Implementation Update – ASSC Recommendations

Context

The Scottish Government committed to regulate and control short-term lets in Scotland. Despite challenges to the legality of parts of the legislation, we believe the government has now delivered on these commitments and enabled local authorities to do so. A robust regulatory regime is now in place with Short-Term Let Licensing, ensuring all operators are operating safely under the control of local authorities. In addition, a Planning Control Area is in place in Edinburgh, with others planned, that will require planning permission for all new STLs located within. Local authorities in Scotland have the tools at their disposal to regulate – however, in order for this to be truly effective, we must overcome the remaining challenges as set out in this paper.

There have been just 26,041 short-term let licence applications (at 1st October 2023) of all types across Scotland. This includes home sharing, home letting and secondary lets. With 18,464 secondary let applications (across 22 local authorities), this represents less than 60% than the 32,000 short-term lets claimed in the 2021 BRIA, with reference to their impact on housing stock. These are all now under the direct visibility of local authorities as licenced operators, meeting policy objectives where housing is concerned. There have been few rejections to date, reflecting that in terms of basic health and safety, businesses and operators are compliant.

Way Forward

There remain various outstanding legal issues that have been flagged in light of the two Judicial Reviews against City of Edinburgh Council in 2023 that render some aspects of licensing and planning policies deficient across Scotland. It is critical to address these issues to remove uncertainty for existing operators, give reassurance to local authority planning and licensing authorities that their policies are lawful and to ensure consistency across Scotland.

In a letter from Minister for Housing Paul McLennan MSP to Fergus Ewing MSP, on 15th January 2024, he made reference to the Implementation Update:

> *"With regard to the forthcoming update on the implementation of short-term licensing, as my 27 October 2023 letter to the Local Government, Housing and Planning Committee outlines, this will be an ongoing iterative process to monitor delivery and to identify solutions to operational challenges within scope. While this will not alter the core principles, which the Committee and Parliament recognised as being integral to the Licensing Order, it still provides a broad base to ensure actions taken are meaningful and* ***this includes being open to amending legislation and guidance."***

We commend an appetite to amend legislation and guidance to reflect the outcome of the two recent Judicial Reviews, which highlighted the legal deficiencies of City of Edinburgh Council's Licensing and Planning policies, and an understanding of the urgent need to give clarity and reassurance to legitimate businesses that are vital across Scotland, benefiting local economies and communities.

Having reviewed the Scottish Government's proposed amendments for secondary legislation and examples of operational challenges under consideration for non-legislative improvements, we are pleased to offer the following recommendations.

1) Licence policies and planning consideration

As required by the Civic Government (Scotland) Act 1982 ("the 1982 Act"), the Civic Government (Scotland) Act 1982 (Licensing of Short Term Lets) Order 2022 (SSI 2022/32) ("the 2022 Order"), local authorities across Scotland adopted their Short-Term Let ("STL") Licensing Policies. The Association of Scotland's Self-Caterers still has significant concerns regarding various STL Licensing Policies across Scotland. These concerns arise in light of the recent decision of Lord Braid in the petition for Judicial Review of the City of Edinburgh Council Short-Term Lets Licensing Policy (case reference: [2023] CSOH 35) (the "Decision") and in terms of provisions contained in The Provision of Services Regulations 2009 (the "2009 Regulations"). In light of the Judicial Review, the ASSC wrote to Glasgow, Highland, Argyll & Bute and Dundee City Councils. They all conceded that their policies were unlawful and have since amended their policies. The ASSC has since assessed Clackmannanshire and Fife Councils on the same basis and found their policies to be deficient.

We believe that many of the deficiencies identified by Lord Braid can be addressed by amendments to guidance, while there are some legislative changes that would provide greater clarity – particularly in Planning terms.

Central to the operation of the newly introduced Short-Term Let Licensing legislation is its interaction with the planning regime. Evidence from our members and discussions with local authorities indicate that this interaction has created significant confusion among local authorities and operators.

This confusion regarding the interaction between planning and licensing is evident in some of the policies set by local authorities. For example, some local authorities have adopted unlawful blanket policies requiring planning permission for all properties or all 'flats' used as short-term lets, regardless of whether a material change of use has occurred. Other authorities have based their requirement for planning permission on factors such as the number of bedrooms or the capacity of the property, which is also unlawful. There are inconsistencies between councils, with some demanding planning permission for certain home-sharing situations, while others state that no planning permission is necessary.

