



Short Term Let Licensing: Outstanding Issues, May 2023

INTRODUCTION

The Association of Scotland's Self-Caterers (ASSC) welcomed the Scottish Government's decision to provide a six-month extension for existing short-term let operators to apply for a short-term let licence. This delay provides an opportunity to take stock, assess the impacts related to the regulations, and work constructively to ameliorate concerns. However, with only four months until short-term let licensing goes live, there are a number of outstanding issues which remain to be resolved.

The ASSC was also pleased at the opportunity to recently meet with the Scottish Government's new Minister for Housing Paul McLennan MSP to discuss short-term let regulation. **We are grateful for his commitment to help resolve the outstanding issues relating to short-term let licensing and we welcome the invitation to be part of the 2024 review.**

We now need to work together to ensure that the regulatory framework functions effectively for all stakeholders involved in Scotland's vital tourism industry. If action is not taken, we fear more self-catering operators will leave the sector, jeopardising not only the industry that provides £876m per annum to the Scottish economy, but it will have major ramifications for the Scottish tourism sector, including the position of the Edinburgh Festival Fringe.

This document outlines the outstanding issues that need to be addressed as a matter of urgency and we provide solutions to the problems faced. Our paper should be read in conjunction with our [submission to the Scottish Parliament's Local Government, Housing and Planning Committee](#) in January 2023.

RECOMMENDATIONS

There is now a real opportunity to have a regulatory framework which can fulfil the original policy objectives of short-term let licensing in a manner which does not harm our tourist economy. The ASSC believes there are two pathways in which the Scottish Government can achieve this.

This involves the following:

1. Consider the ASSC's policy proposal that is workable, proportionate and will not damage tourism; that is, **to pivot licensing to align with the Antisocial Behaviour etc (Scotland) Act 2004.**, which would satisfy the aims of the regulations, covering the safety of the activity, (as per the recommendations in our paper submitted to the Local Government, Housing and Planning Committee in January 2023).

OR

2. **Consider the various amendments to the 1982 Act**, as set out in the sections below, and to **re-draft the guidance** associated with The Civic Government (Scotland) Act 1982 (Licensing of Short-Term Lets) Order 2022, in collaboration with industry and local government stakeholders, to inform licensing authorities in the aim and spirit of the legislation.

EXECUTIVE SUMMARY: PROBLEMS AND SOLUTIONS

The ASSC seeks a fair and proportionate legislative framework that provides an appropriate balance, responding to community needs while protecting Scotland's vital tourist economy. The problems associated with short-term let licensing are not totally insurmountable and through working collaboratively with industry and local government partners, we can arrive at solutions that work for all stakeholders.

Underlying the whole debate on short-term let licensing is the overriding **policy intention**. It remains unclear as to whether it is about health and safety, addressing anti-social behaviour or responding to housing challenges.

Fees are not being set on a cost recovery basis as **some councils are setting fees at extortionate levels**, above estimations provided in the BRIA and way above that for private landlords. The Scottish Government should not have applied modelling from (a) HMOs, based on the number of licences and (b) 2005 Act licences, which are self-funded. Moreover, the government should not encourage 'token' fees for homesharing, which is just one type of STL, and therefore discriminatory.

To tackle **barriers to investment**, Scottish Government guidance must direct that licensing authorities provide Temporary Exemptions, which is standard practice in the Civic Government Act 1982. Operators across all local licensing authority areas should be enabled to apply for a Temporary Licence when applying for a full licence, with that Temporary Licence being in place until a full licence is considered and granted.

Some councils illustrating **overreach in terms of their additional conditions** – for instance on floor coverings or boat/bike provision – which may be ultra vires to licensing. The 2022 Order should be amended remove the option for authorities to include additional conditions that are outwith the scope of the legislation and guidance must be re-drafted to ensure a consistent approach.

There **should not be an inequality of treatment between different types of short-term let** if we are to uphold the central principle of licensing. If one type of licence is being offered exclusions, or different treatment, whether being treated more strictly (secondary letting) or with more latitude (homesharing), it is outwith the legislation. Guidance must express the need for consistency across councils to prevent breaches of natural justice.

There are **inconsistencies in licensing policies remain potentially unlawful on three grounds**: (a) STL licensing is inconsistent with the Provision of Services Regulations 2009 due to a fundamental lack of human interest; (b) it is incompatible with small accommodation business operators Convention rights protected by Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"); and (c) the dual requirements of planning and licensing are oppressive and disproportionate.

On **planning** specifically, planning permission is only required post designation. The Scottish Government must provide transparent, justifiable planning guidance as a matter of urgency until such a time as they remove Schedule 3.13 from the Licensing Order. Schedule 3.13 must be amended to provide clarity that planning is only sought where a material change of use has occurred, unless in a Planning Control Area, at which point policy 26B comes into effect.

