



Paul McLennan MSP  
Minister for Housing  
Scottish Government

CC: Neil Gray MSP; COSLA; local authorities; Scottish Tourism Alliance

27 June 2023

Dear Minister,

### **Local Authority Short-Term Let Licensing Policies: Illegalities**

As an organisation the Association of Scotland's Self-Caterers represents 1,700 self-catering legitimate tourism businesses across Scotland, with over 230 operators in Edinburgh. As you are aware from our previous extensive engagement with you and your predecessors, our aim is to protect the traditional self-catering sector in Scotland and to work constructively and collaboratively with stakeholders regarding the implementation of short-term let licensing. Once again, we reiterate that we are not contrary to regulation, indeed we have been calling for registration since 2018. However, we are fundamentally against flawed and damaging legislation, which is what we are currently faced with.

We are writing to you specifically following the opinion of Lord Braid in the Petition of Averbuch and others for judicial review of the City of Edinburgh Council in respect of the short-term let licensing policy under Civic Government (Scotland) Act 1982 (Licensing of Short Term Lets) Order 2022 (SSI 2022/32) ("the 2022 Order") and related legislation. As you are aware, Lord Braid found the City of Edinburgh Council's policy to be unlawful in a number of material respects. We also refer to our recent meeting dated 21<sup>st</sup> June 2023 in which this Opinion and its implications were discussed.

### **Unlawful local authority policies**

The decision in the judicial review has identified material deficiencies in the current short-term let licensing regime, which are common to the policies of many other local authorities across Scotland – not just the City of Edinburgh Council. With expert legal advice, we have identified that many local authorities in Scotland are operating live short-term let policies which have similar deficiencies and are therefore likely to be unlawful. For example:

- The City of Edinburgh Council's policy requiring floor coverings was deemed to be inappropriate and irrational. Lord Braid goes on to contend that as this could expose a licence holder to significant expense for no good reason, it is oppressive and goes beyond what is necessary to control noise. In a similar vein, many licensing authorities are requesting floor plans, incorporating a requirement which exists within the Licensing (Scotland) Act 2005, which serves a different purpose. 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. As with floor coverings, licensing policies that require detailed and scaled floor plans and indeed site plans would arguably be deemed unlawful on the basis of Lord Braid's decision. These conditions expose operators to further cost without a good basis reason, and go beyond what is necessary to implement the legislation.
- Policies which we contend are ultra vires include additional conditions relating to the provision for 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 which 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. We contend that these additional conditions are again in contravention of the Provision of Services Regulations 2009.

- There are examples of local authority policies which incorporate technical standards from other legislation into the short-term let licensing policies which are beyond the scope of the underlying legislation, e.g. copying HMO conditions from the Housing (Scotland) Act 2006, Electrical Installation Condition Reports, etc. In our view these mandatory conditions imposed at local authority level are also likely to be ultra vires, and unlawful, as articulated by the court in its recent decision. The inclusion of requirements which fall within other licensing or regulatory regimes is also a contravention of the Provision of Service Regulations 2009.
- Further, there are also issues with general compliance of local authority policies with existing legislation. For example, the policy published by Highland and Islands Council provides that it is a mandatory condition of the licence that a host or operator has planning permission or has made an application for planning permission where their premises is in a designated control area, they are using it for secondary letting and it is a dwelling house. This is inconsistent with the mandatory condition under the 2022 Order and conflicts with the statutory provision and is therefore arguably ultra vires.
- Additionally, further to this decision local authorities must also be mindful of the implication of the decision on any future conditions or amends made to the policies, e.g. should local authorities seek to determine applications based on a grant of planning permission then this is irrational as amenity has already been considered.
- The policy currently being implemented by Dundee City Council is also of particular concern<sup>1</sup> with various conditions applied by this policy in conflict with the decision of the court. At 23(g) of the policy it requires impervious work surfaces. This sits squarely with the elements of Lord Braid's Opinion, particularly his comments at p60 which states that a policy is unlawful where too broad and disproportionate. Conditions 23(a), (c), (e) and (f) of this policy place certain requirements on kitchen facilities, for example, for "sufficient drawer space for the storage of cutlery and cooking utensils". The policy also requires "adequate cooking facilities for the maximum occupancy of the property" and "adequate food storage for the maximum occupancy of the property". There are no exemptions for these requirements. These mandatory conditions are inappropriate for certain types of property which will be licenced under this regime; for example, unconventional accommodation. Similarly, such requirements for "adequate" and "sufficient" lack sufficient detail and leave inspectors with too broad a discretion. There is a lack of certainty for operators in how these conditions can be met. These conditions are therefore inappropriate and irrational, as per Lord Braid's decision and contravene the Provision of Services Regulations 2009. We refer again to p60 of the Opinion.