A current example of this Clackmannanshire Council's policy states that:

> *For secondary letting only, Planning Permission under the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) for the use of the premises as a short term let; or proof that an application for planning permission has been made under the 1997 Act, which has not yet been*

determined; or proof that planning permission is not required (for example, a certificate of lawfulness).

This policy appears to be confusing the requirements of a Planning Control Area, where an application for planning permission is a mandatory requirement under Schedule 3 to the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022. Glasgow City Council was also operating a similar policy. The ASSC has taken legal advice from Burness Paull LLP on the lawfulness of this position (and others), it is clear that this STL Policy proceeds on a basis that is wrong as a matter of fact and law.

Instead, all short-term let licences granted by licensing authorities are subject to the mandatory conditions set out in schedule 3 to the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022. Mandatory Condition 13 only requires planning permission to be in place, or an application to be pending, '*where the use of the premises for a short-term let requires planning permission under the 1997 Act*'. Unless section 26B of the 1997 Act operates to bring about a deemed material change of use (which in Clackmannanshire and all other council areas, with the exception of Edinburgh, are not), the question of whether planning permission is required under the 1997 Act is a question of fact to be determined in the circumstances of each case. If there has been no material change of use, or if a material change of use is immune from planning enforcement through the passage of time under section 124 of the 1997 Act, planning permission is not required. Where a premises has been used or is proposed to be used as a short-term let and that use did not involve a material change of use, planning permission is not required, and an applicant for a short-term let licence is not in breach of Mandatory Condition 13.

Planning departments should only be concerned with the use and suitability of a building for short-term let purposes. Given that most short-term lets are residential properties, and the nature of a short-term let stay is typically a residential stay for a shorter period, planning permission for this use is not required unless there has been a 'material change' of this residential use. Historically, planning has only been a consideration for short-term lets when enforcement action has been initiated, typically if a neighbour deems that the use of a short-term let property has been a 'material change' or has had a negative impact on residential amenity. The vast majority of the secondary let short-term lets existing before the introduction of licensing have therefore not applied for planning permission due to the existing framework and have not been subject to any enforcement action.

In the past, enforcement action was one of the few levers available if there were concerns about the operation of a short-term let and its impact on local amenity. However, since the introduction of licensing, how an individual property is advertised, managed, or operated is a matter for the licensing scheme and should not be a planning consideration. However, there is evidence that this distinction is still not clear, and the dual requirement for planning and licensing is causing delays for secondary let applications, much to the confusion of operators who believe they are being assessed twice for similar concerns over amenity impacts (and incurring significant fees to apply for both planning permission and a licence).

There is evidence this dual requirement is also unnecessarily burdening planning departments. Schedule 2 of the licensing order contains a provision that:

> *"A licensing authority may, within 21 days of receipt of an application for a license, refuse to consider the application where it considers that use of the premises for a short-term let would constitute a breach of planning control for the purposes of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act")(1) by virtue of section 123(1)(a) or (b) of that Act."*

This creates a burden on the licensing department to consider whether a short-term let could result in a breach of planning control (as opposed to clear evidence where a breach has occurred through enforcement action). Licensing departments are not qualified to make this assessment; therefore, it typically falls on planning departments to individually assess the planning status of a short-term let property. This process itself is time-consuming and complicated due to the subjective nature of whether a material change of use has occurred. It is questionable whether many local authority planning departments see the value of the role planning involvement in relation to short-term lets outside a Planning Control Area given these pressures on resources.

The requirement for planning permission for short-term lets is causing duplication of regulatory regimes in many cases given impacts on amenity and other conditions (such as guest capacity) are reviewed and controlled through licence conditions.

A clear exception to this would be in areas where a Planning Control Area has been introduced, where consideration of the number and intensity of short-term lets in a particular area would warrant a specific planning assessment on the suitability of any new short-term let in an area (though not retrospectively for any short-term let already in operation, as per judgement in Iain Muirhead And Dickins Edinburgh Limited's Judicial Review Petition regarding City of Edinburgh Council's Short-Term Let Planning Control Area).

The Scottish Government has tried to address uncertainty by publishing Planning Circular 1/2023; however, it is clear from the evidence that the relationship between planning and licensing is still a major contributing factor in the delay of the awarding of secondary let licences. There is also evidence from our members that the requirement or potential requirement to assess planning as a prerequisite for a licence application is a barrier to applying which may reduce the effectiveness of the licensing scheme. The process as it stands is confused and conflated, it discourages licensing applications being made, defeating the safety objectives of licensing.

