



## Evidence to the Local Government, Housing and Planning Committee: Short-Term Let Regulation in Scotland

16<sup>th</sup> January 2023

**Founded in 1978, the Association of Scotland’s Self-Caterers (ASSC) is the leading source of knowledge on short-term letting and holiday homes in Scotland and are the only trade body representing the interests of the traditional self-catering sector.** We represent over 1,700 members, operating tens of thousands of self-catering properties throughout Scotland, from city centre apartments to rural cottages, to lodges and chalets, to castles. The ASSC commits its members to maintaining the principles of *“quality, integrity, cleanliness, comfort, courtesy and efficiency”* and to offering visitors to Scotland consistently high standards within their self-catering properties.

**Our vision** is that the ASSC takes the leading role in supporting and promoting a vibrant and prosperous self-catering sector that is recognised as pivotal to the future of Scotland’s Tourism Economy. **Our purpose** is to empower our diverse and professional membership, enabling them to deliver exceptional experiences to guests. **Our focus** is on supporting individuals, businesses and communities in the promotion of Scottish self-catering as a sustainable, inclusive and responsible form of accommodation, at the heart of Scotland’s tourism offer.

### INTRODUCTION

The ASSC is thankful for the opportunity to provide our perspective on the impact of the proposed six-month delay on short-term let licensing applications for existing operators and how far this goes toward meeting our concerns. We thank the Committee for its commitment to give further scrutiny to this topic. This evidence sets out our outstanding concerns not only on short-term let licensing but on planning policy.

We welcomed the recent announcement by the Scottish Government on the six-month licensing extension, as set out the Cabinet Secretary for Housing’s letter (7 December 2022) to the Convener of the Scottish Parliament’s Local Government, Housing and Planning (LGHP) Committee. We further appreciate the Deputy First Minister’s announcement of the establishment of a Joint Regulatory Taskforce with COSLA, local authorities, business stakeholders, and regulatory agencies to consider the differing impacts of regulation on business, anticipating that the Taskforce will prioritise short-term let licensing as one of the first regulations to review in the New Year.

The delay has been warmly received by our membership as it provides much needed reprieve during challenging times for business. **However, real and pressing concerns still remain about short-term let licensing and we hope that we can work in partnership with the Scottish Government and local authorities to resolve these for the benefit of Scotland’s tourism sector.** The ASSC also believes that the delay provides an opportunity to take stock, assess the impacts related to the regulations, and then work

constructively to ameliorate the outstanding issues. We provide a number of recommendations which we hope will be given consideration by policymakers.

Many councils have now published their finalised licensing schemes. From our analysis of Scotland's 32 local councils, we have concerns in relation to:

- The various discrepancies seen across local authority areas, including on fees, layout plans etc;
- Council licensing policies which are ultra vires in nature; and
- Instances where planning considerations going too far.

More broadly, we have reservations regarding barriers to investment, new operators having to wait to open until a licence is granted, problems associated with bookings, insurance and front-loaded investment amongst other things.

The Cabinet Secretary for Housing Shona Robison has insisted that licensing *"will not be onerous for those who provide short-term lets."*<sup>1</sup> However, those working in the industry would contend otherwise, as this paper makes clear.

Nonetheless, the ASSC welcomes the Scottish Government's correspondence with local authorities on 15<sup>th</sup> December 2022 to seek engagement to ensure that remaining implementation challenges are addressed: *"We understand that local authorities have worked quickly to launch the scheme in time for October and there may now be opportunity to refine guidance and local authority policies, taking into account feedback gathered in the early months since the launch."*<sup>2</sup>

We now need to work together to ensure that the regulatory framework functions effectively for all stakeholders involved in Scotland's vital tourism industry.

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<sup>1</sup> General Questions, 23 September 2021, Official Report transcript. Url: <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=13316>

<sup>2</sup> Redacted letter to LAs - Short-term let licensing administration issues, 15 December 2022.

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### **CONTEXT: SCOTTISH SELF-CATERING IN 2023**

Tourism is a mainstay of the Scottish economy; and self-catering is hugely important to Scottish tourism in terms of jobs, revenue, and world-class experiences offered to guests. To be such an essential part of Scotland's tourism mix is even more remarkable for our sector when most self-caterers operate small or micro businesses. Our professional self-caterers are diligent and considerate business owners who are too often unfairly maligned. They do not, for example, 'hollow out communities', as some have claimed, but rather are part of local communities across Scotland and have been for many, many years.

The self-catering sector boosts the Scottish economy by **£867m** per annum, supporting **24,000 jobs**, and provides a vital source of alternative accommodation for major events like the Edinburgh Festivals.

However, the industry enters 2023 with a sense of trepidation due to short-term let regulation, as well as the impact of the cost-of-living crisis.

Moreover, occupancy levels and forward bookings in the self-catering sector are markedly down with around two-thirds of businesses noting that bookings were significantly lower or slightly lower than the equivalent period last year. Unsurprisingly, with finances being stretched by the cost-of-living crisis, and the continuing uncertainty over the impact of the onerous licensing scheme, more than half of businesses were not very optimistic about the future of their businesses.

The ASSC continues to collate evidence of the impact of the challenges facing our sector as highlighted in two recent sectoral surveys.

#### **(i) ASSC Survey, The Cost of Short-Term Let Licensing and Planning, November 2022**

In late November 2022, the ASSC surveyed over 1,100 businesses on short-term let planning and licensing regulations. The results highlight the variation in costs in relation to obtaining a short term let license from planning permission to insurance and risk assessments for businesses across Scotland.

Some of the main findings include:

- **93%** of businesses remain concerned about short-term let licencing with **66%** saying they are considering leaving the sector.
- Interestingly, of those considering leaving the sector, a massive **95%** said that if they sell their property, it would not be available for affordable housing.
- **87%** had not yet have not yet applied for a licence despite the timeline for implementation.
- Of those operators that have applied, **89%** still being considered by local councils.
- In terms of other costs aside from licensing and planning, **66%** state that utility price increases significantly impacts in their business (94% are concerned to very concerned).
- Consequently, **40%** are experiencing new and mild mental health problems with just under one-in-ten (7%) experiencing new and severe mental health problems.<sup>3</sup>

While this survey was undertaken prior to the announcement of the welcome six-month delay for existing operators, it demonstrates the work to be done in allaying the fears of those involved in Scotland's vital tourism industry and securing a sustainable future for those involved. The Scottish Government must work in lockstep with industry and local councils to minimise the regulatory burden to support small business during these challenging times.

#### **(ii) ASSC Survey on Occupancy Levels, January 2023**

A short survey was undertaken by the ASSC between 6<sup>th</sup>-12<sup>th</sup> January 2022 in order to ascertain occupancy levels over the last few months, and to see how bookings are looking for the year ahead. This provides us with a good indication of how healthy the sector is looking and what the key challenges are.<sup>4</sup>

##### **Occupancy to Date:**

- Between January and March 2023, average occupancy is at **24%** across those businesses that are open;
- Between April and June, based on existing bookings to date, average occupancy is **32%**;

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<sup>3</sup> ASSC Survey, The Cost of Short-Term Let Licensing and Planning, November 2022. Url:

<https://www.assc.co.uk/the-cost-of-short-term-let-licensing-and-planning-survey-winter-2022/>

<sup>4</sup> ASSC Survey on Occupancy Levels, January 2023. Url: <https://www.assc.co.uk/assc-occupancy-survey/>

- Between July and September average occupancy is just **31%**.

#### **Comparison with 2022:**

- Looking at January – March 2023 bookings, **61%** respondents note that the season is worse or much worse (28% much worse) than the same period in 2022.
- In overall terms, when describing how the anticipated 2023 season is looking so far compared to 2022, **64%** respondents note that the season is worse or much worse (25% much worse).

#### **Bookings:**

- In comparison to last year **43%** say their bookings for the next three months are substantially lower than last year with a further **22%** saying bookings are slightly lower.
- In comparison to last year **41%** say their bookings are substantially lower for the next six months with a further 28% saying they are slightly lower.

#### **Other Concerns for the Sector**

- **86%** concerned about lack of consumer confidence to book holidays (47% very concerned).
- **89%** concerned about the very cost of doing business (41% very concerned).

#### **Business Confidence**

How confident do you feel about the performance of your business in the next 0-3 months:

- **53%** not very optimistic (27% remaining neutral).

How confident do you feel about the performance of your business in the next 3-6 months:

- **43%** not very optimistic (26% remaining neutral).

How confident do you feel about the performance of your business in the next 12 months:

- **50%** not very optimistic (17% not optimistic at all)
- Just **2%** are very optimistic.

### **OUTSTANDING CONCERNS OVER SHORT-TERM LET LICENSING**

#### **i. Discrepancies across local authority areas**

##### **a. Cost of Applying for a Licence**

There are widespread discrepancies in local council short-term let licensing policies. While there will always be *some* differences in local schemes, and flexibility is built into system to address local priorities, it is the *extent* of these discrepancies which is of primary concern. Most notably, this can be seen in the fees attached to licences. These were meant to fall within a bracket of £214-£436 for a three-year licence and follow guidance to tailor according to licence type and accommodation size. Moreover, the Scottish Government said that local authorities could establish fee structures that will allow them to recover the costs of establishing and running the scheme.