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Context: Policy Objective of Short-Term Let Licensing

The Policy Note accompanying the 2022 Order states that it establishes a licencing scheme to ensure **short-term lets are safe and address issues faced by neighbours; and to facilitate local authorities in knowing and understanding what is happening in their area as well as to assist with the handling of complaints effectively**. Further restrictive aspirations around the suitability of the use of a property as a STL or the management of high concentrations of secondary lets were removed when the 2021 Licensing Order was not proceeded with.

In terms of the Civic Government Act 1982 more generally, the key aims of licensing are the *preservation of public safety and order and the prevention of crime*.

In considering the implementation of STL licensing, it is critical to come back to this policy intention.

Background: Our Concerns

From our analysis of Scotland's 32 local councils, we still have significant concerns in relation to:

- The various discrepancies seen across local authority areas, including on fees, layout plans and interpretation of the new law.
- Many councils are charging eye-watering fees. For a one-year license for secondary letting, City of Edinburgh Council are charging £5869 for 16-20 occupants, while in Perth and Kinross its £1,600 for 11+ occupants. This should be viewed in the context of the Business Regulatory Impact Assessment estimations, as well as fees for other types of property. The **Scottish Government's estimated fees in the BRIA were £216-£434 for a three-year licence. The fee for a three-year private landlords' registration is just £86.**

- Councils have variously exceeded the legal power given in law to create additional ‘perverse and unreasonable’ clauses.
- In some authorities planning is duplicating what should be a licensing role, retrospectively refusing operators with no history of complaint - precluding the ability to apply for a licence. This is particularly apparent in Edinburgh and Glasgow.

More broadly, we have huge concerns that Short-Term Let Licensing has created a **total and unavoidable barrier to investment or commercial borrowing** in the small accommodation sector. This includes the purchase of a new property, the sale of a property or the ability to invest in a business.

Finally, there **problems associated with bookings** (for instance, can operators accept bookings past October 2023?), insurance and, of course front-loaded investment to achieve compliance in the middle of a cost-of-living crisis.

The reality is that operators are not opting to participate due to such uncertainty. This is evidenced by the fact that only 1,300 have applied for a licence in the Highlands. Argyll & Bute Council has only granted 18 licences from a total of 347 applications, all with conditions (at 28th April).

The law makes provision for either a PRT or an STL licence. This inflexibility fails to account for many exceptions which do not fit with either scenario, for example mid-term rentals.

Meanwhile, despite the lack of applications, councils are struggling to meet the demand in a timely manner for licences or planning consent when operators do decide to apply. Even with the low number of applications in the Highlands, there is a 3 month wait in being assessed by the Scottish Fire and Rescue Service.

Licensing is a huge challenge for short-term let operators, particularly in the current climate due to the cost-crisis and Covid-19 recovery, and exorbitant fees, costly layout plans, the conflation of licensing/planning regimes etc remain issues that we need to resolve. In fact, our latest survey finds that **39% of respondents said that they will be leaving the sector** with a further 27% not sure yet. If respondents were to sell their properties, **96% say if they sell it would not be available for affordable housing.**

ASSC Evidence to Local Government, Housing and Planning Committee, January 2023:

The ASSC was 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 thanked the Committee for its commitment to give further scrutiny to this topic. Our evidence set out our outstanding concerns not only on short-term let licensing but on planning policy. The evidence can be read here: [ASSC Submits Written Evidence to Local Government Housing Planning Committee](#). It covered the following:

- **Outstanding Concerns over Short-Term Let Licensing:**
 - i. Discrepancies across local authority areas
 - ii. Ultra vires policies
 - iii. Rebuttable presumption
 - iv. Planning considerations
 - v. Barriers to investment or commercial borrowing
 - vi. New operators
 - vii. Unconventional accommodation

- viii. The booking problem
- ix. Front-loaded investment
- x. Insurance
- xi. Confusion in local councils
- xii. Private Residential Tenancies / Short-Term Lets
- xiii. Public sector resource
- xiv. Administrative challenges: application process
- xv. New operators: communication
- xvi. Warnings going unheeded.
- **Recommendations on Short-Term Let Licensing**
- **Concerns with Short-Term Let Planning Regulations:**
 - i. Designation of Planning Control Areas
 - ii. Planning outwith Planning Control Areas: Requirement for Planning Permission
 - iii. Reverting a short-term let into a dwellinghouse / flat
 - iv. Planning surcharges
 - v. Revised National Planning Framework 4
- **Recommendations on Short-Term Let Planning Policies**

Regrettably, there has been no movement in terms of ameliorating the scheme since the delay was approved.

Rather than repeating this evidence, the remainder of this document covers additional matters.