Recommendation
Legislation should be amended to clarify the relationship between planning and licensing, and guidance should be amended on the subject. The ASSC has instructed legal advice from Burness Paull LLP on how the Licensing Order could be amended, and guidance updated, to reduce the burden on licensing and planning authorities, and help the successful implementation of short-term let licensing, while still allowing for lawful operation under existing planning legislation. We note that South Ayrshire Council has taken a pragmatic and welcome approach.

We will share proposed wording with the Scottish Government by end of week commencing 22nd January.

Planning Control Area legislation will cover any new short-term let activity.

Dates

Many of the STL Licencing Policies have incorrect dates within them. While we appreciate the lodging dates were amended by the Scottish Government, it is important that published policy documents are accurate and this should have been amended to reflect the changes. In terms of existing hosts and operators, the guidance is misleading suggesting that hosts and operators required to have applied for a short-term let licence by 1st April 2023 at the latest meaning hosts and operators may not have applied by 1st October 2023 because they believed the deadline had passed. Further, the guidance in these policies states that existing operators who were trading on or before 30th September 2022 may continue to accept bookings after 1st October 2022 but only if they have made a licence application by 1st April 2023. Again, this is misleading and may have resulted in operators believing they could not carry on trading. Similarly, some STL Licencing Policies suggest that it will be an offence to offer short-term let accommodation after 1st July 2024 unless the licence is held. That is incorrect. Because the lodging deadline was amended by the Scottish Government to 1st October 2023, with transitional provisions allowing a pause, existing operators' applications require to be determined within one year, therefore by 1st October 2024, however, transitional provisions in the 2022 Order provide for a three-month pause where necessary for planning compliance, which allows a further period until 1st January 2025. The purpose of the STL Licencing Policy per both the Scottish Government guidance and Lord Braid's Decision is to provide guidance and clarity. As such these STL Licencing Policies are unclear and by virtue of that are rendered unlawful.

Recommendation
Guidance should be amended to provide guidance and clarity, and local authorities should update their policies and guidance to reflect the updated change in dates.

Temporary Licences

Some policies provide temporary STL licences, *"For home sharing or home letting or home sharing and home letting to give first-time hosts the opportunity to try out STL, prior to making a full application."* Said policies do not extend this benefit to secondary letting applicants. This form of STL Licensing Policy discriminates against new secondary let applicants who would be unable to trade until their full licence application is determined, and that it does not meet the requirements of Lord Braid's judgment in terms of a satisfactory explanation by the local authorities as to why it will not offer temporary licences for secondary let operators, the policy is irrational and oppressive, *et separatim,* is unlawful as a result.

Recommendation
Guidance should be amended for local authorities to offer Temporary Licences for all forms of STL.

Period of Temporary Exemptions

Temporary licences are provided for in the 1982 Act which states that this is for a 6-week period in any calendar year. It is well accepted that the calendar year is 1st January to 31st December annually.

Setting aside views on whether the requirements should be the same for temporary exemptions and temporary licences or not, temporary exemptions are offered to provide an exemption for an occasional operator to let their property on a short-term basis for up to 6 weeks per annum without the need for either a temporary of full licence. The exemption allows for operators in, for example, Edinburgh to apply for periods of time they do not require a licence – such as four weeks during the Fringe and festival, and two weeks during the winter festival. There is no legislative reason nor intention for those 6 weeks to be concurrent, and this is reflected in the guidance.

On this basis, to change the terms of temporary exemptions is absurd, goes entirely against the spirit of the legislation and the original guidance.

A suggestion that the calendar year should run from the date that the 6-week exemption period commences is confusing and would result in operators with multiple properties having to manage each one, increasing an administrative burden. This proposal is also more onerous for licensing authorities as they then have to calculate individual exemption periods for each property rather than just be able to apply a blanket period from 1st January to 31st December annually.

Recommendation
Temporary exemptions should allow for up to 6-weeks in any calendar year, running from 1st January to 31st December. Each temporary licence application would incur a fee.