However, we note that the following councils have fees that are higher than the Scottish Government's expectations: Aberdeen, Aberdeenshire, Argyll and Bute, City of Edinburgh, Dundee, East Dunbartonshire, Highland, Midlothian, Perth and Kinross, Renfrewshire, South Lanarkshire, and West Dunbartonshire.

As previously stated, we wholeheartedly welcome the delay for existing operators to apply for a licence but they will eventually be subject to fees which could push many out of business. We believe that where local councils have levied above and beyond Scottish Government expectations, there needs to be a clearer understanding of how they have arrived at such figures and whether there was adequate consideration on the impact on business costs.

We reference the Scottish Government's letter to local authorities on 15<sup>th</sup> December 2022:

*"As is the case for existing civic and other licensing schemes, it is for licensing authorities to set fees to cover the costs of establishing and running schemes in their areas. Most local authorities have set licence fees that are broadly in line with our Business Regulatory Impact Assessment estimate of £214 - £436 for a 3-year licence and/or are charging lower fees for home sharing and home letting licences and taking account of guest capacity. Where maximum fees have been set in excess of £1,000, we are keen to understand and discuss the reasons."*<sup>5</sup>

We would question why any fees should be set above the BRIA estimate of £436.

### **Cost of securing compliance with mandatory and additional licence conditions**

The Scottish Government's letter to local authorities on 15<sup>th</sup> December 2022 goes onto state:

*"Alongside Scotland's Housing Network, we have worked with local authority officials involved in short-term let licensing to explore ways to avoid unwarranted variation in operational processes. This focus on consistency, where appropriate, is valued by tourism businesses, particularly those with short-term let accommodation located in more than one local authority area."*<sup>6</sup>

#### **b. Layout Plans**

Angus, Argyll & Bute, Comhairle nan Eilean Sair, Dundee, East Ayrshire, Edinburgh, Glasgow, North Ayrshire, Renfrewshire, Shetland, West Dunbartonshire, and West Lothian Councils are requesting floor plans reflecting the Licensing (Scotland) Act 2005.

Our understanding of the Order is that there is only a requirement to identify maximum occupancy and that the licence holder must ensure the number of guests does not exceed this. This should be a simple procedure: a 4 bedroom house may sleep 8, or perhaps a maximum of 10 if a sofa bed is available in a communal room.

Again, the Scottish Government's letter to local authorities on 15<sup>th</sup> December 2022 notes:

*"Floor plans - our guidance states licensing authorities may wish to ask applicants for floor plan(s) of their accommodation indicating room sizes, fire escape routes and accommodation intended for guests with mobility impairment. We do not specify the format of these plans but the expectation is that authorities will adopt **a pragmatic approach that does not place onerous and costly requirements on applicants** e.g. a basic hand drawn floor plan, or electronic plan*

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<sup>5</sup> Redacted letter to LAs - Short-term let licensing administration issues, 15 December 2022

<sup>6</sup> Ibid

*typically used for home sales, showing room dimensions instead of costly professional architects' drawings at 1:50 or 1:100 scale.”<sup>7</sup>*

We consider that there is no requirement for plans showing the location of equipment used for detection or warning of fire or smoke or for fighting fires, etc as this is not a requirement of fire regulations for the small accommodation sector.

Furthermore, James Saunders, Station Commander, Scottish Fire and Rescue Service confirmed in an email to the ASSC on 31<sup>st</sup> October 2022 that *“the SFRS do not require a plan drawing as part of the application process”*. The existing fire legislation has not changed, so these plans are not required in terms of evidencing compliance with the Fire (Scotland) Act 2005.

Technical layout plans can be expensive to commission (quotations provided to the ASSC were in the region of £600+VAT per premises) and cannot reliably be carried out by the operator themselves. Given the increasing cost of doing business, along with the new licensing fees which will be levied, this will be an additional and potentially significant cost to businesses.

Site plans are not required for licensing. This encroaches on planning policy.

### **c. From Carpets and Cutlery Space to Hot Tub Curfews**

Argyll and Bute, Dundee, East Ayrshire, East Renfrewshire, Highland, Inverclyde, Perth and Kinross, and West Dunbartonshire Councils propose that the licence holder must ensure that the bedrooms, living room and hallway in the premises are carpeted.

Applying a condition like this would not be asked of a private landlord renting out a property where noise complaints had been levelled by neighbours. It also comes at a potentially significant cost to small businesses at a time when they are facing increased costs.

Angus, East Ayrshire, East Renfrewshire, Highland, and West Dunbartonshire Councils propose limitations on the use of hot tubs after certain hours. We would like to understand if there is empirical evidence to suggest that this is a particular problem in these areas. We note that there is no such curfew being applied to other accommodation providers or property types.

Meanwhile, Dundee City Council has additional conditions of *“sufficient drawer space for the storage of cutlery and cooking utensils”*, and *“a minimum of one door separation between the toilet and any area used in the preparation of food”* has been included in the STL licensing regime. This appears to have been drawn from HMO guidance rather than being conditions suited to tourist accommodation.

The Scottish Government’s letter to local authorities on 15<sup>th</sup> December 2022 states:

*“The Scottish Government is committed to the policy objectives of the licensing scheme – primarily ensuring all short-term lets are safe, and that local authorities have powers to respond to local needs and circumstances. However, we want to work with local authority partners to consider genuine concerns from businesses (that they report are causing unnecessary burden in*

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<sup>7</sup> Ibid

*the context of the wider economic climate) to explore whether these might be mitigated, without diluting the policy objectives of the licensing scheme.”<sup>8</sup>*

The condition requiring the licence holder to ensure that the bedrooms, living room and hallway in the premises are covered by a suitable floor covering such as a carpet or similar floor covering is not rationally connected to the stated STL Licensing Policy aim of ensuring properties meet the requisite safety standards. It is arbitrary and unreasonable. We would seek evidence of a proportionate public interest objective, as per Provision of Services Regulations 2009.

**ii. Ultra vires policies**

We contend that many local councils policies included in the additional conditions for their short-term let licensing scheme are ultra vires.

This includes the provision and use of watercraft; provision of bicycles; and outdoor play equipment. These are part of the additional conditions stipulated by Aberdeenshire Council, Argyll and Bute Council, and Scottish Borders Council.

These activities are unrelated to the activity of short-term letting. A short-term let concerns the provision of accommodation to a guest. Accommodation means any building or structure, or any part of that building or structure, that is being let out to visitors. Such proposed additional conditions do not relate to the provision of accommodation. These additional conditions are about the safety of an activity, not the use of the property.

Furthermore, Bruce Stevenson Insurance Brokers is concerned that licensing departments are providing instruction in respect of these: *“Anyone providing bike hire and more importantly boat hire is unlikely to be covered under an off the shelf self-catering policy. In respect of boats insurers will have a large list of requirements and anyone using a motorboat will need to provide evidence of experience and details of their certification. We currently have to arrange a bespoke additional cover for any client who wishes to allow guests to use any boat on the property as the self-catering insurers do not wish to pick up the liability where this is increased exposures.”<sup>9</sup>*

**iii. Rebuttable Presumption**

In terms of City of Edinburgh’s Licensing Policy, to adopt a rebuttable presumption policy against granting STL licences to service providers in such tenement or shared main door properties, who have been operating lawfully and who are otherwise fit and proper persons to hold a licence, is perverse and unreasonable in the *Wednesbury* sense.<sup>10</sup> The Short-Term Let Licensing Policy appears to be being used, not for the purpose of ensuring safety, but to restrict the availability of a licence for a tenement or main door property so as practically to prohibit it.

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<sup>8</sup> Ibid

<sup>9</sup> Email from Derek Nicol, Account Executive, Bruce Stevenson, 28<sup>th</sup> October 2022

<sup>10</sup> A reasoning or decision is *Wednesbury* unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948)).



The ASSC contends that City of Edinburgh Council's licensing policy is irrational and oppressive, and is in breach of regulations 15, 16 and 18 of the Provision of Services Regulations 2009 and amounts to an unlawful and disproportionate interference with the interests of operators of short-term let businesses under Article 1 of the First Protocol to the ECHR.

**iv. Planning considerations**

Local councils are taking different approaches to requirements around planning permission. Schedule 3: 13, references the need for planning permission "*where the premises is in a short-term let control area*". Outwith these areas, some licensing authorities are asking applicants to check with their planning authority before applying for a short term let licence, while others are suggesting that planning permission or a certificate of lawfulness will be required.