Additional Evidence that should be considered:

- [Why do People Stay in Short-Term Lets \(Self-Catering Units\) in Edinburgh?](#)
- [1 in 10 Self-Catering or B&B Businesses in Skye are Set to Close as a Result of Short-Term Let Legislation](#)
- [The Cost of Short-Term Let Licensing and Planning](#)
- [Scottish Tourism Alliance and Tourism: Fact Sheet](#)
- [Edinburgh: Data on Planning Extracted from the Planning Portal](#)
- [SLT Licensing Creates Immediate Barrier to Investment](#)
- [Travel Tech Companies Release Open Letter to the First Minister](#)
- [Open Letter from DMOs](#)
- [Moffat Centre Short-Term Let Accommodation Evaluation Review 2022/23](#)
- [The Facts About Short-Term Letting In Edinburgh](#)
- [Fundamental Flaws in the Underpinning Research: Indigo House Group \(2017-2019\)](#)
- [Real Stories Real Lives Real Livelihoods](#)
- [Briefing: Distinguishing between Empty Homes, Second Homes and Self-Catering Accommodation](#)

Outstanding Issues – and ASSC Solutions

1. Housing / Anti-Social Behaviour or Public Safety

Throughout the process, various Ministers and MSPs have claimed that the policy objective for SLT Licensing is anything from basic health & safety to addressing anti-social behaviour, and ameliorating the housing crisis. Indeed, some have been so bold as to suggest in public that by manipulating the privately-owned property market, they will secure more affordable homes for local people. This desire to directly interfere in the terms of ownership of individual's homes and businesses runs counter to natural justice, European law and Human Rights legislation.

If the Scottish Government continues to believe that this legislation is targeted at addressing anti-social behaviour, we respectfully signpost to former Housing Minister Kevin Stewart’s frequent comments on the requirement for Local Authorities to use existing anti-social behaviour legislation.

More background information can be found here:

- [Health & Safety or Housing](#)
- [Scaremongering: The Duplicitous Approach to Short-Term Let Licensing](#)

2. Fees

- The Scottish Government’s More Homes Division have suggested **“the majority of the fees published so far by local authorities ... fall within the estimate of £218 to £436 for a three-year licence predicted in the Scottish Government’s Business Regulatory Impact Assessment, and follow our guidance to tailor according to licence type and accommodation size”**.
- However, regardless of these assurances, it is clear that they are **far higher than Landlords Register Fees**, of which there are three: Principal Fee: £68; Property Fee: £16 (per let property); and Late Application Fee: £137.
- The ASSC believe that there is **strong evidence to suggest that fees are not being set on a cost recovery basis, with large variations seen throughout Scotland**.
- As Table A below shows, the average fees for both homesharing/letting and secondary letting for those accommodating more than 4 occupants **averages above £1,000**. Such costs – coupled with compliance with existing regulation as well as energy price increases – may force some operators out of business.
- Additional costs will have to be passed onto guests in a price sensitive market. If this becomes too prohibitive, visitors simply won’t choose to holiday using self-catering in Scotland, thereby damaging a key component part of our tourism industry.

Table A: Fees Compared – Homesharing/letting vs Secondary Letting	
Homesharing/letting 3-year license	Secondary Letting 3-year license
Fees range from £125 to £3600. Median = £1737 Average across all occupancy numbers = £817 Average up to 4 occupants = £396.35 Average from 4-10 occupants = £1006	Fees range from £250 - £5869. Median = £2809 Average across all occupancy numbers = £880 Average up to 4 occupants = £421 Average 4 occupants or more = £1274

- The secondary letting figures for City of Edinburgh, Dundee City Council and Perth & Kinross Council are particularly stark when compared to other local authorities for equivalent sized properties.
 - Edinburgh: 11-15 occupants is **£3,872** for a one-year license and for 16-20 occupants, it is **£5,869**;
 - Dundee: **£3,100** for 12-20 occupants on a three-year license; and
 - Perth and Kinross: **£1,600** for 11+ occupants.

On 23rd April 2023, the ASSC submitted an FOI to each local authority in respect of the following:

- How many short-term let licence applications have you received in total and then broken down by: (a) home sharing; (b) home letting; and (c) secondary letting?
- How many short-term let licences have been (a) granted (b) granted with conditions; and (c) rejected?
- How many licence applications did you anticipate in order to reach your fees in total and then broken down by: (a) home sharing; (b) home letting; and (c) secondary letting?
- What short-term let licensing fees have been collected so far?

- E. How many members of staff have been employed to administer the scheme broken down by: (a) full time; (b) part time.

Alarming, from first responses at 1st May 2023, **numbers of applications are extremely low**. More pertinently, we note that neither Dumfries and Galloway or Clackmannanshire Councils have set their fees on a cost recovery basis as they **do not hold information on how many licence applications were anticipated. This fundamentally goes against the legislation and is therefore unlawful.**

The same certification is required irrespective of whether the premises sleeps 2 or 32. In theory, therefore, it should take the same time to assess and consider the application. It is therefore absurd to suggest that a larger property should pay more on a cost recovery basis.

It becomes clear that fees have been set according to (a) HMO Fees and (b) Scotland Act 2005. This is entirely inappropriate.

Fees cannot be set in the same way as HMO licences¹ are as Licensing Authorities have no idea about the number of licences that will be required. Furthermore, HMO licences are based on the number of tenants. If you accommodate more tenants, entering into what is essentially a separate PRT arrangement with each, a landlord is able to accrue more rent per capita. STL properties cannot be assessed under the same test, given the entirely different business model. An STL property is provided in its entirety, and the number of guests is irrelevant. The rate charged to a guest (the lead guest) is not based on number of guests. It does not take longer to process a larger property and the revenue generated is not dependent on number of guests.