Provision of Temporary Exemptions

Where local authorities have decided not to offer Temporary Exemptions to a short-term let licence, the failure to do so and the reasoning for this as narrated in various STL Licensing Policies is disproportionate and excessive. Other policies provide for *"temporary exemptions to the requirement to obtain a STL licence, for home letting or home sharing only, in certain circumstances"*[1]. The failure to offer exemptions to secondary let short-term let licences is disproportionate and excessive as above.

Glasgow Council, for example has stated that the STL Licensing Policy is drafted as such to meet basic safety standards and the fit and proper person test. This could be achieved by exemption applications requiring certification as part of the exemption application process just as an applicant for a temporary licence or full licence would require to. Provision could also have been made for a longer processing period to be given for exemption applications to be considered and the STL Licensing Policy could have

[1] Clackmannanshire Council

highlighted that committee attendance may be necessary where there is a question or further information in required in relation to the fit and proper test in respect of the applicant for exemption.

Argyll & Bute Council's STL Licencing Policy confirmed that it will not consider *"a temporary exemption application from the requirement to hold a short-term let, which, if granted, would destabilise the security or tenure of private tenants, resulting in eviction, will not be considered by the Council."*

It is not for the Council to review other agreements in place by tenants and landlords. If there is an issue with a tenant, that is entirely up to the landlord if they wish to take action; and if the action they take results in eviction, that is dealt with by the existing Housing legislation and by the First-tier Tribunal. Thus, there should be no such decision, judgment, condition required nor information from the applicant in this regard. This is oppressive and unlawful as a result. At 10.4 of Argyll & Bute's original STL Licencing Policy, the licensing authority indicates it will only consider granting temporary exemptions from the requirement to hold a short-term let licence in specific circumstances, however, this is too restrictive and this discriminates against an operator wishing to seek an exemption for a specific reason personal to that operator which is what the 2022 Order envisaged. The policy therefore is out with the terms of the 2022 Order, out with the spirit of the 2022 Order and is too restrictive in terms of the legislation. The purpose of the STL Licencing Policy per both the Scottish Government guidance and Lord Braid's Decision is to provide guidance and clarity. It is not to exercise powers beyond that which the licensing authority is provided with in relation to the 2022 Order and the 1982 Act. As such this section of the policy is oppressive and by virtue of that is rendered unlawful.

Recommendation
Guidance should be amended for local authorities to offer Temporary Exemptions under the terms of the Civic Government Act 1982.

Variations

Argyll & Bute Council's Policy 13, at 13.2, indicates a variation application cannot be used to substitute a new holder of a licence for the existing one. There is no basis for this restriction. This restriction goes beyond the terms of all of the Scottish Government guidance, the 1982 Act and the 2022 Order. The Scottish Government guidance at Part 2 confirms at 6.3.4 that a licensing authority may vary the terms of the licence on any grounds they think fit, which they can do at any time following an application made to them by the licence holder or of their own initiative. There is no restriction on the variation in the legislation, therefore there should be no restriction placed on the variation by the Council. This part of the STL Licensing Policy goes beyond the provisions of the 1982 Act and the 2022 Order. It requires an additional application which is irrational and to the extent that it could expose an applicant for a short-term let licence to significant expense for no good reason, it is oppressive, all in terms of Lord Braid's Decision at paragraph 60, and as such is unlawful.

Recommendation
Guidance should be amended to allow for local authorities to offer variations terms of the Civic Government Act 1982.

Maximum Occupancy

Various policies reference conditions attaching to an STL licence in order to address maximum capacity. Indeed, some seek to designate a maximum number of persons that an operator can accommodate. In doing so, they are seeking to regulate matters which are already regulated by other legislation such as fire safety legislation, building control Regulations and Technical Standards. In this regard, some policies are unclear and contradict current legislation. This is oppressive and goes beyond what is necessary in terms of the aforesaid Fire Safety, building control Regulations and Technical Standards. By way of example, Clackmannanshire Council's policy purports at table 2 that a room than 90 square feet or more may have two persons and a room of 50 square feet or more may have one person but cites no authority for this. At table 1, the STL Licensing Policy purports to state that a property with two rooms, including living rooms and bedrooms, can only accommodate three persons, a three-room property can only

accommodate four persons, and a four-room property can only accommodate seven persons despite having stated at table 2 that a room of 90 square feet or more can accommodate two persons. In addition, table 1 then states that where there are five or more rooms two persons will be allowed in each room. This is neither compliant with the required fire safety and building control regulation, nor is it consistent nor logical. A rigid and literal application of the STL Licensing Policy at tables 1 and 2 would result in a large two-bedroom property within the Clackmannanshire Council area with, for example, two king sized beds, being unable to accommodate four persons. This requirement is irrational, and to the extent that it could expose a licence holder to significant expense, or loss of income, for no good reason, as well as restricting the operation of a short term let property for no good reason, it is oppressive, it goes beyond what is necessary and in terms of Lord Braid's Decision at paragraph 60, it is unlawful. Clackmannanshire Council is not alone, with Glasgow City Council operating a similar policy.