We note that Aberdeen, Angus, Clackmannanshire, Dundee, East Dunbartonshire, East Lothian, Fife, Glasgow, Highland, Inverclyde, Orkney, Perth and Kinross, Stirling, and West Lothian Councils are requesting proof of planning permission or a Certificate of Lawfulness as part of the licensing requirements rather than deferring to the planning authority to consider this on a case-by-case basis. Other local authorities only require evidence of planning in Planning Control Areas.

In November 2022, Brodies LLP prepared a legal opinion for the ASSC regarding planning requirements for short-term holiday letting. The paper opines that the requirement for planning permission for short-term holiday letting depends on whether the premises are situated within a short-term let control area. Licensing requirements are not made under the planning legislation and are not relevant to determining whether planning permission is necessary. In all other areas, **planning permission is not necessarily required for a change of use** to short-term holiday accommodation. In fact, the question of a change in material use **depends on the individual circumstances of each premises** and planning authorities must take this into account. The full legal opinion can be provided.

**v. Barriers to Investment or Commercial Borrowing**

There seems to be some confusion in the application of the Scottish Government's guidance to local authorities in terms of the locus or standing of a prospective purchaser to apply for a short term let licence over a property that they do not own.

This presents a significant problem for the following reasons: (a) further borrowing against existing policies; and (b) new entrants to the market.

The Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022 states the following in the Introductory Text "Interpretation" at 2 (1) to define the 'host', the person who can apply for a short term let licence: "host" means a person who is the owner, tenant, or person who otherwise exercises control over occupation and use, of the accommodation which is the subject of a short-term let."

'Control over occupation and use' is clearly a higher benchmark than someone who simply has the "permission" or "consent" of the owner of the property to apply to the relevant local authority for the short term let licence. This situation appears to be causing confusion at local authority level. The Scottish Government's guidance does not align with the SSI.

The Highland Council, for as example, has stated the following:

*“The host or operator of the let can apply for a licence or they can have an agent of their choice apply on their behalf.*

*The agent will need to have permission from the host or operator to apply for a licence on their behalf.”*

The Highland Council’s interpretation of “*control over occupation and use*” is closer to the SSI than the Scottish Government’s interpretation which simply requires ‘permission’ from the owner. A prospective purchaser does not have locus to apply for a short term let licence with just the “*permission*” of the owner. Moreover, there is no scope in the legislation for the local authority to exercise any “*discretion*” over “*the control*” or “*use*” description of “*the host*”. There is no such discretion and an application granted under such supposed “*discretion*” would be unlawful.

This Scottish Government’s guidance on the point aligns with what the Cabinet Secretary for Housing Shona Robison MSP said to the Convener of LGHP Committee, Ariane Burgess MSP on 7 December 2022. The Scottish Government’s guidance does not align with the SSI. A prospective purchaser does not have locus to apply for a short-term let licence with just the “*permission*” of the owner. Moreover, there is no scope in the legislation for the local authority to exercise any “*discretion*” over “*the control*” or “*use*” description of “*the host*”.

Given the above impasse between the Scottish Government and local councils, it would appear to be the case that it is **impossible to borrow against a property that is going to be used as a short term let.**

If this is the case, it will have a number of deleterious effects. Properties that come on the market will have to go to residential purchasers only. The average price of a property in many parts of Scotland, most specifically in rural areas, is out of the reach of those on an average wage. That means these properties will sell to individuals with wealth – possibly moving from more affluent areas of the country. The properties are more likely to be sold as second homes.

**The Royal Bank of Scotland has confirmed that they “*would expect operators to have all necessary permits, licences, etc. to do business at all times, and that without it they would be in default.*”** We understand that as it stands, the RBS has not amended it’s credit policy on the back of the change in legislation, however, understanding the changes they will have a **more cautious approach going forwards. What is clear is that a licence will need to be in place as a Condition Precedent (CP) before lending is confirmed.**

One of the leading lenders to holiday lets in the UK has confirmed to the ASSC that they are struggling to see how they could lend to someone without a licence as they would not meet the lending criteria which is based on Interest Coverage Ratio (ICR) thresholds. They note the following:

*“With the introduction of the Licensing order from the 1<sup>st</sup> October 2022 lenders are reviewing their ability to lend in Scotland to self-catering holiday let / unlicensed guest houses / Bed & Breakfasts.*

*As a lender active in this market, we believe we will be unable to lend to new property purchases in Scotland because we don't believe we can do so responsibly. We use an affordability test based on Interest Coverage Ratio (ICR) to ensure that the applicant has sufficient rental income to cover loan servicing and repayment. At the point of lending, the borrower would not hold a licence and therefore we cannot be certain they will be able to operate their business, as the applicant is unable to host guests (up to 9 months for new applicants).*

*Therefore, any borrower that requires this income to service the loan would not be able to borrow. Some borrowers could demonstrate affordability using other earned income not related to the property being purchased and use a personal income and expenditure test, however this will restrict the market to high earners running amateur businesses or topping up already high incomes rather than full time guest house and bed and breakfast operators.*

*We believe therefore that this will severely impact the market for these properties. **This in turn means reviewing our budgets and market expectations as to what this will do to lending volumes, property prices and our back book portfolio. With 2/3 of new lending in 2022 being made up of property purchases, this is expected to have a serious impact on our business model.***

*Specific areas of the licensing requirements which have led us to this conclusion are:*

- The owner of the property must be named on the application form or permission from the owner to apply for a licence. Until the sale completes then our applicant is not the owner. Whilst a vendor may give the applicant permission to apply for a licence, this isn't guaranteed, particularly if the sale is dependent on the licence being in place as it could slow down the sale. Applicants are reluctant to spend money on a licence until they are the owner of the property which may not complete.*
- With the requirement that each host and property must be licensed, this is preventing an active host adding to their property portfolio with another property that is currently in let as a holiday let.*
- It's against the law to take bookings or host guests before you have a licence. Whilst this is not impacting our back book portfolio of active hosts, it does impact property purchases.*
- It is stated that there should be no presumption that the purchaser's application for a licence would be granted.*
- **The introduction of Control Areas and planning permission needing to be in place alongside a licence gives greater concern to lending in these areas.***

*In addition, we need to consider our existing customers and the impact on them if they are not successful in their licence application. They may no longer be able to afford to keep the property. While we have strong checks on the types of properties our applicants are purchasing, a large volume of properties on the market at the same time is likely to impact the value of properties if large numbers of existing operators cease trading. Whilst some properties may be suitable for as a longer-term rental property, there is likely to be an impact on rental income making the property unaffordable. In addition, not all properties would be suitable for residential use due to the nature and size of the property. We would expect some customers to see their*

*income severely impacted, and as a lender we would need to support customers in financial difficulties and in the worst-case scenario take possession of properties.”*

While this remains the status quo, lenders are not prepared to lend to new operators. This creates an immediate barrier to investment.

**vi. New operators**

The delay for existing operators is commendable but this does not help everyone engaged in short-term letting that is either entering the market or growing their business.

This includes operators such as the Homelands Trust, a small charity based in Lundin Links Fife. They currently provide respite breaks to people with disabilities, life limiting conditions and their unpaid carers in four purpose built, superbly adapted self-catering properties. The level of adaption provided for people with disabilities is unique in the UK let alone Scotland and puts Fife at the forefront of Scotland’s provision of accessible tourism accommodation. The Trust also owns and operates the Paxton Centre which is wholly subsidised by its self-catering operation and provides valuable community hub services to the local area such as free meeting space for disability groups and other local non-profit organisations, a warm space and various free services and activities aimed at the elderly, disabled and other vulnerable groups in the local community.

Simon Allan, General Manager at the Homelands, has outlined the problems the organisation has faced which we quote below:

*“The demand for Homelands’ self-catering properties is huge with people with a wide range of severe disabilities and their unpaid carers coming from across Scotland and the UK to have much deserved breaks in accommodation specially designed to cater for their complex requirements. The properties run at an occupancy of virtually 100% and are open 365 days per year.*

*Give the huge demand for such accessible properties the Trustees agreed to expand their offering and build a further 5 accessible lodges with 34 bed spaces for those with disabilities, life limiting conditions and their unpaid carers at a cost of £2.5 million. After Covid delays the project finally commenced in August 2021 and is due to complete in quarter 1 2023.*

*Unfortunately due to the timing the Trust now find themselves potentially falling foul of the existing hosts rules in the short term let licencing legislation meaning that despite the lodges being ready in Q1 2023 we will not be able to market, promote or occupy them until a licence is issued by Fife council, we cannot apply for a licence until just before completion in March 2023 as we will not have the necessary certification before that date to accompany our application (gas safety certificates, EICR, EPC, PAT etc), Fife council then have up to 9 months to issue a licence.*

*Given these timeframes there is therefore a distinct possibility that we will not be able to use these new purpose built lodges until January 2024. This delay creates significant challenge for the Trust as the inability to generate any income from these properties leaves the Trust currently reviewing its other charitable activities as its ability to fund them will be seriously affected. The trust is also reconsidering its future plans of developing more accessible accommodation in other regions of Scotland as the current rules make any future developments unfeasible.*

