Decision Notice 17/00463/FUL for Change of use and alteration from a double garage to a residential studio apartment dated 13 April 2017

DOC8 Report of Handling for 2017/00463/FUL (undated)

DOC9 Application form in respect of 2017/00463/FUL

DOC10 Design and Access Statement in respect of 2017/00463/FUL

DOC11 Existing and Proposed Sections and Plans in respect of 2017/00463/FUL

DOC12 Building Warrant 17/01294/WARR completion confirmation details 22 January 2018

Other Relevant STHL Documentation

DOC13 Porteous Properties Limited Certificate of Incorporation dated 12 May 2017

DOC14 Holiday Home Statement of Insurance, 25 October 2017

DOC15 Non-Domestic Rates Application Form submitted 30 April 2018

DOC16 Email correspondence regarding Non-Domestic Rates 27 February 2018

DOC17 Website Invoice for Porteous Studio first booking 29 March 2018

DOC18 Scottish Assessors Valuation Roll details, April 2023

DOC19 Scottish Assessors Valuation Roll details, April 2018

DOC20 Scottish Assessors Practice Note 17, Valuation of Self Catering Units, Revaluation 2023

Relevant Planning Policy

DOC21 National Planning Framework 4

DOC22 Edinburgh City Council Local Development Plan 2017

Relevant Decisions

DOC23 Appeal Decision Notice PPA-230-2446 in respect of 31A Chambers Street for use as a short-term let accommodation including 9 apartments operated and managed as one unit with independent/main door access from the street

DOC24 Muirhead and Ors v City of Edinburgh Council 2023 CSOH 86