The Scottish Government has directed Licensing Authorities to base fees on occupant capacity. **Occupant capacity in HMOs and STLs are not equivalent and cannot be calculated similarly. This is a flawed and inappropriate model to apply to STL Licensing.**

Similarly, when liquor licensing was moved from the 1976 Act to the 2005 Act, Licensing Authorities knew how many licences generally would be applied for. The transitional period assisted in an understanding of appropriate costs. On this basis, the costs were set on a cost recovery basis and could be self-funded. Retrospectively, Licensing Authorities could assess if fees were incorrect and re-calculate accordingly. In the case of STL Licensing, **there is no precedent and no touchstone on which to base fees on a cost recovery basis. On this basis, it is impossible to make the scheme self-funding.**

We understand that in a letter sent to Licensing Authorities on 27th March 2023, the former Cabinet Secretary for Housing Shona Robison MSP encouraged **'token fees' for homesharing**. In their response, Argyll & Bute Council have questioned what the definition of a 'token fee' is. It is their opinion that this does not align with the requirement for cost recovery - or would the cost of administering home sharing have to be absorbed by secondary letting? If so, this amounts to discriminatory treatment of one type of licence over another and amounts to a lack of natural justice.

If a Licensing Authority has to re-calculate fees on the basis of retrospective applications / revenue generated, it may result in increased fees. This is not (a) equitable, (b) a level playing field, (c) natural justice or (d) fair justice.

¹ The ASSC notes that the HMO regime is also relevant because those licences were originally also granted under Part 1 and Schedule 1 to the 1982 Act. From 31 August 2011, the terms of the 1982 Act licensing scheme as applied to HMOs is said in the Explanatory Notes to have been re-enacted in primary legislation in the Housing (Scotland) Act 2006.

SOLUTION

Fees for short-term let licensing should not be set according to HMO fees or the 2005 Scotland Act, nor should the Scottish Government encourage 'token' fees for homesharing.

If Licensing Authorities have incorrectly set fees, they will need to be refunded, as is the case in Scotland Act 2005. They must then be recalculated having been correctly modelled.

Fees should sit within the estimates provided by the Scottish Government's BRIA and a set fee might be a means to achieve this.

3. Investment: Lending and Transfers

Short-Term Let Licensing has created a total and unavoidable barrier to investment or commercial borrowing in the small accommodation sector. This includes the purchase of a new property, the sale of a property or the ability to invest in a business.

The wide range of policies in the examples shown below are indicative of the broad approach across Scotland. There is a lack of consistency and a lack of transparency in terms of policies, rendering them difficult to navigate. For instance:

- **Aberdeen:** Applications for temporary exemptions will not be granted by Aberdeen City Council under any circumstance.
- **Angus:** A temporary exemption to the requirement to have a licence may be granted for a specified property for a specified single continuous period of up to 6 weeks in any period of 12 months. Temporary Exemption applications will be determined within 6 months of application.
- **Dundee:** The Council does not intend to have a policy on temporary exemptions and would not be supportive of such applications.
- **Edinburgh:** The Council may grant temporary exemptions to the requirement to obtain a STL licence in certain circumstances, including: (a) During Edinburgh Festival Fringe and Edinburgh International Festival; (b) During Edinburgh's Christmas & Hogmanay Festive Period; (c) For Major Sporting Events; and (d) For Major International Events. Temporary exemptions will be issued for all types of let. The licensing service will aim to process and determine a temporary exemption application within 3 months of the application being received. Temporary exemptions are limited to a continuous period of 6 weeks, so a second homeowner wanting only to let their property for four weeks in the summer and a week at New Year would not be able to do both.
- **Clackmannanshire:** The Council may grant temporary exemptions to the requirement to obtain a STL licence, for home letting or home sharing only, in certain circumstances.

In the case of both Temporary Licences and Temporary Exemptions, many of the Licensing Authorities policies are either missing, difficult to find or do not exist. Policies should be absolutely clear.

The Scottish Government has written to Licensing Authorities to encourage a light touch for home sharing and home swapping. For example, in a letter from Housing Minister Paul McLennan MSP to Alex Rowley MSP, 12th April 2023:

*"Your constituent may wish to be aware that licensing legislation gives licensing authorities powers to grant temporary exemptions for up to 6 weeks in any period of 12 months. **Licensing authorities can make the temporary exemptions process light touch by offering a reduced fee, shorter application form or not applying some of the mandatory licence conditions.** In Ms Robison's letter to local authorities of 27 March the Scottish Government's expectation that licensing authorities make use of temporary exemption powers to facilitate home exchanges was clearly set out:*

Fees for exemptions for home exchanges should be a token amount to encourage those undertaking these arrangements to continue doing so.

