



Short Term Lets – Legislation

Briefing Paper No. 3

Ciaran McDonald and Andy Wightman MSP
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Contact

If you require further information, or would like to discuss any of the topics raised in this paper, please contact Ciaran McDonald:

Email: ciaran.mcdonald@parliament.scot

Address: MG.20, The Scottish Parliament, Edinburgh, EH99 1SP

Telephone: 0131 348 6368

Foreword

In 1948, the United Nations enshrined housing as a human right in Article 25 of the Universal Declaration of Human Rights¹. Yet, nearly 70 years later, current trends show that this right is not being upheld for many people.

Since we first published our preliminary briefing paper documenting the extent of short term lets in Edinburgh, I have been inundated by constituents from across the Lothian region and throughout Scotland, expressing concerns about the rapid rise of this form of letting.

It is against this background of growing discontent that I am delighted to launch the **Homes First** campaign that will seek to raise awareness of this phenomenon and develop measures to better regulate its extent and impact*.

In the last few months, I have become increasingly aware that there is now a staggering number of residential homes that are now effectively being marketed as 'hotels'. In Edinburgh alone, latest figures show that there are at least 5474 whole properties available for short term let (where the landlord is absent). This is a significant development, which adds further pressure on local housing markets as this means that fewer properties are available for long term renters or owner occupiers wishing to live and contribute to community life in our neighbourhoods.

However, there are also costs to the wider community. As I revealed in our last briefing paper – in Edinburgh alone, over £10 million of non-domestic rates are being avoided by owners of short term let properties. These vital funds could pay for local community facilities and services including schools, libraries and social care.

This third briefing paper explores the legislative and regulatory framework that currently exists in Scotland to consider how it could be reformed to provide better regulation of short term lets in the wider public interest. This is the time for action and I look forward to engaging with all interested parties in the months ahead.

To find out more about short term lets or to contribute your thoughts to the **Homes First** campaign, please contact my office. Details are on page 2 of this paper.



Andy Wightman MSP



* Learn more about the campaign and contribute your experiences of short term lets at <http://greenscot/homesfirst>.

A Review of Current Legislation in Scotland

In light of the rapid growth of short term lets across Scotland, there is an urgent need to introduce effective regulation and control of the short term lettings sector. This is the focus of the **Homes First** campaign.

To gain a better understanding of the legislative processes that can inform this debate, this briefing paper explores current legislation in Scotland and reviews the current position to identify what opportunities exist to better regulate short term lets.

We conclude that we will need to introduce planning, fiscal or regulatory measures that will enable local government to provide effective controls over the change of use of residential property to short term let property.

The Development of Tourism Act 1969

Nearly fifty years ago, the UK Parliament passed The Development of Tourism Act 1969² to create statutory bodies to promote tourism. The Act recognised the importance of encouraging investment in the sector, particularly in relation to areas of the country which would benefit from visitors contributing to the local economy.

Part 3 of the Act made provision for any form of tourist accommodation to be registered with the local Tourist Board:

17 Registration of tourist accommodation.

- (1) Her Majesty may by Order in Council make provision for the registration by the Tourist Boards of, or of any class of, hotels and other establishments in Great Britain at which sleeping accommodation is provided by way of trade or business.

However, after strong opposition, this registration scheme was never enacted and by 1981 a voluntary system had been introduced by the then Scottish Tourist Board³.

This legislation is an important starting point for our review of the implications of regulating short term lets. It confirms the political will to develop a formal system of registering accommodation that is provided as a business but also highlights the opposition that then existed to provide any mandatory registration of accommodation providers. This becomes a more pressing issue when private residential properties are marketed and used for tourist accommodation.

Deeds of Conditions

Short term lets are frequently responsible for the material detriment of the enjoyment of people's homes through not knowing one's neighbours anymore or through instances of antisocial behaviour within communal areas such as stairways and shared entrances. It is with such issues in mind that conditions exist in many title deeds that restrict the use of property to being a main residence and prohibiting business use (see example below).