Recommendation
Guidance should be amended to remove designation by local authorities of maximum occupancy.

Floor Plans

Numerous policies address the need for documentation to be lodged with an application, including the requirement for a floor plan to be submitted. This is often to allow determinations to be made in relation to maximum occupancy. Some others require information in relation to fire escape routes, and accommodation intended for guests with mobility impairment; the location of any steps, stairs, elevators or lifts in the premises, as well as the extent and boundary of the building. Argyll & Bute Council require the position of beds as part of the floor plans. This is a requirement which is irrational and, to the extent that it could expose an applicant for a short-term let licence to significant expense for no good reason, it is oppressive in terms of Lord Braid's decision at paragraph 60 and goes beyond what is necessary in terms of information required to allow a licensing authority to process an application, particularly in relation to the requirement for the fire safety information on the plan. While there is provision within the 2022 Order and the Scottish Government Short-Term Let Guidance for certain information to be provided on plans, requiring this level of detail necessitates the vast majority of operators instructing a professional architect or draughtsperson to prepare the plans. Unless an applicant has some experience in this regard, preparing full, detailed and scaled plans will most likely require professional assistance. This introduces a significant cost and potential delay which sits in direct contradiction of Lord Braid's conclusion there should not be unnecessary outlay for operators. In addition, Scottish Fire and Rescue have publicly stated they do not require fire safety information to be shown on plans. Policies that seek this as part of the plan information are therefore both unlawful and oppressive.

Recommendation
Guidance should be amended to remove the need for floor and/or site plans. The statutory requirement to state maximum occupancy should be based on number of bed spaces relative to the number of bedrooms / public spaces which can reasonably accommodate additional occasional sleeping space (a sofa bed).

Annual Emergency Lighting Certificate

Several policies require an *"annual Emergency Lighting Certificate (Secondary letting only, for accommodation with 5 occupants and above)"*. This is not a statutory requirement of the 2022 Order and is therefore both unlawful and oppressive.

Recommendation
Guidance should be amended to remove the need for annual emergency lighting certificates.

Enforcement

Some policies reference *"General enforcement fees will be included in the fees for new and renewal STL licence applications*"[2]. The Provision of Services Regulations ('the Regulations') protect UK businesses and consumer rights by maintaining obligations on UK competent authorities to ensure that their regulation of service activity is proportionate and justified in the public interest. Fees charged by a competent authority under an authorisation scheme must be reasonable and proportionate to the cost of the procedures and formalities under the scheme, and must not exceed the cost of those procedures and formalities. See regulation 18(4) of the Regulations. Enforcement costs should not be assimilated with the application fee. Such assimilation raises the possibility of an unsuccessful applicant seeking legal remedy where part of their application fee has been used to subsidise successful competitors. Nevertheless, as evidenced by recent FOI requests, various local authorities have added a charge to cover enforcement.

Recommendation
Guidance should be amended to remove the potential for local authorities to be allowed to charge for enforcement of any kind. Local authorities should address any fees charged in this regard and reimburse applicants on that basis.

Insurance

In a letter dated 7th October 2021 to the Convener of the Local Government Housing and Planning Committee, the Cabinet Secretary for Social Justice, Housing and Local Government Shona Robison MSP wrote[3] to outline *"significant and pragmatic changes I propose to make to the Licensing Order*". One of those changes included a change in the requirement for £5m public liability insurance:

> *"I propose to remove the specified figure from the Licensing Order and instead require adequate insurance…In guidance, we propose to include advice that public liability insurance should be at least £2 million for whole property lets and that home sharers should seek advice. However, we will be seeking the views of the stakeholder working group on this as we finalise the guidance."*[4]

Several local authorities, including the Scottish Borders Council, still stipulate a requirement for £5m insurance.

Recommendation
Guidance to local authorities should be amended to be more robust and prescriptive on this matter.