*This happens at a time when the Trust is also seeing a massive increase in utility costs from 1st January with costs on its existing 4 lodges rising from £10k per annum for gas and electricity to potentially £54k per annum should there be no further support to mitigate business energy price increases from March 2023 (it rises to £30k if the support continues for the year 2023 at the rates in place until end March 2023, still an enormous increase!) as well as general inflationary increases in housekeeping and other general maintenance costs.*

*Finally like all self-catering operators our user base is not immune to the cost of living crisis and funds previously used to help finance their much needed respite breaks are already having to be diverted to pay for other basic essentials such as utilities meaning our occupancy levels in the next year (and ultimately the income we can generate) is under threat.*

*The short term let licencing regulations existing host rules therefore pose an significant threat to a unique organisation that has created a world class operation in the accessible tourism arena in Scotland. This project has provided invaluable respite breaks for over 1300 people with disabilities life limiting conditions and their carers each year for the last 7 years and had hoped to double this capacity with its five new accommodation units and then look to future developments in Scotland for much needed accessible accommodation, these future developments will now not happen in Scotland.*

*The Trust is not alone in falling foul of the unforeseen consequences of the short term let legislation which are now becoming apparent. Other third sector organisations who rely on Short Term Let income to fund the maintenance of their buildings and operations will have to consider the potential delay in being able to generate income when considering projects in Scotland to the detriment of our national heritage and our accessible tourism offering. We are sure this was not the aim of the licencing regime.”*

They are facing an impossible task in terms of entering the market with these new premises, facing up to 9 months before they can operate, dependent on when a licence is granted.

The requirement to apply for a licence and have it granted prior to being able to take bookings or accept guests places an unreasonable barrier on those wanting to start a STL business, whilst it also affects people wanting to rent their homes temporarily eg for the Edinburgh Festivals.

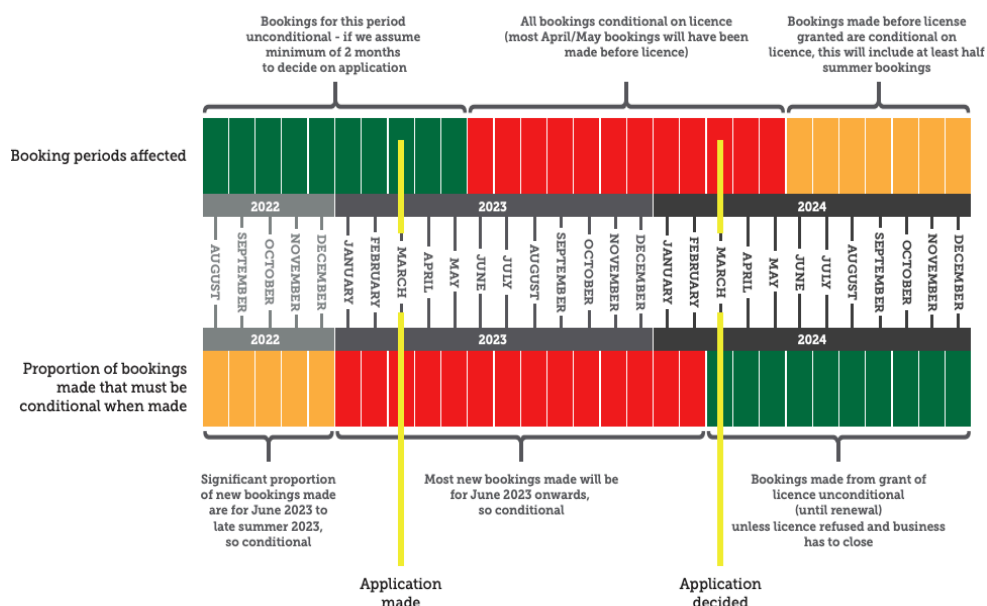
#### **vii. Unconventional Accommodation**

In one incidence that has come to the attention of the ASSC, The Highland Council are asking an operator to go through the entire licensing process for a tent that is erected for 8-10 weeks per annum. This is entirely disproportionate and a further barrier to existing operators who are trying to diversify and augment their accommodation offering, thereby supporting the Scottish economy.

#### **viii. The Booking Problem**

Local authorities have 12 months to grant or a refuse an initial licence, and 6 months for a licence renewal. Given the resource implications and other pressures on councils, and on evidence since 1<sup>st</sup> October 2022, councils will take some considerable time to grant licences. For busy times, many guests book up to 12 months in advance. There will be significant extended periods (shown visually in a diagram

below) when operators will not be able to guarantee the booked property will be available. Bookings will have to be conditional as there is a very real risk that a licence might be refused.



The commercial reality is that guests will simply not book if their bookings are conditional and subject to a term between owner and guest that says the owner can cancel the booking if they cannot either obtain or renew a licence. This is already playing out in real terms with bookings significantly lower than previously.

The solution suggested by the Scottish Government in 2020 was the following:

*“With regard to the handling of bookings, please see paragraph 7.15 of the consultation report. We would expect the position in respect of refunds etc. for future bookings affected by refusal, suspension or revocation of a licence to be covered by booking terms and conditions in the same way as any other scenario in which the accommodation becomes unexpectedly unavailable, such as through fire damage or flood.”<sup>11</sup>*

This is contractually perfectly possible but commercially totally impractical and unfortunately betrays the lack of practical understanding of the way in which the self-catering industry operates in the real world. The ASSC flagged this to the LGHP Committee in January 2021.<sup>12</sup>

An ASSC member forwarded a message from one of their guests in January 2023: *“Unfortunately we have to cancel our stay in Stromness in August. We had booked a cottage in the Highlands before crossing to Orkney, but the owners have cancelled our booking, due to a change in Scottish holiday let rental*

<sup>11</sup> Kevin Stewart MSP, Minister for Local Government, Housing and Planning. 11 Dec 2020 letter to Willie Rennie MSP.

<sup>12</sup> See page 14: <https://www.assc.co.uk/wp-content/uploads/2021/01/ASSC-Committee-Submission-Appendices.pdf>

*requirements...It's quite a disappointment and makes us fear other cancellations as we were planning several stops on our way North."*

**ix. Front-loaded Investment**

The reality is that the perfect storm of the cost of living crisis, with an ever-growing threat of worldwide recession, plus behavioural changes as a result of Covid 19, and the necessity to invest in properties to meet expectation and consumer demand, plus a dramatic drop off in bookings, partly led by the introduction of licensing and the inevitable unintended consequence of the booking problem has led to a significant cash flow crisis for many businesses.

In this context, the front-loaded costs associated with licensing and planning becomes untenable: service providers, certification, consultants, plans, fees associated with planning and licensing and planning application fees.

**x. Insurance**

Under the new licencing scheme, an operator has to demonstrate that they have insurance cover. are being asked to evidence £2m of Public Liability cover and others £5m. Why is there a discrepancy of this nature? The likelihood of having to deal with a PL claim is unlikely to be affected by demographics so why would £2m be sufficient in some parts of our country and £5m in others. One operator has been asked to provide evidence that they have "adequate" cover. What would be considered "adequate" and how would an owner be expected to know?

One insurance firm told the ASSC that they are receiving unprecedented levels of enquires and a number are from clients who have purchased additional coverage, over and above their property policy. These are designed to fill in the gaps in respect of providing liability to paying guests and some other perils. It is unlikely that these policies will provide any loss of revenue following a claim. The types of policy in question do not negate the need for clients to notify their buildings and/or contents insurers that they are also using their property for holiday lets. It is not unusual for an Edinburgh New Town property owner to want to use their property to generate revenue during the Festival each year but they must inform their insurers so they know and also if any restrictions will be placed on the cover. There are some concerns that clients in blocks with a communal insurance cover are adequately covered. Again, they must notify their factor/insurer that they are using the property for short term lets to ensure they are permitted to do so. Any gap type policies are unlikely to pick up the cost of alternative accommodation or loss of rental income.

**xi. Ongoing Confusion in Councils**

We understand from a member that a Senior Property Director at a reputable Property Consultant is (9<sup>th</sup> January 2023) advising clients that the delay in licensing legislation does not apply to operators in Badenoch & Strathspey.

At 10<sup>th</sup> January 2023, the Highland Council and others still state that operators must have applied by 1 April 2023. Whilst this is correct, many local authorities have not cascaded information regarding the proposed delay to operators.

**Clear communication is required for operators, local authorities and the wider tourism industry.**

**xii. Private Residential Tenancies / Short-Term Lets**

The Private Housing Tenancies (Scotland) Act 2016 introduced the Private Residential Tenancy (PRT), which took effect from December 2017. ‘Holiday lets’, as they were previously known, were excluded from the terms of the Private Housing (Tenancies) (Scotland) Act 2016, given that a ‘tenancy’ created for the purpose of conferring on the tenant the Right to Occupy the property for a holiday does not constitute a PRT.