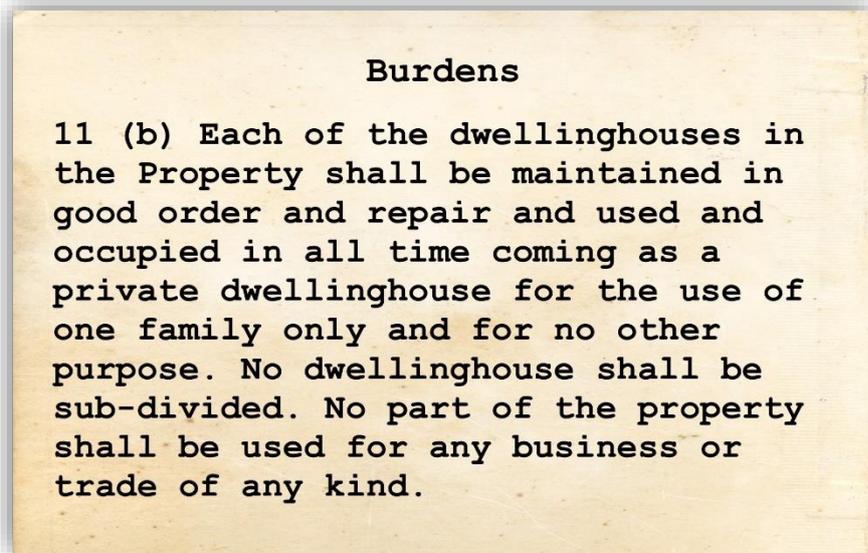


Figure 1: An extract from the title deeds of a property in the Old Town of Edinburgh.

These Deeds of Conditions fall under the Title Conditions (Scotland) Act 2003⁴.

Section 8 asserts the enforceability of title deeds:

8 Right to enforce

- (1) A real burden is enforceable by any person who has both title and interest to enforce it.

[...]

- (3) A person has such interest if—
- (a) in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person's ownership of, or right in, the benefited property

Given the clear prohibitions on commercial use of properties and the restrictions to their use as main residences, Deeds of Conditions are clearly one way in which changes of use to short term lets might be secured. Although the following examples are not about short term lets, they provide an indication of the current state of the law in this area⁵.

The case of *Kettlewell v Turning Point Scotland* 2011 SLT (Sh Ct) 143 involved neighbouring residents taking a care home provider to court over the enforcement of title deeds on the change of use of a residential property. The sheriff found in the favour of Kettlewell who argued that this new use had lowered the value of the neighbouring properties by more than 10%.

Whilst it is easier to argue the material detriment in monetary terms, it is rather more difficult when it comes to more subjective matters such as peaceful enjoyment of property.

In *Barker v Lewis* 2007 SLT (Sh Ct) 48; affd 2008 SLT (Sh Ct) 17, there was a dispute over the operation of a bed and breakfast business in a property which neighbours claimed had a title condition that it should be for the use of a family and not a commercial

operation. Those seeking enforcement presented to the sheriff a backlog of complaints from two years demonstrating how their enjoyment of their properties was blighted by the bed and breakfast business.

However, the sheriff and (on appeal) the sheriff principal rejected this claim, ruling that any material detriment had to be “substantial” and “significant”, which was not in their view the case.

In relation to applying a change of use from a residential property to a short term let, it is worth noting the case of *Whitelaw v Acheson*, which was brought to the Lands Tribunal. In this case, a property owner applied to change their property into “a therapy and wellbeing centre”. However, neighbours objected as they were concerned that such a phrase could be misinterpreted to suggest that the property could be a cover for something else offering more than just massages. Although the Lands Tribunal permitted a variation of the title condition to allow a change of use for “therapy”, the judgment also called into question the interpretation of “material detriment”⁶.

In terms of short term lets these cases suggest that if a property owner changed a residential property into a place of business then this could be considered grounds for taking action. However, at present, there has not been a test case specifically on short term lets to support this⁷.

Use Class Orders

As set out in The Town and Country Planning (Use Classes) (Scotland) Order 1997⁸, there are 11 Use Classes of property. For example, Class 1 covers all manner of retail operations “where the sale, display or service is principally to visiting members of the public” and Class 3 is “for the sale of food or drink for consumption on the premises”.

Use Classes form part of the planning system and mean that, in simple terms, a domestic dwelling property cannot be turned into a café without an application for change of use and consent being granted. However, it is abundantly clear that flats and other residential properties are being converted into short term lets without any consent being sought. This is in part because the Use Class order is weak in relation to the uses to which flatted property is put.