Mandatory Conditions

To give licensing authorities powers to decide if and what mandatory conditions should apply to temporary licences would be absurd. Mandatory conditions are those that are automatically placed on all premises licences or club premises certificates, where applicable. The purpose of the licensing scheme, per Scottish Government Guidance, is *"to ensure all short-term lets are safe"*[5]: *"All short-term lets in Scotland must comply with mandatory conditions to be granted with a licence"*. To avoid a Judicial Review, this position must be maintained for temporary licences, unless all Mandatory Conditions are removed across all licence types.

[2] Clackmannanshire Council
[3] Letter dated 7th October 2021 from Cabinet Secretary for Social Justice, Housing and Local Government Shona Robison MSP to Convener of the Local Government Housing and Planning Committee, Arianne Burgess MSP.
[4] Letter dated 7th October 2021 from Cabinet Secretary for Social Justice, Housing and Local Government Shona Robison MSP to Convener of the Local Government Housing and Planning Committee, Arianne Burgess MSP.
[5] https://www.gov.scot/publications/short-term-lets-scotland-licensing-scheme-part-1-guidance-hosts-operators-3/

Exempting mandatory conditions for temporary licences has the potential to compromise the effectiveness and integrity of the regulatory scheme, leading to various risks and negative consequences for public safety, fair competition, and the overall purpose of the regulations.

If mandatory conditions are in place to ensure certain standards, safety, or compliance, exempting them for temporary licences might create opportunities for abuse or exploitation. Individuals or businesses could take advantage of the temporary nature of the licence to circumvent necessary requirements.

Mandatory conditions are implemented to safeguard public safety, health, or the environment. Exempting these conditions for temporary licences could compromise public safety, leading to potential risks and hazards that the mandatory scheme was designed to prevent.

Exempting mandatory conditions will erode the integrity of the regulatory framework. If temporary licences are granted without adhering to the same standards as regular licences, it would diminish the overall effectiveness and credibility of the regulatory system.

Exempting mandatory conditions for temporary licences might result in inconsistent enforcement of regulations. This can create confusion among stakeholders and make it challenging for authorities to maintain a cohesive and fair regulatory environment.

Safety regulations are implemented to achieve specific objectives, such as protecting consumers and maintaining public order. Exempting mandatory conditions for temporary licences would undermine the overarching purpose of these regulations, rendering them less effective in achieving their intended goals.

Exempting mandatory conditions could lead to unfair competition between businesses that adhere to the requirements and those that exploit temporary licences to avoid compliance. This disparity may harm businesses operating within the regulatory framework and discourage adherence to standards.

Mandatory conditions often serve as a mechanism for holding licence holders accountable for their actions. Exempting these conditions for temporary licences may weaken accountability, as temporary licence holders may not feel the same level of responsibility to meet the standards set by the regulatory body.

If a temporary licence holder does not have to adhere to the same basic health and safety requirements as a full licence holder, and a tragedy occurs, the Local Authority, as the regulatory body, may be deemed to be liable as they have failed to enforce the basic conditions.

Recommendation
Maintain mandatory conditions for all, or remove for all, to avoid a Judicial Review.

<u>Additional Conditions</u>

Various local authorities have added additional conditions which are ultra vires to the STL licensing Order. Dundee City Council was an example:

"Kitchens should be provided with the following (minimum facilities):

A) adequate cooking facilities for the maximum occupancy of the property"

This is not defined. There is a lack of specification and it cannot be entirely subjective.

B) "a sink with integral drainer."

There is no objective requirement for an integral drainer particularly if the property also has a dishwasher. In addition. certain sinks such as butler sinks do not have an integral drainer. This is a

requirement which is irrational and, to the extent that it could expose a licence holder to significant expense for no good reason, it is oppressive and goes beyond what is necessary in terms of kitchen provision in terms of Lord Braid's Decision at paragraph 60.

> *E) "adequate food storage for the maximum occupancy of the property." Again this lack specification as it gives operators no clarity nor guidance.*
>
> *F) "sufficient drawer space for the storage of cutlery and cooking utensils".*

Again, this lacks specification. Furthermore, there is no reference to specific properties where cutlery is not provided such as a glamping pod, bunkhouse or guest house/hotel/B&B. Home sharing where only a room in a home is let may also not provide cutlery. Conditions have been applied as though it is applicable to all types of short-term let and all kinds of property which is inappropriate and irrational.

