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| **Iaian Muirhead** | **July 2023** |

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| **Address here** |  |
| Application for Certificate of Lawful Use for Short-term Let Accommodation: Planning Statement |



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**Certificate of Lawful Use or Development for Short-term Let Accommodation: Planning Statement**







# Introduction

* + 1. Contour Town Planning has been asked to provide a planning statement in support of this application to the City of Edinburgh Council (‘the Council’) by Iain Muirhead (‘the applicant’) for a Certificate of Lawfulness of Existing Use or Development (‘CLEUD’) in respect of the use of the subject property (the flat) in his/her ownership at **(address here and info change here)**.
    2. The flat has been used as short term let visitor accommodation since July 2022 **(date may change)**. The purpose of this application is to demonstrate as described in Section 150 (2) of the Town and Country Planning (Scotland) Act 1997 (as amended), ‘The Planning Act’, that the use of the flat as short term let visitor accommodation does not constitute development as no material change of use has taken place.
    3. For booking purposes the flat is known as the ‘Bright and Stylish Apartment in the City Centre’. **(City Centre’ may change)** The flat is used for short term residential letting purposes, or as a ‘self-catering holiday let’, and has been used continuously for this purpose since before the confirmation of Edinburgh’s short term let control area.
    4. The property is indicated on the Site Location plan and Floor Plan submitted in support of this Application.

# Property Description and Surroundings

* + 1. The property comprises a top floor flat within a mid-nineteenth century 3-storey with basement flatted block located on Cumberland Steet in the heart of Edinburgh’s New Town **(Town and street info will change here)**. The property is less than a mile from Waverley Station (a twenty-minute walk), and closer still to Edinburgh’s Princes Street tram-stop, offering direct access to Edinburgh airport and now Leith. The location of the property is identified on the Location Plan submitted with the application.
    2. The flat itself contains 1 double-bedroom, with open-plan kitchen living and dining area, and a separate full-bathroom and hallway. **(Bedroom count and living info change here)**
    3. Entrance and egress for this third-floor flat is taken via the common stairway within number 77 on the street. **(address and sairway info will change here)** The door for this access is sandwiched at ground-floor level by commercial premises operated as Freja Designer Dressmaking. In total, the common stairway serves 6 flats across 3 floors of accommodation.
    4. For the avoidance of doubt, there are no designated car parking spaces associated with this property. **(parking info and outdoor amenity spaces may change)** There is also no access to any private or shared outdoor amenity spaces associated with this property.

# Determining Matters: Certificate of Lawful Existing Use or Development (CLEUD)

* + 1. While a Certificate of Lawful Existing Use or Development (CLEUD) is different from a planning permission, these certificates are nevertheless still governed by the Planning Act.
    2. The definition of ‘lawfulness’ and the provisions governing applications for a CLEUD are set out in Sections 150-153 of the Planning Act with further guidance provided in Annex F of Circular 10/2009 ‘Planning Enforcement’.
    3. Section 150 of the Planning Act sets out the provisions for Certificates of Lawfulness.
    4. Section 150(1) states that if any person wishes to ascertain whether:
       1. *any existing use of buildings or other land is lawful,*
       2. *any operations which have been carried out in, on, over or under land are lawful, or*
       3. *any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful.*

*He (sic) may make an application for the purpose to the planning authority specifying the land and describing the use, operations or other matter.*

* + 1. Section 150(2) of the Act goes on to clarify that uses and operations may be considered lawful if:
       1. *no enforcement action may then be taken in respect of them (****whether because they did not involve development; or require planning permission****; or because the time for enforcement action has expired or for any other reason), and*
       2. *they do not constitute a contravention of any of the requirements of any enforcement notice then in force.*
    2. In this case under part (a) the first and second criteria (because it did not involve development or require planning permission) are the reasons upon which this application is being made. It is considered that the use of the flat as short term let visitor accommodation (sui generis) does not constitute a material change of use from being operated as a residential flat (sui generis). Further, under part (b) there is no enforcement notice currently outstanding in respect of this property.
    3. The detailed arguments why it is considered that this position holds for the subject property are set out below in section 4 of this supporting Planning Statement ‘Material Change of Use’.
    4. Further advice on the determination of CLEUDs is contained within Annex F ‘Certificates of Lawful Use or Development’ within Scottish Government Planning Circular 10/2009: Planning Enforcement.
    5. The annex helpfully notes at paragraph 4 that the first and second criteria under section 150(2) are to be treated as one and the same. Consistent with the arguments presented in this application (see 3.1.6), paragraph 4 notes the following:

*“If no enforcement action may then be taken in respect of them, whether* ***because they did not involve development or require planning permission****, or because the time for enforcement action against them has expired, or for any other reason”.*

* + 1. Paragraphs 16 and 21 of the same annex also offers useful commentary on the type of decision making practice Planning Authority’s need to employ when determining applications for CLEUDs.
    2. Paragraph 16 notes the following:

“*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*”.

* + 1. Paragraph 21 meanwhile states:
    2. “*Moreover, the applicant’s own evidence does not need to be corroborated by independent evidence in order to be accepted. If the planning authority has no evidence to contradict or otherwise make the applicant’s version of events less than probable, this is not in itself a valid reason to refuse the application*”.
    3. As detailed in the next section of this Planning Statement, the recent Scottish Government Planning Circular ‘1/2023 Short Term Lets and Planning’ clarifies that the making of a short term let control area does not have a retrospective effect on existing short term lets within the boundaries of such areas. By contrast, rather than automatically deeming all existing short term lets as material changes of use requiring planning permission, the Planning Authority will still need to assess whether individual existing short term lets are in fact material changes of use on a case-by-case basis.
    4. Paragraphs 16 and 21 of Planning Circular 10/2009 confirm that Planning Authority’s will need to do more than simply point to the existence of a short term let control area as justification for refusing to issue CLEUDs when these have been applied for under Section 150(2) and where it is considered by the applicant that no material change of use has actually taken place.
    5. By contrast, any assessment as to whether a material change of use has taken place in respect of such properties must consider in detail the fact and degree of any change. It would therefore be inappropriate for the Planning Authority to rely upon the formation of a short term let control area to automatically and without further justification deem any change of use within its territory as a material change of use requiring the benefit of planning permission.

# Material Change of Use: Short Term Lets.

* + 1. The Planning Act confirms at section 28(1) that “*planning permission is required for the carrying out of any development of land”*.
    2. In clarifying what is meant by development, section 26(1) of the Planning Act notes that:

“*’development’ means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any* ***material change*** *in the use of any buildings or other land”.*

* + 1. Following amendments to the Planning Act in 2019, section 26B of the Planning Act is titled ‘*Material Change of Use: Short Term Lets*’. Under section 26B(2) it notes the following:

*“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 dwellinghouse”*

* + 1. Section 26B(5) of the Planning Act further notes that:

*“The Scottish Ministers may by regulations make further provision for the purposes of this section including, in particular, provision about (inter alia) –*

*d.) any circumstances in which, or descriptions of dwellinghouse to which, this section does not apply”.*

* + 1. While the Town and Country Planning (Short Term Let Control Area) (Scotland) Regulations 2021 (‘the Regulations’) did include a schedule which itemised exempt building typologies titled *Schedule: Excluded Properties*, it was silent on whether the Regulations should be applied retroactively to any buildings not excluded in the schedule. This had created some uncertainty over the applicability of the control area rules on existing short term let properties.
    2. The recently published Scottish Government Planning Circular ‘Short-term Lets and Planning 1/2023’ was published in May 2023 and later amended by an erratum in June 2023. This Circular and erratum now do helpfully address the retrospective application of the control area regulations. In this regard the amended Circular notes at paragraph 4.3:

*“Section 26B* (of the 1997 Planning Act as amended), *is not retrospective, meaning that the designation of a control area does not, in itself, retrospectively deem any previous change of use of a dwellinghouse to use for short-term lets within that area to be a material change of use. Section 26B applies where a change of use of a dwellinghouse occurs after designation of a control area. However, it is important to bear in mind that section 26B does not replace the existing requirements of the 1997 Act in respect of the need for planning permission for a material change of use. This means that material changes of use to short-term letting whether before or after the designation of a control area would require planning permission”.*