Flats do not fall within a specific category and are exempted from Class 9 (Houses):

Class 9. Houses

Use—

- (a) as a house, **other than a flat**, whether or not as a sole or main residence, by—
 - (i) a single person or by people living together as a family, or
 - (ii) not more than 5 residents living together including a household where care is provided for residents;
- (b) as a bed and breakfast establishment or guesthouse, where at any one time not more than 2 bedrooms are, or in the case of premises having less than 4 bedrooms 1 bedroom is, used for that purpose.

Whole properties let out on a short term basis do not meet this class of permitted use and do not fall within any class of use. As a consequence, some local authorities, such as in Edinburgh and Glasgow, have resorted to applying localised interpretations of short term lets.

Case Study: Edinburgh

For many years now, there has been a debate about how the City of Edinburgh Council should manage the change of use of residential properties into short term lets. In response to this, the Council introduced measures covering 'Short Stay Commercial Leisure Apartments' (October 2016) and latterly 'Short Stay Commercial Visitor Accommodation' (March 2017)⁹.

The appendices to these reports do, however, highlight shortcomings in the Council's approach to tackling short term lets. The Committee reports that 41 properties were investigated by council officials following concerns by neighbours about properties being run as short term lets, including antisocial behaviour or a material change of use. In all, it took an average of 326.2 days to investigate these reports suggesting that this is an issue which is not under effective control.

Recognising the need to better control the growth of short term lets, the Council has recently contacted the Scottish Government calling for:

- (a) An amendment in planning legislation to classify short term lets rented out for 90 days or more per calendar year as a commercial business.
- (b) An introduction of legislative proposals for a licencing or registration scheme, which would cover short term lets being rented out for 90 days or more per calendar year.¹⁰

In the absence of any such reform, the Council relies on its own local policies to manage short term lets. In its publication, 'Guidance for Businesses', three important statements are made:

"The change of use from a residential property to short term commercial visitor accommodation may require planning permission."

"In the case of short stay commercial leisure apartments, the Council will not normally grant planning permission in respect of flatted properties where the potential adverse impact on residential amenity is greatest."

"Change of use in flatted properties will generally only be acceptable where there is a private access from the street."¹¹

Furthermore, the Edinburgh Local Development Plan, and notably Policy HOU 7, explicitly states that:

"Developments, including changes of use, which would have a materially detrimental effect on the living conditions of nearby residents, will not be permitted."¹²

This suggests that most properties operating as short term lets in Edinburgh are doing so without planning consent, which means that the majority of properties being let in the city are doing so unlawfully.

Case Study: Glasgow

Glasgow City Council has utilised a combination of local powers to effectively regulate and manage this form of letting.

The Council published supplementary guidance that recommends that planning permission must be sought if a residential property is to have a change of use into a short term let:

“The use of a flat as short-stay accommodation, therefore, has the potential to result in conflict with mainstream residential flats in a block through regular influx of temporary residents as well as increased pressure on infrastructure and shared space. Evidence has shown that amenity issues can arise through the introduction of short-stay accommodation and illustrates the need to effectively control the activity taking place... Where a flat is being used frequently to provide short-stay accommodation, there is likely to be a material change of use.”¹³

In addition to this, the Council has stated that it will “strongly resist” the change of use to “short stay flats” in six neighbourhoods in the city that lie within Conservation Areas.¹⁴

The Antisocial Behaviour Notices (Houses Used for Holiday Purposes) (Scotland) Order 2011

The rise of short term lets has been associated with a steady increase in instances of antisocial behaviour particularly in relation to so-called “party flats”. The numbers and transient nature of tenants staying in this type of accommodation means that this can be difficult to police. Consequently, the Scottish Government took action to deal with these properties by introducing The Antisocial Behaviour Notices (Houses Used for Holiday Purposes) (Scotland) Order 2011¹⁵.

This statutory instrument is an amendment to Part 7 of the Antisocial Behaviour etc. (Scotland) Act 2004¹⁶ which provides local authorities with the powers to serve an antisocial behaviour notice on a private landlord who owns a property where a tenant and/or a visitor engages in actions that can be deemed to be antisocial in nature.

The 2011 Order is relevant to short term lets as it takes into account that tenants will only be occupying properties for a short space of time. If antisocial behaviour takes place in a property on at least two occasions, then a local authority can intervene and take action on the landlord who carries the responsibility to mitigate any future instances of antisocial behaviour. Furthermore, this Order allows local authorities to place controls on the number of people who occupy properties where landlords have been served notices¹⁷.

