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Serviced Accommodation & Planning Use Classes

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The area of serviced accommodation has been an attractive and innovative area for developers and investors for many years, often being a catalyst for bespoke property education courses focussing on this sector.

However, it has often thrown up confusion and conflicting advice to those believing that it is straightforward in planning terms and flexible, no matter what your intended business model or property set-up.

This month, we will take a look at a few of the cases around this area to highlight some of the key issues and reflect on some practical considerations. This is not intended to be an exhaustive review of all of the key case law or planning appeal decisions, and planning or legal advice should be sought in any specific case if in doubt, especially to avoid the possibility of planning enforcement action at a later date, the forfeiture of a lease or breach of finance terms.

What is 'serviced accommodation'?

There is no legal definition for the term serviced accommodation. Broadly speaking, it is used to refer to a furnished apartment that provides amenities, housekeeping, and other services for guests within the cost of rental. Serviced apartments can sometimes provide amenities similar to those offered in hotels, such as laundry and cleaning, and sometimes include access to gyms, and even concierge services, but in a self-catering setting.

Serviced apartments usually include a full kitchen, separate sleeping area, and bathroom, with internet and all utilities included and might comprise an area where each apartment is under the minimum for a self-contained apartment under the Nationally Described Space Standards (37 sqm). However, since 19 May 2016, fully-furnished layouts are not required to demonstrate compliance with national minimum space standards.

This should be contrasted with 'holiday lets'. Whereas a serviced apartment is available from one night to several months and caters for a wide range of guest-types, holiday lets are more often residential properties that are commercially let to holidaymakers for weekends, weeks, or fortnights, but with no added servicing.

Short-term commercial let vs residential use

Whether or not an SA use falls into the C3 Use Class (Dwellinghouses) or C1 Use Class (Hotels) will depend on the character of use and, often, the pattern of arrivals and departures. The potential nuisance to neighbours through increased 'comings and goings' (compared to the use of a property as a single family dwellinghouse) may lead the local authority to conclude a change of use has taken place.

The importance of these factors has been held to be particularly instructive by the Courts in similar cases in the past, if not determinative; Mayflower Cambridge Ltd v Secretary of State for the Environment and Cambridge City Council (1975). The case turned on the difference between a hotel and a bed-sit. The Court held that: "...the real difference between use as a bed-sitting room and use for the purposes of a hotel turns on the stability or instability of the population in the premises and the extent to which they are making the individual flat lets their homes. The essence of a hotel is that it takes transient passengers."

Furthermore, if the owner does not reside at the property on a full time or part time bases, nor are there residents at the premises on a full or part time bases and the whole unit is let out under the classification of an Airbnb, the use class will therefore be a short-term commercial let and not residential use. ▶

The 90-day rule

In London, it used to be the case that residents who wished to rent out their homes for no more than 90 consecutive nights had to apply for planning permission, because it would mean a change of use of their property (under the Greater London Council (General Powers) Act 1973). A failure to obtain permission risked a fine.

A relaxation of the rules (s.44 Deregulation Act 2015, which came into force from 26 May 2015) now means that Londoners renting out their homes for up to 90 consecutive nights within a calendar year no longer have to obtain planning permission. Nevertheless, the government's policy does not provide for new opportunities for short-term use on a permanent or commercial basis. At present, property owners will still have to seek planning permission if they wish to change the use of premises, for example from a C3 to a C1 use. From 1 January 2017, Airbnb introduced a new and automated 90-day limit, unless hosts confirm that they have the planning permission to share their space for a longer period of time.

In London, it will frequently be the case that there will be a clause in the head lease stating you cannot sublet for less than 90 days. Although it is possible for experienced operators to follow these restraints and have a slightly different model to holiday and short lets.

'Material' change of use

Whether or not a particular SA or holiday-let use will lead to the need for planning permission for a change of use will almost always turn on its facts. This point was emphasised by the Planning Inspectorate appeal decisions involving Cambridge City Council against three enforcement notices issued against Lux Living (Cambridge) Ltd; PINS reference 3196460 (decided 4 March 2019). The substantive decision in the appeals was held in favour of the LPA.

Notwithstanding that all of the apartments comprised all of the facilities to enable a Class C3 use to occur, the LPA and the Inspector considered the typical rental periods, frequencies of turn-over and the character of the use. The LPA relied on the judgement in Moore v SSCLG [2012], in particular that the Court held that "...It was not correct to say either that using a dwelling for commercial holiday lettings would never amount to a material change of use or that it would always amount to a material change of use. Rather in each case, it would be a matter of fact and degree and would depend on the characteristics of the use as holiday accommodation."

The Inspector in the Cambridge appeal opined that the pattern of arrivals and departures; any associated traffic movements; the likely frequency of party-type activities; the potential lack of consideration for neighbours and other factors which differed from a private family use of the property all cumulatively impacted on the character of the use to such an extent that it would no longer be reasonable to conclude that its use would remain in C3 dwellinghouse use. The 'hands -off' (that is, just offering a very limited service) management approach of the properties in this case also caused concern in relation to the shorter term lets. The appellant company had no control over the activities of 'guests' and it was clear from the evidence that some inconsiderate customers had caused undue levels of noise and disturbance for other guests staying in the flats.