The critical point raised following the introduction of The Civic Government (Scotland) Act 1982 (Licensing of Short-Term Lets) Order 2022 is that a **‘Short-Term Let’ is anything that isn’t a PRT<sup>13</sup>**:  
*“A tenancy cannot be a private residential tenancy if it is a short-term let within the meaning of article 3 of the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022”.*

Gilson Gray LLP was asked to comment on the use of private residential tenancies (PRT’s) as an alternative to short-term let licensing, not to circumvent a short-term let licence but where the operation is in an area where there will be no short-term let licence able to be granted due to planning or licensing policies and where the property is let for weeks or months rather than days. Gilson Gray LLP is of the opinion that PRTs cannot be used as an alternative to a short-term let licence (where that may not be suitable due to the type of let, e.g. weeks or months). The proposition is defeated by Section 1 of the Private Housing (Tenancies) (Scotland) Act 2016, and in particular Section 1(1)(b). That defines a PRT as one where “the tenant occupies a property (or any part of it) as the tenant’s only or principal home.” It goes without saying that a short-term let is unlikely to be let to a tenant who will use it as their principal home. If that situation exists, then a PRT is a valuable alternative but in our opinion that situation will be very rare.

**It becomes impossible to rent a property ‘mid-term’ to someone if they have a primary residence elsewhere, whatever the reason, without entering into a PRT.** The two pieces of legislation running concurrently make it insurmountable to offer any kind of flexible accommodation provision.

The very real unintended consequence of this results in those people looking for ‘temporary’ or mid-term accommodation finding it impossible to do so. Many self-catering units (now called secondary short-term lets) are second homes, which are opened up to be used, rather than left empty when the owners are not there. These are professionally managed by property managers and a team of cleaners and ancillary service providers across Edinburgh (and beyond). These properties provide a vital role in the city, letting homes to/for:

- The Edinburgh Festivals
- Blue chip companies
- Film companies housing staff
- Locals needing temporary accommodation resulting from flood / fire / renovation
- Individuals relocating to the city
- Fulbright scholars
- Visiting academics

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<sup>13</sup> Paragraph 6 of schedule 1 of the Private Housing (Tenancies) (Scotland) Act 2016 / <https://www.legislation.gov.uk/asp/2016/19/schedule/1>



- Family members caring for people in hospital
- Visitor with accessibility requirements
- Tourists

Where licensing or planning significantly reduces the number of STLs, the result will be that the only option available is hotel accommodation, which may be financially or physically challenging or indeed impossible.

### **xiii. Public Sector Resource**

Under short-term let licensing, the police have to undertake thousands of record checks for applicants, and report back to the licensing authority on these. The ASSC understands that this is causing huge concern to Police Scotland since the legislation came into effect. This will have an obvious impact on the other licence applications the police have to deliver a similar service, for example, on alcohol licence applications.

At 15<sup>th</sup> December 2022, there were 550 STL applications submitted to Highland Council, with zero granted. At 20<sup>th</sup> December, Highland Council's legal department stated that all of their checks were complete but they were waiting for Police Scotland to carry out their checks.

Resource concerns are not limited to the police – Scottish Fire and Rescue Service, local authority licensing staff, and connected services such as environmental health and building control, are also caught up in this.

**This was referenced in our responses to various consultations from 2020 onwards.** Stephen McGowan, partner and head of licensing in Scotland at UK law firm TLT also warned of the impact back in 2020. McGowan, who is also chairman of the Institute of Licensing Scottish region, and accredited by the Law Society of Scotland as a specialist in licensing law, explained that the regulation will also have a significant impact on local authorities and other local services. He warned that:

*“Provision will need to be made to deal with the impact of such a magnitude of applications on local authority resources. A massive rush of applications of this order could bring licensing administration to a halt, and have a knock-on effect on reporting obligations with Police Scotland and other authorities such as Fire and Building Standards, who will likely have to comment on each application. This could impact on processing times for other types of civic licence. The Licensing Law Committee of the Law Society of Scotland has itself emphasised the importance of piloting the new licensing scheme ahead of implementing the new powers.”<sup>14</sup>*

**The decision to extend the deadline for applications to 30 Sep 2023 pushes this issue further down the tracks. It does not solve the fact that in October 2023, this legislation will still be fundamentally disproportionate and have the same unintended consequences.**

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<sup>14</sup> See: <https://www.scottishhousingnews.com/articles/licensing-expert-warns-of-flood-of-short-term-let-licences>

**xiv. Administrative challenges: application process**

The implementation of the **Highland Council** version of the short-term let legislation application form has no intermediate “save” function; this means you need to fill-in the entire form, fault free, in one single sitting. This is a complex form with many tabs and places where you might want to pause the application and come back to it later.

In late 2022, the licensing team confirmed that: *“The IT team has recently provided a update that the issue with the save function is very complex. Due to this they have notified us that they will not be adding it back to the form in the near future and it may be significant time until it can be added back.”*

Their advice was to read the guidance before starting an application. This entirely misses the point. One ASSC member has rightfully highlighted that:

*“I cannot commence entering my application until this feature is made available. Reasons are:-*

- i. I am not confident that I can complete the complex, multi-tab form in one sitting (even with the guidance supplied) and I think it is completely unrealistic for us to be expected to do so.*
- ii. We are in a rural setting, with a potentially unreliable internet connection.*
- iii. I want my application to be vetted by our lawyers, prior to submission. They state they have no way of doing this without an intermediate save function. “*

A lawyer at THC suggested the option of travelling to a service point and filling in the application form there, to avoid any internet connection issues. Our member comments:

*“I’m not sure this is very practical. I might live fairly close to a service point, but I would imagine there are many other who would need to travel a considerable distance. I would also have to cart in all my files and back-up documentation just in case I needed it and have access to my own digital files so that I can attach them to the form (and I don’t use a laptop). Adding these up, I think this makes your suggestion unworkable.*

*I don’t think it is acceptable for your IT dept to remove a key feature of an application simply because it doesn’t work. I have worked as a professional in the IT software delivery industry for many years and the normal approach is a) don’t deliver something in the first place if it doesn’t work, b) fix problems as and when they occur, and c) go forwards, not backwards. I think the save function is a CRITICAL part of the application, not some nice-to-have extra feature and you have now rendered the application unusable and not fit-for-purpose.”*

When asked why there isn’t a national form, the same lawyer noted that:

*“The STL legislation provides that each licensing authority must introduce a regime which covers the licensing of STLs. Whilst, as a general principle, the Scottish Government seek to avoid arbitrary variation across Scotland, it is for each licensing authority to introduce, develop and implement the regime in their own area”.*

*I take your point regarding the Scottish Government devolving responsibility for the application to each council. However, it must be possible for local councils to collaborate and build a common application? Even if some of the questions and the logic surrounding them might vary from*

*council to council, it's perfectly possible to build that into a common form ; look at the HMRC self-assessment form as a good example. I am staggered by the amount of money and effort that must be being wasted across 32 local councils in Scotland – it is a national disgrace. And, of course, through collaboration, we might have actually got an application form that worked!*

This position is, unsurprisingly, causing yet more stress. An 87 year old ASSC Member, a self-caterer in Sutherland for 43 years, is specifically very distressed about this element of the licensing process.

The position is unsustainable, whether the transitional dates for implementation have been amended or not. The fact remains that new operators still face this hugely burdensome situation. In addition, we note that there is no paper alternative provided. **This is surely discriminatory to those who do not have access to the internet, or have the required skills to use it**, which we pointed out prior to implementation in one of our many consultation responses.

**Perth & Kinross Council's** changes to the 'save' feature has also been causing problems. The ASSC have been made aware of the following: *"For any applications which have been started and progress saved to date, any progress you have made will be lost unless you submit your application by 31 January 2023. A new application will need be made from 1 February 2023."*

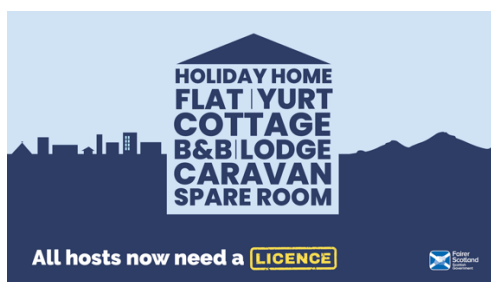
#### xv. New operators: communication

The ASSC is aware of new operators opening businesses after 1<sup>st</sup> October 2022, who have not applied for a licence, far less waited for a licence to be granted. They continue to welcome guests despite it technically being an offence to do so. We are not suggesting that they are doing so knowingly or purposefully, or indeed understand that they are committing an offence. Further, these properties are being listed on platforms (some clearly listed as 'New'). Although platforms are not committing an offence per se and the statutory obligation lies with the owner, and they are signposting to regulatory requirements, they are nonetheless facilitating an offence by listing the property after 1<sup>st</sup> October.

It seems inequitable that legitimate businesses and members of trade associations are facing the administrative and financial burden of licensing, while new operators appear largely unaware.

Communication of the scheme is lacking to those that are not actively engaged in either a trade body, DMO or national tourism organisation.