> *G) "impervious work surfaces."*

This requirement is irrational and, to the extent that it could expose a licence holder to significant expense for no good reason, it is oppressive and goes beyond what is necessary to address all in terms of Lord Braid's Decision at paragraph 60.

Recommendation
Guidance should be amended to remove the potential for local authorities to include additional conditions which are beyond the scope of the legislation.

Objections

A local authority's role where licensing is concerned is purely administrative. This is well established in the 1982 Act and other pieces of legislation such as the 2005 act dealing with liquor licensing. Councils should not be giving objectors advice or guidance on how to object. Nor should they provide a pro forma form to fill-in online[6]. The legislation and guidance is very clear with regard to objections.

For licensing authorities such as Argyll & Bute Council, to have live links on the public register allowing an objector to press a button and object is not an administrative function of a licensing authority in keeping with the legislative requirements or natural justice provisions. It is a step too far, breaches natural justice, and the licensing authority. Moreover, Argyll & Bute has not been consistent in their application. The button appears on the register for some applications but not for others, this is inconsistent and therefore inconsistent natural justice.

It is the responsibility of the council to identify if an objection is relevant or competent, and this decision should be clear and unequivocal. If there is any question as to whether the objection is spurious, vexatious, is competent or is relevant, the application should go to the committee and the objection and application should be considered transparently at committee, including the competency and relevancy of the objection. Both the applicant and objector are given the opportunity to address the committee on the application and objection, and on its competency and relevancy. That is the proper course of action in line with the 1982 Act and the objections received for applications to the existing licensing schemes covered by the 1982 Act. Why local authorities or the Scottish Government feel a need to depart from that now is neither clear nor logical. The Scottish Government chose to insert the Short-Term Let Licensing scheme into the 1982 Act and in doing so, must accept the existing provisions within the legislation and the history and manner in which existing legislation has been operated.

If it is obvious an objection is spurious or vexatious (the property has a red door, and I do not like red doors), is not competent (no name and address is stated in keeping with the requirements of the 1982 Act) or is irrelevant (it relates to a local pub and nothing to do with the applicant premises) then the

[6] https://argyllandbute.custhelp.com/app/REG/Short_Term_Lets_Objection/application_reference/1408016

council reverts to the objector confirming that their objection is not competent, not relevant, spurious, or vexatious, and will not be considered.

Councils and their staff should not be giving objectors advice on what is a competent objection. If an objection is lodged and is, in view of the licensing authority, spurious, vexatious, not relevant or not competent, that objection should be returned to the objector confirming this and confirming that it will not be placed before a licensing committee for consideration. Further, the licensing authority should confirm in that correspondence that its role is not to provide legal advice, but rather to act in an administrative capacity only. None of its staff or licensing standards officers should therefore give advice.

Giving advice on an objection in order to render that objection competent amounts to legal advice and goes beyond the remit of the local authority. Local authorities should simply confirm that if objectors require further information they should look at the Council's Short-Term Let Licensing Policy, the government guidance, and/or should direct them to take legal advice from citizens, advice, a law centre or a solicitor. Any correspondence between an objector and the local authority should be copied to the applicant or the applicant's agent, as per property tribunals, to ensure full transparency and to ensure there is no breach in natural justice.

Should the Scottish Government support licensing authorities to advise or coach objectors, FOI requests from the applicant or applicant's agents would ensue to ensure transparency as to the manner in which the licensing authority has approached the objection, and evidence whether any breach in natural justice has occurred. All of this would have to be undertaken before the application was considered. Natural justice is one of the four basis for appeal against a refusal of an application, in terms of the 1982 act. This necessary level of scrutiny would place a significant burden on licensing authorities.

Recommendation
Many local authorities are not administering their short-term let policies through the Licensing team as they have the other licensing schemes under the 1982 Act. Rather, they are delivering STL licensing via housing, landlord registration, environmental services departments, and so on. Guidance should be amended to ensure that STL Licensing is addressed by the licensing team, who will understand the manner in which applications are processed under the 1982 Act. To have pro-forma objection forms on Council websites is entirely inappropriate, a breach of natural justice and, if it continues, forms the basis of a Judicial Review. Guidance should reflect this.

Guidance should be amended to ensure that the Scottish Government does not encourage, facilitate, nor support breaches in natural justice or encourage local authority action that is out with the prescribed administrative function.