Conditions attached to temporary exemptions for home exchanges should be minimised to keep costs down for applicants. We would encourage licensing authorities to limit these to requirements placed on homeowners through existing legislation, such as:

The legal requirement for any homeowner to have interlinked smoke and heat alarms as set out here: [Make sure your home is fire safe - mygov.scot](http://www.mygov.scot).

A requirement to have public liability and buildings insurance in place for the duration of each exchange.

Applications for temporary exemptions for home exchanges should be accepted by licensing authorities throughout the year (and not restricted to specific months/ circumstances such as large-scale events). The current legislation allows authorities to grant exemptions for a specified period (which must not exceed 6 weeks in a period of 12 months)."

SOLUTION

The solution is to amend the Order via an SSI to remove the option for Temporary Exemptions to be optional. Scottish Government guidance must direct that Licensing authorities provide Temporary Exemptions, which is standard practice in the Civic Government Act 1982. On this basis, Short-term let licences should not be treated differently.

Policies should be absolutely clear, and aligned with the legislation.

Operators across all local licensing authority areas should be enabled to apply for a Temporary Licence when applying for a full licence, with that Temporary Licence being in place until a full licence is considered and granted, being dealt with in the same manner as any other licence. The fee should be lower, and it should be processed timeously to prevent any barrier to market.

4. Overreach

Some licensing authorities are illustrating overreach in terms of their additional conditions which we consider to be ultra vires to the STL Licensing scheme and its key aims. Two examples are floor coverings and bike/boat hire provision.

Floor Coverings:

This can be illustrated by City of Edinburgh Council's policy. In this case, the policy only applies to secondary lettings, and requires 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. This condition, which has no statutory basis, is an irrational and arbitrary exercise of a Licensing Authorities discretion and is therefore invalid at common law. Home letting or homesharing in a tenement may also give rise to noise but are not subject to the policy. Additionally, the policy is not limited to tenements, but also to detached properties. **There is no rational or justifiable basis for this approach, which is discriminatory. It is not rationally connected to the stated STL policy to ensure that properties meet a basic safety standard.**

Boat / Bike Hire Provision:

Argyll & Bute Council has confirmed to the ASSC that they are quite willing to review their policy with regard to the inclusion of e.g., boat and bike hire provision, which we consider to be ultra vires to STL licensing. Their view is that if the Scottish Government does not consider boat/bike hire provision to be

within the scope of the legislation, they need to direct Licensing Authorities accordingly. They recognise the need to (and have an appetite to) amend policy but await precise guidance and clarity from Scottish Government. Argyll and Bute will aim to review and amend policy to go to the August Committee, but that would require amended guidance in the next 10 days (from 1st May).

In addition, the ASSC received the following by email from Argyll & Bute Council in April 2023:

“We have not heard anything further from the Scottish Government regarding plans / layouts / boat and bike hire provision, I do believe the Scottish Government are looking at reviewing the guidance. Argyll and Bute Council, as advised previously are willing to review these matters pending both Scottish Government Guidance and evidence to indicate that these issues are dealt with by other means (insurance etc.).”

SOLUTION

The Order should be amended via an SSI to remove the option for Licensing Authorities to include considerations and additional conditions that are outwith the scope of the legislation.

Guidance must be re-drafted to be clear and ensure a consistent approach, in line with the legislation.

5. Licensing Authority Interpretation / FAQs

There is a lack of understanding of the policy intention resulting in overreach (for example, requiring adequate cutlery space in Dundee City). South Lanarkshire Council has stated to ASSC members that they are confused, there is a lack of guidance and they “don’t know what they are doing”. Moreover, some Licensing Authorities illustrate a lack of understanding which is causing consternation in certain areas. The Highland Council, for example, appears not to have a reasonable understanding of **legal entities** and is therefore not allowing transferral of licences between Ltd Companies.

The Highland Council similarly appears to be confused as to the **relevant persons** requiring to be licenced. There is confusion over applications from an agency / management company and an agent (e.g., a solicitor acting for an applicant). It is not a requirement for a solicitor to include their home address or date of birth when assisting with an application. Due to this confusion, applications are not progressing.

South Ayrshire Council is an example where they struggle to understand the **number of licences required** for e.g., 2 semi-detached cottages. As a result, different operators are being administered differently. Whilst the ASSC was given definitive answers on this, the information has clearly not filtered to Licensing Authorities who remain dumfounded (in their own words). Perth & Kinross Council are similarly taking an inconsistent approach to unconventional dwellings and the number of licences required for conventional dwellings.

This is not natural justice and operators are not being treated on a level playing field. There is consistent evidence of lack of training and lack of oversight.

Where licensing authorities have provided FAQs on websites (e.g., Argyll & Bute Council), they are not always correct. Providing misinformation must be avoided and councils must be clearer in their messaging. This can be solved by clear legislation and robust guidance.

SOLUTION

The solution is to amend the Order via an SSI to ensure that the legislation is absolutely clear and not open to interpretation. Scottish Government guidance must be clear, unambiguous and not open to interpretation. Licensing authority policies should be clear, transparent and consistent.