It is clearly a matter of concern that these policies, and many others across Scotland, are susceptible to challenge in the same way as the City of Edinburgh Council. The points above are illustrative but by no means exhaustive. It is incumbent upon the Scottish Government as the architect of the short-term let legislative framework to support local authorities in a review of their policies to ensure that these are lawful in light of the recent outcome of the judicial review.

Further, the worryingly low number of applications across Scotland, evidenced by our latest Freedom of Information Request plus analysis of licensing authority registers, is indicative of a policy that is proving challenging to operators to the point that they are disincentivised to apply. This in turn questions whether or not full implementation is achievable by 1<sup>st</sup> October 2023.

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<sup>1</sup> [stl\\_guidance\\_notes\\_committee\\_final\\_draft\\_2022092\\_v3.pdf \(dundee.gov.uk\)](#)

## **Next Steps**

**In order to avoid further, and likely, legal challenges to these policies, we would ask the Scottish Government to take the following steps:**

- **Provide a further extension beyond 1 October, for both existing and new operators, to allow local authorities to undertake a full and appropriate review of their existing policies and to address any deficiencies as soon as possible; and**
- **In order to ensure lessons are learned across Scotland, we recommend that the Scottish Government and COSLA help co-ordinate this review exercise with input from ourselves and other relevant stakeholders to ensure that all short-term let licensing policies are lawful and fit for purpose.**

The Scottish Government committed to working with industry representatives to address many of the regrettable flaws and unintended consequences relating to local authority policies and to make this new regulatory regime operate in a proportionate and lawful manner. This was pivotal in the decision to delay the implementation of the legislation for six months in January 2023. This has not been achieved.

In recognition of the wider cost of living crisis that is placing pressure on existing short-term let hosts and businesses, the Scottish Government announced that they would introduce legislation in January 2023 to extend the deadline for existing hosts to apply for a licence from 1 April 2023 to 1 October 2023 (PQ S6W-13624). The cost of living crisis has, if anything, got worse. It would seem reprehensible on that basis not to extend the extension to support and protect these businesses.

The Scottish Government has additionally entered into a commitment to reset relationships with business in Scotland. Wellbeing Economy Secretary Neil Gray said that *“Only by working closely with business can we hope to achieve an economy which prospers while caring for people and planet. This is our vision for a wellbeing economy.”*<sup>2</sup> As part of the New Deal for Business, this is an opportunity to rebuild and regain trust as part of this partnership principle.

As requested, we have provided substantive briefings on outstanding issues and legally robust solutions, but have not yet had a constructive or substantive response to these, nor has the situation been materially ameliorated by draft revised guidance.

On behalf of our members and the wider tourism industry we continue to be encouraged by ongoing discussions and wish to work with you and other stakeholders collaboratively. However, this must happen at pace, and we are materially hindered by recess. As you know, we can bring our extensive industry experience to assist in the formation of legally sound legislation, policies and guidance which supports good regulation and encourages responsible operators to continue operating in the vital small accommodation sector. However, we will collectively fail unless a further delay in the launch of these policies for operators is delayed, via an SSI.

We look forward to your substantive response in short order to identify a path forward.

Kind regards

**Fiona Campbell**  
**Chief Executive**  
**Association of Scotland’s Self-Caterers**

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<sup>2</sup> <https://www.gov.scot/news/developing-a-new-deal-for-business/>