Fees

In her letter dated 7th October 2021 to the Convener of the Local Government Housing and Planning Committee, the Cabinet Secretary for Social Justice, Housing and Local Government Shona Robison MSP wrote[7] that "*we do want licensing authorities to keep costs, and therefore the revenue that needs to be raised from licence fees for full cost recovery, as low as possible. Therefore, I am considering specifying an average fee in guidance which licensing authorities should not exceed. The average fee could be calculated in some way from the total fee revenue per year in relation to the total guest capacity in licensed accommodation*". Fees remain far higher than those estimated in the 2021 BRIA or guidance and remain disproportionate and an extreme financial burden to small businesses. City of Edinburgh Council fees are a case in point.

Recommendation
Local authorities should be required to review their fees based on number of actual applications received and associated costs (not including enforcement).

[7] Letter dated 7th October 2021 from Cabinet Secretary for Social Justice, Housing and Local Government Shona Robison MSP to Convener of the Local Government Housing and Planning Committee, Arianne Burgess MSP

Removing Natural Names from the Public Register

In her letter dated 7th October 2021 to the Convener of the Local Government Housing and Planning Committee, the Cabinet Secretary for Social Justice, Housing and Local Government Shona Robison MSP wrote[8] :

"The consultation draft Licensing Order makes provision for names of hosts and operators (as licencees) to appear on the public register. Concerns have been raised about this. We agree that the publication of hosts' names, especially in the context of home sharing, could be off- putting to potential hosts. We are proposing that the applicant's natural name is not included in the public register but that only a company name is included where (one of) the licence holders is a body corporate." Public registers do not reflect this amendment.

Recommendation
Guidance should be clearer to local authorities that there is no requirement to publish natural names on their Public Registers.

Transfer of Licence

A Licence is not transferable. As a result, it is not possible to sell as business as a going concern (with existing bookings, stock-in-trade, etc.) as the new owners would be un-licenced until their application was considered, processed and awarded.

Under contractual terms with most Online Travel Agents and platforms, cancellation clauses if you cannot honour existing bookings and the OTA have to 'relocate' your guests can be extremely expensive. If the relocated stay is more expensive, an operator is liable for the difference (irrespective of what it says in their own terms of booking). It therefore becomes necessary to run down any remaining bookings prior to a property sale with an 'empty' order book, which is punitive.

Recommendation
Where a property sale incorporates a business, only the 'owners' will have changed, whilst the mandatory health and safety conditions will continue to be met. Guidance should state that only the 'Fit and Proper Persons' test must be undertaken by the new owner and the licence associated with the property transferred. Should the STL business be incorporated into the Legal Pack for the house sale and a 'No Material Changes' to the property statement made by the vendor's solicitor, this would facilitate a licence application for the new owners. In practice, the precedent has been set for this, per transfer of a Scotland Act 2005 premises. This may require legislative amendments to the 2022 Order (Alternatively, look at transfer conditions for existing HMOs – a new owner can trade so long as a current licence in place and an application for grant of fresh licence in new purchasers' name(s) made within 30 days. This application stands of falls on its own merit and, if refused, trading must stop).

Conclusion

In her letter dated 7th October 2021 to the Convener of the Local Government Housing and Planning Committee, the Cabinet Secretary for Social Justice, Housing and Local Government Shona Robison MSP wrote[9] the promised *"review will … seek to confirm that the wider sector is still healthy, making sure we have avoided unintended consequences."*

[8] Letter dated 7th October 2021 from Cabinet Secretary for Social Justice, Housing and Local Government Shona Robison MSP to Convener of the Local Government Housing and Planning Committee , Arianne Burgess MSP.
[9] Ibid

We request that the former Cabinet Secretary's commitment is made good and that a robust understanding of the impacts of the legislation is undertaken. This must reflect the successes and unintended consequences of both licensing and planning policies across Scotland:

- Impact on affordable housing
- Improvement to safety of the sector
- Improvement of anti-social behaviour
- Impact of business closures on local economies
- Impact on tourism sector.

The ASSC believes that local authorities now have the necessary tools to fairly and effectively regulate short-term lets; and that the Scottish Government should now update the legislation and guidance and request that local authorities update their policies and guidance as soon as practically possible to reflect the recent legal judgements, whilst protecting the vital small accommodation sector.

As ever, the self-catering industry, which contributes so much to the local economy, stands ready to work with the Scottish Government in a constructive and positive manner and would welcome any further dialogue.

January 2024