The Scottish Government's own marketing strategy is felt to be derogatory to legitimate self-catering businesses, and incompetent.



*“The budget for the short-term lets marketing campaign is £128,000. This includes development of material, user testing, a targeted digital marketing campaign that will run across various platforms (initially in October 2022 and again in March 2023), and provision of a toolkit for stakeholders.”<sup>15</sup>*

Regrettably, we believe this campaign to have failed.

The only meaningful communication has come (and continues to come) via the ASSC / SBBA and other accommodation trade associations, VisitScotland, and the Industry Advisory Group, with content provided by the ASSC.

**xvi. Warnings going unheeded**

In the 2021 consultation response, the ASSC included concerns about the impact on self-catering businesses at sections 4 and 5. These were noted on pages 107/108 of the Business Regulatory Impact Assessment.<sup>16</sup> Regrettably, these concerns are all becoming a reality.

We warned that introducing licensing would result in significant damage to Scotland’s tourist industry, including the businesses that provide services to property owners, and, in turn, to local economies. It seemed, and now becomes, counter intuitive at best to continue to push ahead with this when we are trying to recover from the economic damage of Covid-19 and the ongoing economic challenges and when staycations are being encouraged for sustainability and environmental reasons.

We warned that small accommodation providers would discontinue the activity. Perfectly legitimate self-catering and B&B operators are now making decisions daily to close their businesses. The ASSC, Scottish Bed & Breakfast Association and Scottish Guest House and Bed and Breakfast Alliance are now being notified of closure decisions being taken all the time. This is the real-world effect of short-term let licensing.

Sara MacLeod from Kings Reach Vegan Bed & Breakfast<sup>17</sup>, Lochgilphead, has taken the decision to close her B&B. She agreed to share her situation:

*“The STL licensing scheme is one of the main reasons we closed the B&B. After two years of pandemic restrictions and low bookings again last year we just cannot justify carrying on. Scottish tourism is on its knees and will take years to recover. I know of many holiday accommodation providers who have closed already in an area where there is shortage of good quality accommodation. We also have two self-catering cottages behind the main house so we would have to apply for THREE licenses with associated costs. Even though we are here on site all the time and all the property is on one site (and one title deed). Although we agree that the problem*

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<sup>15</sup> Freedom of Interest Request reference: 202200323007, 19<sup>th</sup> October 2022

<sup>16</sup> See: <https://www.gov.scot/binaries/content/documents/govscot/publications/impact-assessment/2021/11/short-term-lets-business-regulatory-impact-assessment2/documents/short-term-lets-licensing-scheme-planning-control-area-legislation-business-regulatory-impact-assessment-bria/short-term-lets-licensing-scheme-planning-control-area-legislation-business-regulatory-impact-assessment-bria/govscot%3Adocument/short-term-lets-licensing-scheme-planning-control-area-legislation-business-regulatory-impact-assessment-bria.pdf>

<sup>17</sup> See: <https://kingsreachbedandbreakfast.co.uk/rooms>

*with AirBnBs in the cities needs to be addressed and the lack of affordable housing for locals, this is really NOT the way to do it.*

*“So here’s that in brief: The STL licensing scheme is the final straw after two years of Covid restrictions and Scottish tourism barely beginning to recover. We have now closed our B & B in Argyll partly due to this ill thought out and badly timed licensing scheme. B&Bs should not be included, the Scottish government are using a sledgehammer to crack a nut.”*

Closures resulting from short-term let licensing will deprive Scotland of many hundreds of bed spaces, guest-nights, and the multipliers of guest spend in areas, particularly rural, which will now be lost to the community and the local economy.

Sara’s example further highlights the specific problem of multiple licenses being required by what has always been in effect one business - in this case a B&B with two self-catering units on site, all managed as one enterprise on one site and as one legal entity. This combination of accommodation provision within one portfolio is common place in Scotland, but has been neither recognised nor understood. Why should one licence not be enough?

Regrettably these warnings were not heeded. However, we now have a chance to review this in light of where we now find ourselves as a sector.

## **RECOMMENDATIONS ON SHORT-TERM LET LICENSING**

The ASSC has a proven track record of supporting regulation for the Scottish self-catering industry. **The ASSC proposed registration with mandatory health and safety for all short-term lets in October 2017.**

**The ASSC then worked constructively and proactively with the Scottish Government to facilitate the provisions on short-term lets in the Planning Act 2019**, which led to the passing of The Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021 (the “Control Area Regulations”).

The ASSC contends that local authorities do not know where STL premises are, what they are or how many there are anywhere in Scotland. The only indisputable evidence is the number of self-catering units (SCUs) on non-domestic rates. In 2020, 2021 and 2022, the Scottish Government concurred that they did not have this data. Indeed, part of the justification for licensing was cited that the scheme would give local authorities a better idea of what is going on in their local area. Regrettably this aspiration has not materialised, and cannot realistically do so.

A robust, verifiable database on which to base the implementation of a policy initiative is critical. A simple, low cost registration scheme as proposed by the ASSC, could have achieved this.

The ASSC engaged the respected legal firm Burness Paull LLP in Summer 2021 to provide expert comment on the Scottish Government’s short-term let regulatory plans.<sup>18</sup>

In the view of the ASSC, the legislation remains **incompatible with the legal requirements of the Provision of Services Regulations** (the “Regulations) 2009 (as amended) and the Provision of Services

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<sup>18</sup> See: <https://www.assc.co.uk/wp-content/uploads/2021/08/ASSC-Consultation-Response-13.8.21.pdf>

(Amendment etc.) (EU Exit) Regulations 2018 which preserved the Regulations notwithstanding the UK's withdrawal from the EU.

Further, the Scottish Government's Short-Term Let Policy amounts to an unlawful interference with the possessions of small accommodation operators, in breach of their **Human Rights: Protocol 1, Article 1 and Article 17 of the Charter on Fundamental Rights – Right to Property**.

Regardless, we find ourselves where we are, and the ASSC stands ready to assist the Scottish Government to rectify the shortcomings of the short-term let regulations as they stand.

In order to reverse the unintended consequences that have unfolded during the implementation of the short-term let legislation, it is critical to:

- **Review** the underlying purpose of the licensing legislation: is it about upholding health and safety, or is it to address housing concerns?
- **Assess** any impacts to date on operators, licensing authorities, public sector, local economy, community, and tourism generally.
- **Re-address** the scope of the policies and reconsider the legislation in light of the over-reach that has occurred in certain local authority areas.
- **Review** whether the current legislative framework is fit-for purpose and amend the regulations / guidance in light of this process (more detail below).
- **The Scottish Government should commit** to engaging with industry on the possibility of a further extension of the delay, while taking cognisance of impact of Covid recovery and cost-of-living crisis, and preparedness of local authorities.

### **Legislative review**

The ASSC recommends that the Scottish Government review whether licensing is the correct conduit to deliver the legislation most effectively. The ASSC suggests that there should be a review of how applications are handled in light of landlords registration, pivoting the licensing legislation to align with the **Antisocial Behaviour etc (Scotland) Act 2004**. **This would satisfy the aims of the regulations, covering the safety of the activity.**

Alternative methods have been explored and presented to the Scottish Government, but we consider this approach to be the most proportionate and effective given the Scottish Government's position on these regulations.

Landlord's Registration lasts for three years, mirroring the majority of short-term let policies. A landlord receives notification that the registration is due for renewal and the application can be made online or on paper. Renewals are not onerous or burdensome, requiring confirmation that a landlord continues to comply with the statutory guidance, which covers the same health and safety requirements of the short-term let licence. There is no requirement for layout or site plans showing fire protection etc, maximum occupancy or additional conditions. The cost across Scotland is £68 for principal owner plus £16 per property (plus £137 for late application). This is considered to be proportionate, targeted and appropriate, and the small accommodation sector would welcome this regulation.

## Re-writing licensing guidance

If the Scottish Government is unwilling to consider legislative alternatives, guidance associated with The Civic Government (Scotland) Act 1982 (Licensing of Short-Term Lets) Order 2022 should be re-written to inform licensing authorities in the aim and spirit of the legislation. Local authority policies should be revised in light of this. The ASSC believes that:

- Licensing policies should focus on the mandatory conditions pertaining to the safety of the activity, in line with existing legislation.
- Issues that licensing authorities are attempting to address should be addressed via existing legislation rather than duplicating regimes: eg
  - Fire Safety: Fire (Scotland) Act 2005 ('the 2005 Act')<sup>19</sup>
  - Anti-social Behaviour: Part 7 (housing: antisocial behaviour notices) of the Antisocial Behaviour etc. (Scotland) Act 2004 and Antisocial Behaviour Notices (houses Used for Holiday Purposes) (Scotland) Order 2011.
- The presumption of bad practice should be removed from all guidance.
- Over-reach of existing legislation should be removed (floor plans), anti-social behaviour etc.
- Ultra vires policies should be withdrawn.