* + 1. In the circumstances, a property such as 77/6 Cumberland Street, which has operated as a short-term let since July 2022 cannot be deemed to require planning permission for change of use, as its operation as a short term let precedes the designation of Edinburgh’s short term let control area and is therefore not controlled by section 26B of the Planning Act.
    2. By contrast in determining whether planning permission is required here, an assessment needs to be made as to whether it’s ongoing operation as a short term let amounts to a material change of use. Only if a material change of use is considered to have taken place would planning permission be required under section 26 (and not under section 26B) of the Planning Act.
    3. Although recently superseded by City of Edinburgh Council’s April 2023 non-statutory guidance document ‘Guidance for Business’, the November 2021 iteration of this document is considered to be a valuable attempt to articulate the situation provided for by section 26, especially in terms of short term lets.
    4. In setting out the options available to those willing to make the case that an existing change of use is not development and therefore does not require the benefit of planning permission, page 6 of this document notes:

“*Some activities within a residential property can be undertaken without requiring planning permission. Some common enquiries are given below… If you believe planning permission is not required, you can apply for a Certificate of Lawfulness for legal confirmation*”.

* + 1. Before publication of the 2023 iteration of the non-statutory guidance document, many Reports of Handling for planning applications relating to changes of use for short term lets, referred directly to the 2021 non-statutory Guidance document and the references it makes to short term lets as one of the ‘common enquiries’ the document references. However, these reports inaccurately noted a number of individual assessment matters that the “*non-statutory Guidance for Businesses (sic) states that an assessment of a change of use of dwellings to (STLs) will have regard to*”.
    2. By contrast however, page 6 of the 2021 document actually notes in relation to these individual assessment matters that:

“*The change of use from a residential property to short term commercial visitor accommodation* ***may require planning permission. In deciding whether this is the case,*** *regard will be had to:*

* + - * *The character of the new use and of the wider area*
      * *The size of the property*
      * *The pattern of activity associated with the use including numbers of occupants, the period of use, issues of noise, disturbance and parking demand, and*
      * *The nature and character of any services provided*”
    1. These matters were therefore important as issues which would help Planning Officers to decide whether planning permission was required at all. These were therefore factors to be assessed when deciding whether a material change of use, and therefore development itself, has actually taken place. If it was decided that there had been a material change of use, then planning permission would be required. If not, and as explained at 4.1.10 of this Planning Statement, the document confirms that a certificate of lawfulness could be applied for to provide legal confirmation that no development had taken place.
    2. Support for the view that this was the purpose of these specified matters comes from the appeal decision of 18 May 2018 for Certificate of Lawful Use appeal reference CLUD-230-2007 at 11 Stevenson Drive, Edinburgh. This overturned a deemed refusal by the City of Edinburgh Council to award a Certificate of Lawfulness. In this case, while contesting the appeal, the Council failed to provide reasons why it considered that a material change of use had taken place.
    3. Directly relevant to this discussion of the assessment matters detailed at 4.1.7 therefore, the Appeal Reporter’s decision letter notes the following:

“*The council’s guidance for businesses is helpful. It sets out the matters it considers are relevant when considering whether the change of use from a residential property to short term residential letting accommodation requires planning permission. It states that regard will be had to the character of the new use and the wider area; the size of the property, the pattern of activity associated with the use including the number of occupants, the period of use, issues of noise, disturbance and parking demand; and the nature and character of any services provided*.

* + 1. The importance of these matters specifically as considerations that could help to determine whether a material change of use had taken place, are considered in the English Court of Appeal Case of Sheila Moore v (1) Secretary of State for Communities and Local Government and (2) Suffolk Coastal District Council (2012 EWCA CIV 1202).
    2. In this case (cited in the appeal decision at Stevenson Drive) an Appeals Inspector had dismissed a planning appeal for the unauthorised use of a detached dwellinghouse as commercial leisure accommodation. The appellants had argued that no change of use had taken place and that therefore planning permission was not required.
    3. In this case, the original Planning Appeals Inspector had described the type of activity that characterised this particular form of commercial leisure accommodation. Among other things he noted: providing accommodation for up to 20 people in a detached house; enabling many guests to arrive in their own vehicles; allowing for group activities such as yoga and cycling; facilitating group events like reunions and parties; and, allowing occupancy for up to 175 nights a year and operating tight ‘turnaround’ windows between groups of visitors when cleaning and servicing activities took place.
    4. In dismissing the appeal, Lord Justice Sullivan’s judgment noted that in this particular case, a material change of use had ‘*as a matter of common sense*’ taken place, but also confirmed that such a judgement needed to be reached ‘*as a matter of fact and degree*’ and that the extent of its departure from a permitted use needs to be considered when evaluating if such a change is ‘material’. In this regard, he noted:

“*He (the Inspector) carefully examined the characteristics of the lettings in the present case and concluded that, as a matter of fact and degree, they were a material change of use from the permitted use as a dwelling-house. In our judgment, he was not merely entitled to reach this conclusion; it was clearly, on the facts of this case, the correct conclusion. As a matter of common sense, this particular use for holiday lettings is very far removed from the permitted use as a dwellinghouse and a material change of use has occurred*”.

* + 1. Within Edinburgh, this case was further cited in the decision for Certificate of Lawfulness appeal reference CLUD-230-2004, which was allowed on 26 April 2018, overturning City of Edinburgh Council’s refusal of a CLUD for short-term let visitor accommodation for a property at Flat 1, 1 South Gyle Mains. In his decision letter, the Appeal Reporter notes the grounds upon which the appeal at South Gyle Mains was being made and offers some commentary on the relevance of the Moore case. The relevant paragraphs from the decision letter, which are considered to be directly relevant to the current application, are copied below in full with particularly relevant text underlined for emphasis here:

“*The council refused the application on the basis that a change of use was involved and that as that use had not been in effect for at least 10 years it was not immune from enforcement action so as to be lawful. The appellant does not suggest that the use has become lawful by reason of the immunity from enforcement action by operation of the 10-year immunity period referred to in section 124(3) of the 1997. Its case is that the existing use of the property is lawful because this does not differ materially from that of a residential flat and does not therefore amount to development within the meaning of section 26(1) of the Town and Country Planning (Scotland) Act 1997.*

*My decision has to reflect solely whether the appeal use is lawful and therefore does not require to be authorised by a separate grant of planning permission. That involves considerations of law and the facts of the case, in which questions of planning merit or the operation of development plan or other policies are not relevant considerations.*

*The council draws my attention to the decision of the English Court of Appeal in the case of Sheila Moore v (1) Secretary of State for Communities and Local Government and (2) Suffolk Coastal District Council (2012 EWCA CIV 1202). This makes clear that the use of a house for short-term holiday lets could, but would not necessarily always, amount to a material change of use. The appellant accepts, and I agree, that whether a material change of use is involved in any particular case requires consideration of matters of fact and degree. In that context, a succession of lettings of relatively short duration need not, in principle, result in a material change in the use of the flat*”.

# Assessment

* + 1. As Lord Justice Sullivan noted in his ruling, the Planning Authority is ‘*entitled*’ to form a view as to whether a material change of use has taken place; based on matters of fact and degree.
    2. Turning to the subject property at Flat 6, 77 Cumberland Street, **(address change here)** as already noted, the 2021 Guidance document referred to in section 4 of this Planning Statement provides a useful list of relevant matters that will allow the fact and degree of any change from a residential use to a short term let use to be assessed.
    3. To assist the Planning Authority in its assessment of these matters, the paragraphs that follow offers some consideration of the subject property when assessed against these matters.

### The character of the new use and of the wider area

* + 1. The short term let use allows visitors to the city to stay temporarily in residential properties. Very often such stays are marketed as allowing visitors to ‘live like locals’. The emphasis of such use is on visitors behaving in such a way that they feel like they are permanent residents. In this way, guests that want to give most expression to the idea of living like a local will act and behave in a manner that is practically indistinguishable from that of a permanent resident.
    2. In terms of the character of the wider area, the property is located in Edinburgh’s New Town **(town info may change)**. This is an explicitly urban quarter of the city, expressly laid out as such in the late 18th century and early 19th Century. In such areas, acting reasonably, both permanent residents and visitors should recognise that an urban setting like this can absorb a relatively wide range of urban activities. These might include: people coming in and out of buildings at different times of day and night; people and vehicles moving along streets at different times of day and night; and, commercial activity taking place predominantly during the day.
    3. The property at 77 Cumberland Street **(address and measurement and town info change)** is located less than 50 metres from a public house with a beer garden, and less than 200 metres from an area beginning on St Stephen’s Street designated in City of Edinburgh Council’s Adopted Local Development Plan 2016 as performing a ‘town centre’ function for Stockbridge.
    4. Overall, the immediate area surrounding the property is considered to be relatively busy where some activity is reasonably to be expected. It is considered that for many people the ongoing activity that the area supports would be regarded as a benefit rather than as an adverse outcome; and compares favourably with perhaps the vast majority of places elsewhere in Scotland where such activity does not occur. The latent activity levels that this area enjoys also means that this is an area that has shown itself capable of assimilating a range of uses together in a host urban environment that does not appear to be fragile or adversely sensitive to change.

