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Councillor Neil Gardiner (Convener)
Planning Committee
City of Edinburgh Council



By email only: planning@edinburgh.gov.uk;
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28/02/2022

Dear Sirs

SHORT-TERM LET AREA OF CONTROL DESIGNATION DECISION OF THE PLANNING COMMITTEE

We refer to the above matter and are instructed on behalf of the Association of Scotland's Self-Caterers (**ASSC**).

Our clients have serious concerns over the substance of the City of Edinburgh Council's (**CEC**) proposals to licence short term letting as set out in the executive report¹ (**Proposal**) and the manner in which it is being progressed. These concerns include, but are not limited to, what they consider to be fundamental legal flaws in the Proposal and the decision-making surrounding it which we set out below. Many of the material issues raised during consultation have not been addressed in the CEC's consultation report including points raised regarding legality of the proposals.

It is our client's fear that the Proposal, if implemented, will inflict sweeping and onerous regulation on an entire sector to address perceived issues in certain parts of Scotland without due consideration as to proportionality and the detrimental impact on small businesses in an extremely fragile economy. The impact of the Proposal will ultimately drive many small businesses to close, without achieving the apparent purpose of the Proposal. Our clients considers there to be fundamental legal flaws in the Proposal and the decision-making surrounding it.

We have set out below high level details of the legal grounds for opposing this Proposal.

¹ [7.1 - Short-term Let Area of Control Designation.pdf \(edinburgh.gov.uk\)](#)

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1 **CONSIDERATION OF IRRELEVANT FACTORS & FAILURE TO CONSIDER RELEVANT FACTORS**

- 1.1 There is serious concern that the premise for the Consultation, and in fact the whole Proposal, is fundamentally flawed. It is irrational under public law for CEC to take into account irrelevant factors, fail to consider relevant factors (which would include failure to consider robust, current and representative evidence) or to err in fact when decision making, for example by relying on faulty and inaccurate data. As raised in the response to the Consultation, there is a lack of evidence of the impact of STL on housing supply, which is clearly a relevant consideration for CEC in advancing this Proposal. The background documentation to the Consultation and Proposal fails to provide empirical and robust data to show a link between short-term letting and the housing market in Edinburgh.
- 1.2 The data for the Proposal in respect of STLs appears to be sourced entirely from Airbnb.² The data provided and relied on is therefore in-specific and un-particular and provided in such a way as to suggest that this is a predetermined policy objective. The limitation of the data to Airbnb data to represent a whole industry is disingenuous and misleading.
- 1.3 CEC has the opportunity to wait until the outcome of the Scottish Government's own research. In its own Planning Committee report, the Committee recognises that "...an official source of data on the number and location of STLs will be helpful".³ It is premature for CEC to push through this Proposal, when it has the opportunity to await fuller information which would inform its decision making. If CEC has relied on a lack of empirical evidence, this undermines the credibility of the Proposal.
- 1.4 The timing of this Proposal in light of the wider economic and social conditions is troubling. CEC should have considered the impact on already challenged industry. This is also relevant to CEC's failure to consider relevant data, as the data does not reflect the changing nature of the market following the pandemic. Relying on inaccurate, out-of-date data, particularly given the seismic and well reported effect the pandemic has on the accommodation industry, is clearly unreasonable.
- 1.5 We understand from our clients that CEC has indicated that there will be no provision for the STL business owners who will face additional costs or be forced out of business as a result of the Proposal. The impact on small business owners is critical, particularly when there will be no recompense for those who are forced to make staff redundant, curtail employment, and ultimately be unable to continue trading activities if planning permission is not granted.
- 1.6 It is not clear that CEC has fully engaged in the proper procedure to agree and implement the Proposal by failing to obtain and rely on relevant data.

² 9.7; 9.3; and 9.5 [7.1 - Short-term Let Area of Control Designation.pdf \(edinburgh.gov.uk\)](#)

³ 4.39 [7.1 - Short-term Let Area of Control Designation.pdf \(edinburgh.gov.uk\)](#)

2 **BIAS & IMPROPER PURPOSE**

- 2.1 Our client is concerned that the Proposal is unreasonably and unduly focused on the alleged impact of Airbnb, without properly considering the wider ramifications and the factual reality of the market. It appears to us that a local bias against Airbnb has been unduly influential in the decision-making process and procedure in determining to proceed with the Proposal. Airbnb is a single operator, with a particular business model and consumer offering. The undue focus on Airbnb type of properties demonstrates a concerning lack of understanding of the industry and the range of accommodation needs that are serviced by a diverse range of STL providers.
- 2.2 The Proposal appears to be made for an improper purpose, on the basis that its stated objective of managing high concentrations of secondary letting and ensuring homes are used to best effect cannot be guaranteed to be achieved, having not been based on any relevant data.
- 2.3 As early as July 2020, CEC leader is on record stating that “...*he wants to see the council work with landlords to return properties to their “rightful” use as homes, not holiday lets*” and “...*we’re saying strongly and clearly that landlords running short-term lets from residential without permission should stop and move their property back into residential use*”.⁴ This is not consistent with the stated objectives of the Proposal and clearly shows a predetermined decision, for an improper purpose.