## **CONCERNS WITH SHORT-TERM LET PLANNING REGULATIONS**

### **i. Designation of Planning Control Areas**

Further to decision letters sent from the Scottish Government to Edinburgh and Highland Councils, it is our understanding that Edinburgh and Highlands should not be asking for a planning application in all cases for those properties that were already operating before a Control Area was designated. This is based on two paragraphs in the letters, as follows:

*"A change of use of a dwellinghouse to a short-term let after the designation of the control area will be deemed to be a material change of use by virtue of section 26B of the Act.*

*Where the change of a dwellinghouse to a short-term let took place before the designation of the control area the existing rules will apply. These require planning permission for a change of use of property where that change is a material change in the use of the property".*

These two paragraphs appear in both the Highland letter, and also in the earlier Edinburgh letter.<sup>20</sup> Similar sentiments also appear in the Scottish Government's draft planning guidance. It is clear that on this basis, existing operators have 'grandfather rights' in terms of planning within a Planning Control Area.

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<sup>19</sup> See: <https://www.gov.scot/publications/practical-fire-safety-guidance-existing-premises-sleeping-accommodation/>

<sup>20</sup> Letters from Scottish Government to City of Edinburgh Council and The Highland Council, 20 December 2022.

Edinburgh Council seem to be ignoring the second paragraph, and are essentially stating that the Control Area works retrospectively to catch all existing short-term lets. As it stands, City of Edinburgh's Licensing Policy requires that having planning permission for secondary lets is a condition of being granted a licence. This leaves City of Edinburgh Council's Licensing policy incompetent, as it is mis-aligned to the PCA policy. The licensing policy will need to be reviewed and revised in light of this, given that existing operators will have to be considered in a different light.

**City of Edinburgh Council's proposed planning policy**, which it has just consulted on, is unfair, disproportionate and discriminatory, setting criteria that amounts to a de-facto ban on short-term letting despite all assurances to the contrary. By identifying only a small number of limited circumstances where short-term lets are to be permitted, for example those with a main door in an area that is "commercial" in character, this will mean that the vast majority of short-term lets will be refused, leading to an exodus of small tourist accommodation businesses, severely impacting the local economy which depends on tourism.<sup>21</sup>

**Glasgow City Council** has essentially introduced a PCA without going through due process, and introduced what amounts to a de facto ban on short-term lets, even homeletting and some homesharing. We are only aware of one planning application having been granted lately to a property which "has a dedicated private access and private amenity space to the front meaning there is no conflict between it and residential uses that are accessed via the main close door adjacent". The Report of Handling also usefully summaries the guidance, so you can see that the majority of flats will fail the guidance test, as most will share doors, or be in one of the restricted areas, or both. Glasgow City Council Planning Officers have said:

*"For the avoidance of doubt where a flat is frequently used to provide short-stay accommodation, there is likely to be a material change of use and an application for planning permission would be required. An Application for a Certificate of Proposed Lawful Use would be to confirm whether planning permission is required. Our advice on the basis of the property being a flat (and frequently use as short-stay accommodation) is that planning permission is required therefore the submission of an Application for a Certificate of Proposed Lawful Use would likely only serve to restate this.*

*As I indicated previously in order to protect residential amenity planning permission will not be granted for a change of use from a residential flat to short-stay accommodation within existing blocks of residential flats, resulting in a mix of mainstream residential flats and shortstay accommodation within a single building sharing a means of access. For example in a tenement or modern block of flats sharing an entrance door and close then the use of flat as short-stay accommodation would not be acceptable.*

*For the detailed guidance please see policy SG 10 Meeting Housing Needs (Short Stay Accommodation) via the link below.*

*<https://glasgow.gov.uk/index.aspx?articleid=20795>*

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<sup>21</sup> We refer the Committee to the ASSC's submission to City of Edinburgh Council for further details. Url: <https://www.assc.co.uk/wp-content/uploads/2022/12/ECC-STL-Planning-Guidance-consultation-response-12.12.22.pdf>



*Following your enquiry last year we have published further guidance regarding the planning requirements for short-stay accommodation at <https://www.glasgow.gov.uk/index.aspx?articleid=29811> that may give further assurance regarding the requirements.”<sup>22</sup>*

ii. **Planning outwith Planning Control Areas: Requirement for Planning Permission**

In November 2022, Brodies LLP prepared a legal opinion for the Association of Scotland’s Self-Caterers regarding planning requirements for short-term holiday letting.<sup>23</sup> The paper opines that the requirement for planning permission for short-term holiday letting depends on whether the premises are situated within a short-term let control area. Licensing requirements are not made under the planning legislation and are not relevant to determining whether planning permission is necessary.

In all other areas, planning permission is not necessarily required for a change of use to short-term holiday accommodation. In fact, the question of a change in material use depends on the individual circumstances of each premises and planning authorities must take this into account.

Other authorities issuing guidance on what they deem to be a material change of use, for example Perth and Kinross Council, is purely guidance, and has no legal status. If operators disagree, and consider that their use is not a material change, they would have to either test that via submitting a CLOPUD, or take their chances and not submit a planning application at all, and see if it comes up as part of the licensing process.

East Lothian and South Ayrshire are cases in point. There is nothing specific in the **East Lothian Local Development Plan 2018**, which only really comments to a degree on the importance of the sector to the local area (see below), with Policy TOUR4 relating to hotels and guesthouses (see also below).

3.26 The East Lothian Economic Development Strategy 2012-22 identifies tourism as one of the strengths of the East Lothian economy and a source of employment opportunities in the future. The local development plan’s policies and proposals seek to ensure that a balance is found between encouragement of tourism, including activity based tourism (e.g. walking and cycling) and the economic benefits that it provides and the protection of for example, important landscape and nature conservation interests. All leisure and tourism related development proposals, including visitor attractions, hotels and holiday accommodation, will be assessed against all relevant Local Development Plan policies.

3.30 A range of hotel, guest house and other accommodation attracts visitors and encourages them to stay and benefit the economy of East Lothian. There is a need to encourage high quality hotel accommodation. Proposals that will result in the loss of hotel or guest house will be resisted unless it can be clearly demonstrated that the continued use of the building as a hotel or guest house is not practical. This will mean an applicant providing evidence of a formal marketing campaign at a reasonable price for a minimum of a year, including details of methods of marketing, relevant dates, copies of particulars, and details of all interest and offers received. Policy TOUR 4 will not apply to tourism accommodation that required a

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<sup>22</sup> Sam Worden, Planner, Planning and Building Standards, in email to ASSC member, December 2022.

<sup>23</sup> The full opinion can be provided upon request.

change of use of an existing building within three years of the date of its permission. This exemption will not apply to new build tourism accommodation.

Policy TOUR4: Hotels and Guest Houses

Proposals for the change of use of hotels and guest houses will be resisted unless it can be clearly demonstrated that all reasonable efforts have been made to retain the property in use as a hotel or guest house, including evidence that it has been marketed as such and no reasonable offers received.

However, we note Planning Appeal 22/01161/P, the Report of Handling illustrates an extremely hard line from East Lothian in relation to flats.

**South Ayrshire Council (SAC)** met to discuss Short Term Lets Planning Guidance, item number 17 on December 15<sup>th</sup> 2022<sup>24</sup>. The planning policy implies that SAC has to bring in a STL planning policy, which is not the case. SAC could choose against requiring to change their planning policy or the introduction of a planning classification change for short-term let units – which would be in line with the vast majority of other Scottish local authorities and would be proportionate for South Ayrshire. SAC could choose to move ahead singularly with the licensing policy only.

Further, the proposal being reviewed states there are no risks with the implementation of planning on top of the already approved licensing controls. This is inaccurate on the following basis:

- No adequate analysis has been carried out on the potential impact on the South Ayrshire tourism economy.
- Data provided by South Ayrshire council indicates that the short term let industry directly contributed £52m in 2021. This £52m is at significant risk if the planning policy is introduced. Operators, current and new, will be actively discouraged from remaining or entering the market of short-term lets because of the risks to their investment.
- Based on the statement within the draft planning policy (4.6) and wording around planning permission being denied unless the property is within town centres or 1-bedroom apartments, we would highlight that dwellinghouses, town centre and 1-bedroom properties make up a minority of South Ayrshire's STL units. Thus, existing businesses, will be swiftly forced out of business, causing loss of employment and economic benefit.

We strongly contend that this proposed planning policy, and similar policies elsewhere, are disproportionate and over reaching, where other local authorities have concluded that licensing is sufficient to cover the safety of the activity.

**iii. Reverting a short-term let to a dwellinghouse / flat**

If you are granted planning in East Lothian but then refused a licence, we have been advised that an operator is required to apply again (and pay for) change of use back to residential. This is because you

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<sup>24</sup> Item 17, Report by Depute Chief Executive and Director of Housing, Operations and Development to South Ayrshire Council of 15 December 2022.

have previously used it as a holiday let. If you have never traded and never had that use confirmed, it could just be withdrawn without the associated costs. In Edinburgh, however, advice is that you do not as it is not considered a development. This approach is inconsistent.

