

MEMORANDUM OF ADVICE

The Association of Scotland's Self-Caterers

Civic Government (Scotland) Act 1982 (Licensing of Short-Term Lets) Order 2022

25 January 2024

1 INTRODUCTION

- 1.1 The Association of Scotland's Self-Caterers ("ASSC") has instructed legal advice from Burness Paull LLP on how the Civic Government (Scotland) Act 1982 (Licensing of Short-Term Lets) Order 2022 ("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.
- 1.2 The background to the ASSC's instruction and request for advice on this matter is set out in their Implementation Update dated January 2024. Under its first recommendation concerning "Licence policies and planning consideration", the ASSC set out the uncertainty and confusion surrounding the relevance of the planning status of a premises that is the subject of an application for a licence and the role of the licensing authority in deciding whether or not the use of the premises for a short-term let requires planning permission.
- 1.3 In our opinion, the 2022 Order conflates the roles of the licensing authority and the planning authority in a way that is apt to cause confusion and is unnecessarily getting in the way of licensing authorities progressing otherwise legitimate, lawful and desirable applications for short-term let licences.
- 1.4 In our opinion, the requirement for certainty on the planning position in all cases is inconsistent with the overall scheme for licensing short-term lets. The scheme specifically provides that a local authority may adopt a planning control area for this purpose. That has its own process, which includes confirmation of the requirement for such a control area by the Scottish Ministers. In our opinion, the current drafting of the requirement in the 2022 Order for licensing authorities to consider the planning position has created *de facto* control areas. That was not the Scottish Parliament's intention.
- 1.5 In our opinion, the 2022 Order and associated guidance should be amended to achieve the following:
 - 1.5.1 clarify the role of the licensing authority in deciding planning matters on receipt of a short-term let application,
 - 1.5.2 ensure separation between the role of the licensing authority and the planning authority,
 - 1.5.3 ensure separation between licensing and planning as two distinct regulatory controls, and
 - 1.5.4 clarify that obtaining a licence to operate a short-term let does not remove, relieve or overcome the requirement to comply with planning control.

2 AMENDMENT OF 2022 ORDER

- 2.1 The 2022 Order requires the licensing authority on receipt of an application for a licence to consider whether or not the “*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 by virtue of section 123(1)(a) or (b) of that Act*”. In our opinion, requiring the licensing authority to consider planning matters in this way is problematic. There is no guidance on how the licensing authority should consider this matter or what they should take into account. This is causing considerable delay and uncertainty in the handling of applications.
- 2.2 The consequences that follow the licensing authorities’ consideration of the planning position are significant. For existing operators who submitted an application prior to 1 October 2023, the licensing authority may suspend consideration of their application if they consider there would be a breach of planning control (art. 7, 2022 Order), and for applications after 1 October 2023, it may in those circumstances refuse to consider the application (Sch. 2, para. 8, 2022 Order).
- 2.3 This requirement essentially requires the licensing authority to step into the shoes of the planning authority and exercise planning judgment. In the case of applications submitted after 1 October 2023, it must do so within 21 days of receipt of the application. In our opinion, this is unnecessary and unhelpful. It has resulted in a position where licensing authorities are being asked to make planning decisions, which is beyond the scope of their jurisdiction, and are unable to consider applications unless there is planning permission in place for use of the premises as a short-term let. That is not what the legislation requires, but that is how it is being construed and that is how it is being applied in practice.
- 2.4 It is important to note that granting a licence under the 2022 Order does not relieve the applicant from the requirement to comply with planning control. Notwithstanding the grant of a licence, the planning authority could take enforcement action to prevent the use of the property as a short-term let. The licensing authority could then take steps to suspend or revoke the licence (para 11, Sch. 1, Civic Government (Scotland) Act 1982).
- 2.5 In our opinion, the 2022 Order could be amended to clarify (i) the extent to which the licensing authority is required to consider the planning position, and (ii) the continuing requirement for the holder of a licence to comply with planning permission.
- 2.6 **Consideration of planning position:** Article 7 and Sch. 2, para. 8 of the 2022 Order could be amended as follows to assist the licensing authority’s consideration of the planning position as part of the application process:

2.6.1 Article 7:

7.— Transitional provision

...