Despite this Order being law for six years, it is clear that, whilst it might be an effective means of tackling problems with multiple occupation of “party flats” it is not well placed to tackle the wider phenomenon of short term lets in residential areas. Moreover, when council officials attend a property in response to a complaint, this is often days later when the persons acting in an antisocial manner have departed.

Landlord Registration

Under Part 8 of the Antisocial Behaviour etc. (Scotland) Act 2004, private landlords are required to register with the local authority in which their property is located. This scheme ensures that landlords are checked to be 'fit and proper' persons to be letting property. If landlords operate without registering then this is a criminal offence, which may be subject to a penalty on conviction of up to £50,000 and a ban on letting properties of up to five years. Following registration, it is the responsibility of landlords to renew their application to let property every three years¹⁸.

The benefits of this scheme include:

- **Transparency**
A register available for public inspection of all private landlords who are considered 'fit and proper' by local authorities.
- **Consistency**
A regularly updated register.
- **Security**
Enforcement action can be taken on landlords who fail to act to minimise the anti-social behaviour of tenants¹⁹.

However, the provisions only apply to conventional residential tenancies and not to landlords of short term lets.

This creates potential risk since landlords of short term lets who have been deemed to not be 'fit and proper' by a local authority could be exploiting the unregulated short term let sector with the attendant risks that the safety and wellbeing of short term let tenants is compromised.²⁰

Conclusion: A New Legal Framework?

This briefing paper has explored a number of existing legislative frameworks that could be used to improve how short term lets are regulated. It is important to distinguish between those provisions that seek to regulate the **operation** of the short term let sector (such as landlord registration) and those that regulate the **extent, location and nature** of the sector (such as planning Use Classes).

Whilst better regulation of operations would be welcome, this does nothing to regulate whether domestic residential property is used for short term lets in the first place and it is this first order question that needs to be addressed as a matter of priority.

In terms of regulating operations, **The Development of Tourism Act 1969** could provide the means to register all accommodation providers that operate as a commercial enterprise. It is thought unlikely that this would attract political support since it would imply registration of accommodation providers well beyond those operating short term lets (akin to a sledgehammer being used to crack a nut).

Rather more likely to attract support would be the extension of the existing **Landlord Registration** scheme to those letting properties on a short term basis. Clearly, **The Antisocial Behaviour Notices (Houses Used for Holiday Purposes) (Scotland) Order 2011** may well have a role to play although its provisions are very much focussed on very short stay “party flats”.

Whilst any means of improving the operation of the short term let sector would be welcome, it is the first order question of its very existence – its scale, location and extent – that needs to be the primary focus of resolving questions about the residential character and use of properties in cities, towns and villages across Scotland. Here the question is about how best to provide the powers necessary to regulate how property is used in the first place.

It is apparent that the scope, validity and effect of **Deeds of Conditions** needs to be tested in the Court of Session since large numbers of properties are being let in apparent breach of the conditions set out in the title deeds.

Deeds of Conditions, however, are private matters between buyers and sellers of property. The fundamental question of whether and where short term lets should be located in the first instance can only be resolved through the planning system with elected Councils having the power to determine for themselves how they wish the sector to develop.

Use Class Orders, as we have argued previously, appear to be the most logical and direct way to tackle short term lets. Whilst it is evident that short term lets are a material change of use, it is far from clear that this is reflected in the legislation as implemented by councils. Indeed, as Neil Collar, a specialist in planning law, recently observed, this issue is complex in Scotland as there is a differentiation in planning rules between a house or a flat in the classification of residential property²¹.

Using secondary legislation, Ministers of the Scottish Government could, if they wished, introduce a new Use Class Order that categorised short term lets as requiring planning permission to operate in residential property. This type of new Use Class Order would be

applied nationally allowing local authorities the flexibility to apply policy in different ways in different locations. For example, traditional festival lets in Edinburgh could be treated very differently to year-round commercial operations. Areas of cities or specific villages could also be subject to different levels of control depending on the likely impact on the amenity of an area.

Above all, however, bringing short term lets fully within the planning system allows communities to frame policies that reflect their own specific needs in their own localities. Fundamentally this is about local democracy and ensuring that the rapid changes that are underway are subject to proper and proportionate scrutiny and determination before any such change takes place.

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