### The size of the property

* + 1. **(change bedroom and max people and measurement info)** The property has one double-bedroom. It is advertised as capable of hosting a maximum of 3 people. The property extends to approximately 44 sqm. This is considerably smaller than the 52sqm minimum standard for a one-bedroom residential property identified by the City of Edinburgh Council in its January 2020 Design Guidance document. The reason stated in the document for defining these minimum space standards was ‘*in order to ensure satisfactory amenity’*.
    2. **(change bedroom and resident count and visitor info)** For the avoidance of doubt, a one-bedroom property like this would be equally capable of hosting either 3 permanent residents (a couple and a child) or 3 visitors (a couple and a child).

### The pattern of activity associated with the use including numbers of occupants, the period of use, issues of noise, disturbance and parking demand

* + 1. **(change guest count info)** As noted above, the maximum number of guests that could stay in the property would be 3. The applicant has confirmed that a minimum stay duration of **(change amount of nights and month info)** 2 nights is in place throughout most of the year, with this total rising to a 4 night minimum stay in August. The applicant advises that the property is used as a short term let an average of 9 nights per calendar month.
    2. Each guest is vetted by the hosting company that looks after its servicing. Under its own procedures, the company ensures that no-one under the age of 25 is allowed to rent the property.
    3. All guests are required to agree to ‘house rules’ for the property at the point of booking. These rules outlaw practices such as: smoking or vaping anywhere in the property; holding parties; and keeping pets. The guest book provided with the property for each group of guests explains these rules as well as providing further detail on matters such as refuse disposal and recycling; bag storage and nearby parking; and ‘quiet periods’ in the property (between 10pm and 7.30am) **(hours may change)**.
    4. To assist in assessing the property against this matter, a copy of the property’s guest book as well as a copy of the hosting company’s house rules have been appended to this application as supporting documents. Overall, it is considered that there is far greater control of guest behaviour and of all activity that can take place in the property than would be the case if it was let out to a permanent resident.

### The nature and character of any services provided

* + 1. For those arriving by car, guests are directed to suggested local public car parks within the guest book provided with the property. For the avoidance of doubt, the lack of car parking is made clear on the property’s online listing. Anecdotally, the hosting company has confirmed that most guests in fact arrive by train or plane and do not require parking of any description.
    2. The property has no access to any private or shared outside amenity garden areas. **(storage rules may change here)** It also has no bag storage facilities on site (although again, suggested commercial outlets where bag storage is available is detailed in the guest book).
    3. All cleaning of the property takes place after check-out/departures (10.30 am) **(times listed here may change)** and before check-in/arrivals (4pm). Accordingly, the servicing of the property always takes place in office hours and not during anti- social times.

# Conclusion

It is considered that the use of this small property as short term let visitor accommodation does not amount to a material change of use. Given the fact and degree of the change that has taken place here is so slight when compared with a permanent residential use, ‘development’ as set out in section 26 of the Planning Act should not be held to have taken place here when this change was activated.

It follows that if no material change of use has taken place, no development has taken place, and the Planning Authority can confirm this by issuing a certificate of lawfulness confirming its existing use as short- term let visitor accommodation. The Planning Authority cannot rely on the making of a short term let control area in Edinburgh as grounds for automatically seeking a planning application for this change of use. By contrast, the Planning Authority is required to consider matters of fact and degree in determining whether a material change of use here has in fact taken place.

As explained in appendix F of Planning Circular 10/2009, unless the Council has reason to reach a different conclusion on those matters assessed in section 5 of this planning statement, the logical outcome of this application is that a CLEUD should be issued in the applicants’ favour. It is therefore respectfully requested that this Certificate of Lawful Use or Development be granted.

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