The Inspector concluded that the variable nature of the transient uses of the properties had resulted in a sort of hybrid use between Class C3 and a hotel Class C1 use. Even though the services provided were not anywhere near a full hotel service, nevertheless, the flats were let as separate suites of accommodation; they were let and advertised as a hotel might be and, most importantly had been let for many 1- or 2-night stays.

Property law issues and landlord & mortgagee consent

SA relationships often arise where the apartment owners are investors who have acquired the property on a long lease specifically to rent out on a short-term basis, either directly to the end occupiers or by underletting their property to a serviced apartment operator who will then enter into short-term lets. However, whether or not such lettings are lawful or whether they breach any covenants restricting the property's use or alienation is often overlooked by individual investors, particularly when listing for short-term lettings.

Such owners and serviced apartment operators should be aware of the specific terms of the long lease of the apartment. A very common restriction in such leases – to use the apartment as a private residence only – has been held by the Upper Tribunal to prohibit short-term lets (Iveta Nemcova v Fairfield Rents Ltd [2016] UKUT 303 (LC)). This now gives disgruntled neighbours, disturbed by the disruption caused by short-term occupants, and head landlords looking to prevent such use (or to secure a premium for varying the lease) a clear argument for the use being in breach of the lease. In this case, the main cause for concern was the transient nature of the sub-lets. The decision confirmed that a longer-term sub-letting would have been deemed compliant, although 'longer term' was not specifically defined.

Such situations might at most lead to the risk of forfeiture by the landlord (if available under the lease). If you are a landlord in an SA, it's important to understand what type of lease to use when granting an underlease; e.g. common law or company let agreements are advisable over ASTs. Check with the building concierge or a management

company and let them know what you are doing before proceeding, as they will be the first ones to pull you up if you are in breach of the head lease.

Leaseholders who have mortgaged their property need to ensure that they do not, by sub-letting, breach the terms of their mortgage, as most residential mortgages prohibit commercial use and/or sub-letting without the lender's consent. Additionally, most home insurance policies will not cover the use of the property under a short-term let, further risking the terms of the mortgage being breached.

Funding terms for SA

There can be reluctance among some lenders to a serviced apartment model as most banks and lender prefer the traditional AST contract route (they understand this more than the SA model). Therefore, it is best to speak to a broker who can tailor the right lending package for your needs and to fit your model. Your SA model might need to be customised in order to minimise the extent of 'material change' from the existing lawful use of the property. There are customised lending packages available for SA as popularity has increased and it is best to go to a lender who specialises in the short-term rental sector, increasing your chances of getting the loan approved. Overall, the lender needs to feel comfortable with the tenant's covenant strength and experience in the industry.

Government review 2022

In the summer of 2022, the Government announced that it would be reviewing the effect of short-term holiday lets in order to "seek to improve the holiday letting market for those living in popular tourism destinations."

The scheme, proposed in a new government review looking at the impact of increases in short-term and holiday lets in England, could involve physical checks of premises to ensure regulations in areas including health and safety, noise and anti-social behaviour are obeyed. The review will also consider the operation of the provisions in London under the Deregulation Act 2015 to allow for measures to be taken against anti-social behaviour, whilst allowing Londoners to rent out their homes.

The Government called for evidence to consider its position in respect of any further steps over a 12-week period. The consultation period expired on 21 September 2022 and its outcomes are yet to be reported.

Depending on the outcome of this review, it may lead to further policy changes at the local level amongst some local authorities. There will be further local policy consideration regarding the appropriate balance between, on the one hand, the availability of longer-term permanent rental accommodation (Use Class C3) for local residents and managing the impact on local amenity and the local environment and, on the other hand, promoting well-run and managed SA and holiday lets that positively contribute to the local economy and provide a source of good quality temporary accommodation and local employment.

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SA 'CHECKLIST:

1. If you are a leaseholder considering short-term sub-letting, check the lease for a private residence-only restriction, and also for other covenants that might prevent such use, such as a prohibition on letting for short periods or against uses other than a C3 use class.
2. If you are acquiring a lease with the intention of granting short-term lets, negotiate provisions that allow this use.
3. Ensure that you have the right mortgage: don't try to use a buy-to-let mortgage or a standard mortgage for a serviced apartment as you will be in breach of the lender's terms.
4. If you have a mortgage and are looking to use the property for SA, review your mortgage documents; its terms and conditions might prevent sub-letting without consent.
5. Check the building insurance policy; short-term lets may invalidate it. Fire risks may change and this might also affect the insurance to the property.
6. If, as a leaseholder, you are looking to grant an underlease to a serviced apartment operator, and the head lease contains provisions that might prevent short-term lets, agree with the operator who will take the risk of enforcement action and what will happen if the use is successfully challenged (for instance, whether either party may terminate the lease).
7. The property will need to be fully furnished and ensure all utilities including WiFi are up and running and arrange for the servicing aspects of the rental such as cleaning and laundry. These might either be managed by the SA provider in person or through a professional company to oversee the property, manage guests and all other services.