Adequate training must be given to those administering applications.

6. Light Touch, Risk Based Approach

The Scottish Government continues to encourage licensing authorities and assure operators that schemes should be light touch and driven by a risk-based approach. **The reality is that this is not the case in many parts of the country, resulting in a scheme that is not equitable, results in a loss of level playing field, and a lack of natural justice.** By its very nature and driven by the legislation, STL Licensing cannot be light touch.

7. Inequality of Treatment

Home Sharing / Home Exchanging / Home Swapping: In his letter to Alex Rowley MSP, the Housing Minister Paul McLennan encourages a light touch approach: *“Conditions attached to temporary exemptions for home exchanges should be minimised to keep costs down for applicants”*.

We understand that in a letter sent to Licensing Authorities on 27th March 2023, Shona Robison MSP encouraged the same. Argyll & Bute Council’s position on this is that if licensing is about basic health and safety, why would it be appropriate for home sharing (or any other type of property) not to meet mandatory conditions? The Scottish Government’s messaging is contradictory in this regard. It is ultra vires for the Scottish Government to suggest this is an option, and they are acting outwith the boundaries of their entitlement.

If one type of licence is being offered exclusions, or different treatment, whether being treated more strictly (secondary letting) or with more latitude (home sharing) it is outwith the legislation and is thus in breach of natural justice. This inequality of treatment is discriminatory and unjustified.

SOLUTION

Any amendment to the licensing scheme must go through proper statutory processes. This involves laying a new SSI and amending the guidance.

Rebuttable Presumption:

City of Edinburgh Council’s policy assumes that tenemental accommodation, or properties with a shared main door, are unsuitable for secondary STL due to their character, location and risk of creating undue nuisance. **This is inconsistent with the aims of the Licensing Order as detailed in the Policy Note accompanying the 2022 Order.**

We further note that exceptions may be possible, however, Edinburgh’s policy provides no guidance on what is actually required to overcome the rebuttable presumption.

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.² 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.

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.

Moreover, Schedule 1, (5) (3)³ of the Civic Government Act 1982 supports the granting of a licence. Shall being the critical word – this is a direction. A licensing authority can only refuse a licence if one of the following grounds can be evidenced:

(3) A licensing authority shall refuse an application to grant or renew a licence if, in their opinion—

(a) the applicant or, where the applicant is not a natural person, any director of it or partner in it or any other person responsible for its management, is either—

(i) for the time being disqualified under section 7(6) of this Act, or

(ii) not a fit and proper person to be the holder of the licence;

(b) the activity to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant or renewal of such a licence if he made the application himself;

(c) where the licence applied for relates to an activity consisting of or including the use of premises or a vehicle or vessel, those premises are not or, as the case may be, that vehicle or vessel is not suitable or convenient for the conduct of the activity having regard to—

(i) the location, character or condition of the premises or the character or condition of the vehicle or vessel;

(ii) the nature and extent of the proposed activity;

(iii) the kind of persons likely to be in the premises, vehicle or vessel;

(iv) the possibility of undue public nuisance; or

(v) public order or public safety; or

(d) there is other good reason for refusing the application;

and otherwise shall grant the application.

ASSC argues that the belief that tenemental / flatted dwellings or shared main door accommodation is unsuitable for secondary STLs and the subsequent presumption against granting STL licences for such accommodation in Edinburgh and Glasgow is unlawful.

Renewal Cycles:

The examples below give rise to unreasonable and unjustifiable unfairness and an unjustified inequality of treatment between different licensing authority areas.

² 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))

³ <https://www.legislation.gov.uk/ukpga/1982/45/schedule/1>

- **City of Edinburgh Council's STL Licensing Policy** imposes a one-year limit to secondary letting licences. That contrasts with three years for other STLs and the three-year period for HMOs.
- **Clackmannanshire Council** is only offering a one-year licence for secondary letting.
- **Dundee City Council** issues a STL licence for a period of up to 3 years. "All licences expire on 01 February of the appropriate year except where a short licence has been granted. Where a licence has been previously awarded and is due for renewal, the relevant application form can be obtained from the Council's website. You will be contacted and reminded in advance of the 31 January (or renewal date) that your licence is due for renewal. Renewal applications will be accepted from 1 November onwards (or up to 3 months in advance of expiry)."
- **North Ayrshire Council** has agreed to a 6-year cycle for renewals.

The ASSC contends that consistency is critical.

Insurance:

The ASSC continues to argue that the inconsistency in requirements for level of insurance cover is unjustified and contrary to national justice.

Department Administering Licensing:

No matter which department deals with the processing of STL Licence applications, appeal matters must be heard in front of the Licensing and Regulatory Committee, per 1982 Act.

Fife Council is hearing appeal at their Housing Panel. As a point of competency, this is not appropriate. The Housing Panel assesses HMO Licences, which are underpinned by the Housing (Scotland) Act 2006. STL Licensing is not considered under the same legislation.

Appeals at the Licensing and Regulatory Committee are heard by Councillors, whilst appeals at the Housing Panel are heard by council employees.