3 **DISPROPORTIONATE**

- 3.1 Where CEC has the opportunity to adopt a more proportionate measure, it should do so. CEC has had the ability to adopt a less restrictive measure and has adopted a disproportionately restrictive measure. The Proposal does not take a targeted approach and instead applies control areas to the entirety of the CEC’s jurisdiction, irrespective of the local impact. As CEC is aware, the needs and use of STLs as against domestic use varies locally and the current Proposal takes no consideration of this.
- 3.2 The Proposal is unreasonably focused on one particular STL provider, without consideration of the other providers in the market, and does not appear to seek to achieve a balance. STLs meet a diverse range of needs in Edinburgh; business lets, emergency accommodation, relocation services, etc. The Proposal does not reflect this, and is disproportionately based on the impact of a single provider.

4 **NON-COMPLIANCE WITH HUMAN RIGHTS**

- 4.1 We seriously question whether the Proposal is compliant with the European Convention on Human Rights (“ECHR”). Protocol 1 Article 1 provides that every natural or legal person is entitled to peaceful enjoyment of their possessions. To be deemed compatible with Article 1 of Protocol No. 1, the interference must fulfil certain criteria: it must comply with

⁴ [Plea from Edinburgh City Council for Airbnb owners to return flats to residential use | Edinburgh News \(scotsman.com\)](https://www.scotsman.com/news/plea-from-edinburgh-city-council-for-airbnb-owners-to-return-flats-to-residential-use-1.5000000)

the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised. It is in our opinion clear that the Proposal fails to comply with the latter.

4.2 The specific public interest objective being pursued by the CEC via this Proposal is unclear and as already articulated above, not sufficiently explained or underpinned by clear, sound data or evidence. There appears to be no account taken of the following:

4.2.1 the existing regulatory framework for short-term lets. There is no substantive evidence put forward to support the proposition that the existing framework is not fit for purpose or that the proposed measures are necessary and capable of effectively addressing potential issues such as availability of affordable housing and safety of short-term lets. This results in the Proposal failing to be in the general interest; and

4.2.2 the lack of data to support the Proposal further underlines it ought to be regarded as irrational and arbitrary, such as in the case of *R (Kensall) v Secretary of State for Environment [2003] EWHC Admin 459*, where measures were found to be in convention of ECHR rights.

4.2.3 The proposed framework includes several aspects which prima facie look to be subjective and could lead to irrational decisions and/or disproportionate interference with property rights;

4.2.4 the conditions and impact of the Proposal means that interference with peaceful enjoyment is extremely frequent and imposes an excessive burden, as in *Sporrong and Lönnroth v Sweden [1983] 5 EHRR 35* where measures were found to be in contravention of the right to peaceful enjoyment of property;

4.2.5 the framework would appear to be onerous on CEC without full costs recovery, at a time when the CEC is facing significant financial limitations; and

4.2.6 there are more proportionate and less intrusive measures available to CEC.

4.3 We also challenge whether the Proposal would be in compliance with the Charter of Fundamental Rights of the European Union (the “**Charter**”). Whilst the Charter no longer has effect in UK law following Brexit, the Scottish Government has made clear its desire to stay aligned with EU law as far as possible, and protect rights that existed for UK citizens.

4.4 Article 17 of the Charter provides that everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions, and the use of property may be regulated by law in so far as is necessary for the general interest. For the reasons outlined above, we do not consider that objectively, a case has been made, backed up by evidence that the Proposal is either in the general interest or is only interfering in use of property so far as necessary.

5 **IMPACT – COMPETITION AND CONSUMER ISSUES**

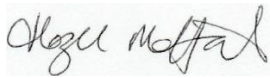
- 5.1 The proposed regulation of STLs has the potential to cause a substantial lessening of competition in the market. Potentially a large proportion of STLs will be forced out of the market by inevitable planning refusal, limiting sources of supply, and significantly limiting the choice of accommodation, particularly for certain categories of consumers. The Proposal applies dissimilar conditions to equivalent accommodation providers by limiting STL's ability to operate in a competitive environment.
- 5.2 Implementing the Proposal as currently suggested will have a disproportionate impact on the market, by removing consumer choice, which has unequal impact on groups of consumers. A particular value provided by STLs is consumer choice in the nature and requirements of the accommodation. A consumer has the ability to determine exactly the nature of the accommodation and be certain that this will be the accommodation provided; this is not the case with most hotels. A consumer travelling with multiple young children is often required by hotels to book multiple rooms, driving up costs, even where it would be inappropriate for those children to be in separate rooms. Similarly consumers with specific additional needs are provided with more control over the nature of the accommodation.
- 5.3 Consumers, including business customers and visitors, will have restricted access to accommodation. The Proposal effectively prevents a diversification of accommodation, which visitors expect when visiting a multi-cultural, international city.

6 **NEXT STEPS**

- 6.1 We look forward to your detailed response to this letter, properly addressing our concerns, within 14 days. We respectfully request that CEC reconsider the implementation of the Proposal, failing which to at least pause implementation of the pending Scottish Government measures, and until these issues are addressed.
- 6.2 If this is not possible, then in circumstances where there are genuine concerns about the effectiveness of the Proposal in meeting the stated objectives, a review period of no longer than 6 months should be built into any implementation. Independent, robust data should be collated and reviewed in a timely manner and used to conduct an interim assessment as to whether in light of the evidence, CEC ought to adopt a less restrictive approach, and assess whether a whole area designation area is proportionate as well as overall assessing whether the approach to designation is as a matter of evidence and fact furthering CEC's clearly stated objectives.
- 6.3 We request your confirmation that CEC will specifically report to all stakeholders on a regular basis, to understand whether the purposes of the Proposal are being delivered and engage in a positive, genuine and constructive manner in doing so.

We reserve all our rights in respect of this matter.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Hazel Moffat', is displayed on a light grey rectangular background.

Hazel Moffat

Partner

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