A flat is a 'sui generis' use (i.e. it's not in Class 9 Houses), and so is a short-term holiday let. If you have secured either a Certificate of Lawfulness, or a Planning Permission for that matter, and this only refers to the use being as a short-term holiday let, or something similar, then technically speaking you would need planning permission, to then use it as a flat (tenanted or owner occupied etc). There is an option to apply for a flexible planning permission that allows for both uses, so you have the right to swap between them without needing a further planning permission, however, this option is not clear to operators. Further, this option doesn't apply to the Certificate scenario, as that Certificate is describing the lawful use, as a single use, and so you would need planning permission to revert back.

Whether the Council would even bother about someone with a Certificate reverting to a flat is probably more important than an academic discussion on the rights and wrongs of whether you have to apply or not. In effect, the City Council have set out their stall to forcibly persuade people to use their flats for tenants and owner occupiers. It is highly unlikely, therefore, that upon refusing someone's licence, who has a Certificate, but then has no licence, they will give a second thought to that person's planning legal position who then, for example, rents out their flat to a tenant albeit it has a Certificate for a short term let. In my experience, these things only tend to surface when people sell their property whereby solicitors acting for purchasers may ask the seller to regularise the situation to the use the purchaser wants.

Finally, whilst needing to apply, nobody with a Certificate for a short term let applying to use it as a flat is likely to find the planning process that difficult, as they are, in effect, doing what the Council wants them to do.

#### **iv. Planning Surcharges**

From 1 October 2022, Perth & Kinross, Edinburgh and Fife Councils<sup>25</sup> have added a surcharge to retrospective planning applications. Any application for planning permission made after the any part of the development has commenced will be subject to an additional charge equivalent to 25% of the normal application fee plus VAT.

In terms of transitional arrangements, any retrospective applications received from 1 October 2022 will be subject to the new charges. This will also include any applications submitted prior to 1 October 2022 which are invalid and remain invalid after 30 September 2022. This represents yet more costs associated to the new legislation, in addition to the increase in planning application fees on 1 April 2022.

Operators who require to conduct their businesses in a professional manner, and rely on advance bookings or may have to advise clients about their ability to let individual properties, are left in a state of substantial uncertainty. That uncertainty is accentuated by an absence of relevant Scottish Government planning guidance. To introduce a policy exercising one function (licensing) whilst the same activity will

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<sup>25</sup> Fife Council guidance for reference: [Fees for Retrospective Planning Applications](#). Full details of the legislation can be viewed here [The Town and Country Planning \(Fees for Applications\) \(Scotland\) Regulations 2022 \(legislation.gov.uk\)](#)

be regulated through the exercise of a different function (planning) and when the nature of the combined effect is unknown is disproportionate, illogical and perverse.

It is irrational to apply policies regulating the same activity in inconsistent ways. Separately, it imposes unnecessary hardship to require operators to subject themselves to parallel processes for materially identical purposes and to pay repeat fees.

**v. Revised National Planning Framework 4**

The ASSC responded to the Scottish Government’s consultation on the National Planning Framework 4<sup>26</sup> and have also provided written evidence to the Committee on the revised NPF4 in November 2022.<sup>27</sup>

Particularly with the limited opportunity for scrutiny of the revised draft, **we are concerned that Policy 30 on short-term lets will entail unintended consequences** – namely, a reduction in the diversity of accommodation offered to visitors to Scotland, as well as a decrease in one of the most environmentally sustainable forms of tourist accommodation, a situation which will neither help local communities or Scotland’s net zero goals.

The ASSC firmly believes that there should be no further short-term let regulations in Scotland until the cumulative effect of licensing and control areas has been fully analysed to ensure there are no unintended consequences and that they are clearly meeting policy objectives. There needs to be clear evidence that existing planning law, including control areas and local development plans, has improved access to affordable housing.

**RECOMMENDATIONS ON SHORT-TERM LET PLANNING POLICIES**

Moving forwards, planning policies should be:

- Proportionate in nature, balanced, and rely on a firm evidence base;
- Appreciate tourism related economy at a time when it should be supported to recover, and understand that short-term lets are a key source of accommodation that is imperative to the viability of local communities and international events; and
- Consider the economic impact of any planning policy, which will cost jobs and livelihoods in a sector that provides a £876m to the Scottish economy.

**It is our recommendation that, in line with Scottish Government guidance, within a Short-term Let Control Area, planning permission should be granted:**

1. Where extensive refurbishment of a long-term empty dwellinghouse is proposed to bring the building back into active use.
2. The proposal is for the upper floor(s) above a commercial unit.
3. It is an **established short-term secondary let property** in a long-established dwellinghouse.

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<sup>26</sup> See: <https://www.assc.co.uk/wp-content/uploads/2022/03/National-Planning-Framework-4-ASSC-response.pdf>

<sup>27</sup> See: <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-local-government-housing-and-planning/correspondence/2022/the-association-of-scotlands-self-caterers-npf4-submission>

We note that the Highland Council’s policy suggests that **‘Established short-term secondary let property’** means: A dwellinghouse that has been trading as a short-term secondary let property before the first date of the first approval at a Council Committee meeting proposing the establishment of a short-term let Control Area.

We seek clarity that, as per correspondence from the Scottish Government,

*“A change of use of a dwellinghouse to a short-term let after the designation of the control area will be deemed to be a material change of use by virtue of section 26B of the Act.*

*“Where the change of a dwellinghouse to a short-term let took place before the designation of the control area the existing rules will apply. These require planning permission for a change of use of property where that change is a material change in the use of the property”.<sup>28</sup>*

**We also seek clarity that the same principal would apply outwith a Short-Term Let Control Area.**

Planning permission should be granted unless a material change of use or development has taken place, prior to a change in planning policy. The definition of an ‘established short-term secondary let property’ should apply where planning policies are changed and planning permission should only be required after the change in planning policy is agreed and implemented. This will protect the livelihoods of existing operators and legitimate businesses via ‘grandfather rights’.

## **CONCLUSION**

The Scottish Government previously committed to a review of licensing in summer 2023. Under the circumstances with the six-month delay, this would no longer be merited. **We are currently in a far better position to review the policy now.**

Scotland Outlook 2030: Responsible Tourism for a Sustainable Future, our national tourism strategy identifies the following:

***Our picture of success:** We will provide a wide range of immersive, responsible and authentic visitor experiences that reflect our strengths and changing visitor trends. Every visitor expectation will be met, with each visitor enjoying a world-class experience creating ambassadors for Scotland all over the world. Our visitors will stay longer throughout the year, see more of Scotland and spend more during their visit.*

***The Context:** “Consumers are increasingly connected, informed and keen to get the most from their visit with high-quality, memorable experiences. By connecting visitors with outstanding experiences that are authentic to the place they’re visiting, we can increase the value per visitor while contributing to thriving places across Scotland.*

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<sup>28</sup> Letters from Scottish Government to City of Edinburgh Council and The Highland Council, 20 December 2022.

***Our Commitment:*** “We will nurture Scotland’s tourism assets to deliver high quality, memorable experiences that benefit visitors and the places they visit.”<sup>29</sup>

The First Minister noted as part of the national strategy: “These are challenging times, both for the tourism sector and for Scotland as a whole. It means that an innovative, resilient and welcoming industry is vital, not only for Scotland’s future prosperity, but for Scotland’s place in the world. Scotland becoming the tourism industry world leader is an ambition I share. Yes, it is bold, but I believe there is no country better equipped to rise to the challenge. I look forward to working together to achieve it.”<sup>30</sup>

We stand ready to work with the Scottish Government, MSPs, the Committee, local authorities and relevant stakeholders to continue to ensure that the details of the legislation and guidance are absolutely right. At this crucial stage of Covid recovery, and in the midst of a cost-of-living crisis and recession, we must work collaboratively to protect Scotland’s £867m self-catering industry and not burden small businesses who do so much to promote and enhance the country’s unique tourism offering and boost local economies.

Once again, the self-catering industry is incredibly grateful for this badly needed delay provided by the Scottish Government on short-term let licences. It gives us all time to review and address the unintended consequences that have unfolded. We hope the points outlined in this evidence can be addressed by the Scottish Government, working in tandem with the sector, local authorities and other relevant stakeholders, so we can reduce the regulatory burden on business to ensure that they survive and thrive in the future. The recovery of Scottish tourism will benefit small businesses, while responsible and sustainable tourism can help communities to recover too.

On behalf of the ASSC, we look forward to working with you in 2023 to ensure that we achieve the correct balance between tourism and local communities.

**FIONA CAMPBELL, CEO, ASSOCIATION OF SCOTLAND’S SELF-CATERERS.  
JANUARY 2023**

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<sup>29</sup> See: <https://scottishtourismalliance.co.uk/wp-content/uploads/2020/03/Scotland-Outlook-2030.pdf> page 27

<sup>30</sup> See: <https://scottishtourismalliance.co.uk/wp-content/uploads/2020/03/Scotland-Outlook-2030.pdf> page 4