All Licences under the Civic Government Act must be considered equitably. Not dealing with this consistently is in breach of natural justice.

SOLUTION

Guidance must express the need for consistency across Local Authority areas to prevent breaches of natural justice.

8. Fire Safety

There appears to be an inconsistency in approach by Scottish Fire & Rescue Service (SFRS) towards the inspection of premises. The ASSC have heard that fire officers in Argyll & Bute, on inspection of premises for STL Licensing, are insisting on operators fitting fire doors and door closers in open plan premises prior to a licence being granted. People are being told that they are not allowing any open plan premises including shepherd's huts. **This goes beyond Annex 2 of existing fire regulations.** Indeed, one of our members notes the following:

"The stage we are now at is that SFRS have said they can't give a verdict on the license until we have done the work they suggest (patio door on downstairs bedroom). We have asked if we can do this in November as we are full all year. SFRS said yes and Argyll and Bute have said no they can't wait that long for the SFRS decision! SFRS have been lovely.

So, we have booked an independent assessment as she thinks maybe just increased detection may suffice. Once she has visited I will have another opinion. Then it's down to what work needs done to get the licence and how long they can wait – if not until November I need to out book a guest and find someone to do the work ASAP – not easy on MULL! Anyway, I would appreciate any help you can give me – I have worked in tourism all my life and this is a shambles.”

9. Neighbour Objections

The current media and political narrative is driving neighbour objections, often spurious or vexatious, even where there has been no problem. The sudden requirement to put up a notice concerns neighbours, making them think a new kind of operation will be taking place. From recent experience, neighbours are of the opinion that they can attribute tests that lie outwith licensing, such as impact on local housing stock. They are raising issues such as Title Deeds, which should not be heard in a licensing appeal as this remains a planning matter and should be heard by the Planning Committee. **The STL Licensing Order deals with safety, not planning.** Objections are being raised in terms of the display of notices, despite the display being competent.

10. Digital Divide

Determination to implement using online systems has made no concessions to or recognition of the digital divide. Worse still, online applications are often unwieldy, difficult to operate and with no save function (Highland / Perth & Kinross Councils) which necessitates completion, including uploading all required documents, in one sitting.

11. Monitoring, Evaluation and Review

The lack of consistency in implementation systems means it will be impossible to amass consistent, reliable and robust data for monitoring and evaluation purposes. There will, therefore, be no means of measuring the impact on the sector, any benefits in terms of health and safety compliance across the sector, improvements or otherwise in anti-social behaviour, or indeed an increase in the availability of affordable housing. The Scottish Government and Local Authorities will have no idea what they had because it will be gone, nor will they be able to quantify the benefits of the policy.

As our latest survey demonstrates, 39% of respondents said that they will be leaving the sector due to short-term let licensing, with a further 27% not sure yet.

The delay to summer 2024 in any monitoring and review of the impact on the sector means that the sector will have been badly damaged before any recognition is given. Recovery will be impossible and the loss to the Scottish tourism economy will be incalculable. Worse still those that leave the sector between 2022 and 2024 will be lost from the records for good. The Scottish Government must **act now** by considering the ASSC's proposals for a more proportionate regulatory regime.

12. Potential Illegalities: Inconsistencies in Licensing Authority Policies

The ASSC argues that the inconsistencies in licensing policies remain potentially unlawful on three grounds:

- STL licensing is inconsistent with the **Provision of Services Regulations 2009** due to a fundamental lack of human interest.
- It is incompatible with small accommodation business operators Convention rights protected by **Article 1 of the First Protocol to the European Convention on Human Rights (“A1P1”)**.

- The **dual requirements of planning and licensing** are oppressive and disproportionate.

Provision of Services Regulations

Potential Illegality Under the Provision of Services Regulations

The 2009 Provision of Services Regulations are retained EU law and the Court should continue to have regard to the underlying Services Directive and to decisions of the Court of Justice for the purpose of interpreting the 2009 PoS Regulations: European Union (Withdrawal) Act 2018 (the “EUWA 2018”), sections 1B(7), 2, and 6(7) (retained domestic case law and retained EU case law).

In Art 9, member states shall not make access to a service activity or the exercise thereof subject to an authorisation scheme conditions of (a) non-discrimination, (b) justification by an overriding reason relating to the public interest; and (c) the objective pursued cannot be attained by means of a less restrictive measure.

In Art 10(1) that authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

In Art 10(2) that the criteria referred to in Art 10(1) shall be (a) non-discriminatory; (b) justified by an overriding reason relating to the public interest; (c) proportionate to that public interest objective; (d) clear and unambiguous; (e) objective; (f) made public in advance; and (g) transparent and accessible.

In Art 11 that an authorisation granted to a provider shall not be for a limited period, except where (a) the authorisation is being automatically renewed or is subject only to the continued fulfilment of requirements or ... (c) a limited authorisation period can be justified by an overriding reason relating to the public interest.

In Art 13(2), that the authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service.

Short-Term Let Licensing is out of step with these requirements and is therefore unlawful.

13. Human Rights Violation

We seriously question whether the draft Order 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 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 draft Order fails to comply with the latter. See more: [Potential Human Rights Violation](#).

14. Planning

Put simply, the STL Licensing Order deals with safety, not planning.

Central to the operation of the STL licensing scheme for existing operators is its interaction with the planning regime. The dual requirement of planning and licensing in various licensing authority policies, the ASSC argues that the policies are oppressive, disproportionate and thus potentially unlawful.

Where licensing policies require planning permission, it will be necessary for STL operators to apply for both planning permission and STL licences at the same time and pay both sets of fees. If planning permission is not granted, however, (in accordance with the STL Licencing Policy) there is no provision for repayment of the application fee in respect of the STL licence although planning permission is a requirement of those STL licence application.

Withholding Planning Permission Fees:

ASSC members have alerted us to Highland Council with holding planning permission fees. An application validated on 26th October 2022 was notified in April 2023:

*“You have submitted a planning application for a short-term letting unit. The Council have received a large number of applications for this and this has caused a significant impact on our officer caseloads. While we aim to process planning applications as quickly as possible **we are currently waiting for further clarification from Scottish Government which may have a significant impact on how we consider the short-term letting unit applications.***

In addition, we are also waiting for the outcome of the Council’s recently ended consultation process. Until such a time as both of these have been finalised we will not be processing your application further.”
Bob Robertson, Planning Team Leader.

Legal Opinion:

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.

There is a lack of clarity where planning policy is concerned, specifically around retrospective planning permission. The ASSC argues that the two regimes should be uncoupled. Existing operators must be protected, with a clear commitment to not retrospectively apply any new planning policies.

Highland Council – Badenoch & Strathspey STL Control Area:

At the time of writing, the report being considered on the 4th of May 2023 by the Highland Council’s Economy and Infrastructure Committee seeks councillors support for formally establishing a Control Area for Badenoch & Strathspey, and to agree the Planning Policy that will be applied therein should it be established. A proposed designation date is 18th June 2023, although the report suggests that this may be delayed if councillors don’t wish it to clash with school holidays.

Assuming the Control Area is established, the report suggests that all STLs will need some form of planning-related permission. Officers are basing this on Schedule 3 of the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022 (see para 5.8 of the report) rather than planning law. No reference is made to the Scottish Government’s letters to both City of Edinburgh and Highland Councils in relation to this, although it is appended to the committee report.

Neil Collar, Head of Planning Law at Brodies LLP, prepared the following legal opinion for the ASSC (3rd May 2023) which underlines that **planning permission is only required post designation.**

1. *There is a new power for planning authorities to designate short-term let control areas. In a short-term let control area, the use of a dwellinghouse for the purpose of providing short-term lets is deemed to involve a material change of use and therefore requires planning permission.*

[Town and Country Planning (Scotland) Act 1997 section 26B, inserted by Planning (Scotland) Act 2019; Town and Country Planning (Short-term Let Control Areas) (Scotland) Regulations 2021]

According to the Scottish Ministers:

2. *"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."*

[Scottish Government decision letter dated 20 December 2022 ref: STL-270-001 re Badenoch and Strathspey STL Control Area]

3. *In my opinion, that is a correct statement of the law. A new planning permission is not required if, for example:*

3.1 the existing short-term letting is authorised by a grant of planning permission issued prior to the establishment of the Control Area; or

3.2 the letting is lawful because it has been carried out for more than 10 years; or

3.3 planning permission was not required at the time the use was commenced - planning permission is required if there is a material change of use; the courts have held that whether a change of use is material is a question of the facts and circumstances of the individual situation; it is not appropriate to refer to new policies adopted after the use was commenced.

SOLUTION

The Scottish Government must provide transparent, justifiable planning guidance as a matter of urgency until such a time as they remove Schedule 3.13 from the Licensing Order.

Schedule 3.13 of the Licensing Order must be amended to provide clarity that planning is only sought where a material change of use has occurred, unless in a Planning Control Area, at which point policy 26B comes into effect.

CONCLUSION

Genuine and meaningful partnership working can deliver beneficial results. The ASSC wants Scotland to be a leader in smart regulation which balances the needs of our economy and communities, not one which is burdensome and other countries seek to avoid as an example of bad practice.

We must strive to 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.

The Scottish Government have two pathways towards a more equitable, fair and effective STL regulatory landscape. It could:

- 1. Implement the ASSC's proposal to pivot licensing to align with the Antisocial Behaviour etc (Scotland) Act 2004.**, which would satisfy the aims of the regulations, covering the safety of the activity; or
- 2. Consider the various amendments to the 1982 Act and re-draft the guidance** associated with Licensing Order 2022, in collaboration with industry and local government stakeholders.

We sincerely hope that the solutions outlined in this document can be actively considered by the Scottish Government so that we can arrive at a proportionate and fair regulatory regime, where unintended consequences are minimised, and the self-catering sector can survive and thrive into the future.