(3) Paragraphs (4) to (7) apply to applications received by a licensing authority prior to [1 October 2023]⁵ from a relevant person where the licensing authority **on consideration of the factors set out in sub-paragraph (11)** 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](#)⁶ by virtue of [section 123\(1\)\(a\) or \(b\)](#) of that Act.

(4) The licensing authority may, as soon as reasonably practicable after receipt of the application, notify the relevant person that—

(a) the licensing authority will suspend their consideration of the application for a period of three months beginning on the date of the notice,

(b) the relevant person must, within that three month period, submit an application for planning permission or apply for a certificate of lawfulness of use or development which would, if granted, remedy the considered breach, and

(c) the relevant person must notify the licensing authority that an application has been made in accordance with sub-paragraph (b).

(5) Where the licensing authority notifies the relevant person under paragraph (4), the licensing authority may only refuse to consider the application under paragraph 2A of schedule 1 of the 1982 Act where—

(a) the relevant person has not submitted an application for planning permission or a certificate of lawfulness of use or development, which would remedy the considered breach of planning control, within the period of three months referred to in paragraph (4)(a), or

(b) the planning authority refuses the application for planning permission or a certificate of lawfulness of use or development and the relevant person does not appeal against that refusal or cannot appeal against that refusal.

(6) Where the licensing authority does not notify the relevant person under paragraph (4), paragraph 2A of schedule 1 of the 1982 Act does not apply.

(7) Where the licensing authority notifies the relevant person under paragraph (4), section 3(1) of the 1982 Act applies to the application as if the 12 month period begins on the earlier of—

(a) the date on which the relevant person notifies the licensing authority in accordance with paragraph (4)(c), or

(b) [1 January 2024]⁷.

...

(11) The factors to which the licensing authority shall have regard in its consideration of whether the use of the premises for a short-term let would constitute a breach of planning control for the purpose of sub-paragraph (1) are-

(a) the planning authority having taken enforcement action in relation to the use of the premises for a short-term let, or

(b) the planning authority investigating enforcement action in relation to the use of the premises for a short-term let.

For the purpose of this sub-section and sub-section (3), the licensing authority shall presume that use of the premises for a short-term let does not constitute a breach of planning control if the above factors do not apply.

2.6.2 Sch. 2, para. 8

8. Preliminary refusal

After paragraph 2, insert—

2A.— ”Preliminary refusal: breach of planning control

(1) A licensing authority may, within 21 days of receipt of an application for a licence, refuse to consider the application where **on consideration of the factors set out in sub-paragraph (6)** 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.

...

(6) The factors to which the licensing authority shall have regard in its consideration of whether the use of the premises for a short-term let would constitute a breach of planning control for the purpose of sub-paragraph (1) are-

(a) the premises is within a short-term let control area and it does not have planning permission or a certificate of lawfulness for use of the premises as a short-term let and the applicant has not applied for any such permission or certificate,

(b) the planning authority having taken enforcement action in relation to the use of the premises for a short-term let,

(c) the planning authority investigating enforcement action in relation to the use of the premises for a short-term let, or

For the purpose of this sub-section and sub-section (1), the licensing authority shall presume that use of the premises for a short-term let does not constitute a breach of planning control if the above factors do not apply.

2.7 **Compliance with planning permission:** Mandatory condition 13 could be amended as set out below to reflect the decision of the court in *Muirhead and Ors v City of Edinburgh Council* 2023 CSOH 86 and to make clear that the holder of licence must at all times comply with planning control:

13. (1) Where the premises is in a short-term let control area for the purposes of **section 26B of the Town and Country Planning (Scotland) Act 1997**¹ ("the 1997 Act"), the holder of the licence must, where the use of the premises for a short-term let **commenced on or after the date of designation of the relevant short-term let control area**, ensure that either—

(a) an application has been made for planning permission under the 1997 Act and has not yet been determined, or

(b) planning permission under the 1997 Act is in force.

(2) In all other cases, the holder of the licence must not use the premises in breach of planning control for the purposes of the Town and Country Planning (Scotland) Act 1997 by virtue of section 123(1)(a) or (b) of that Act.

2.8 In terms of para. 11, Sch. 1 of the 1982 Act, the licensing authority may suspend or revoke a licence if in their opinion a condition of the licence has been contravened.

3 **AMENDMENT OF GUIDANCE**

3.1 The Scottish Government's Guidance on the licensing scheme and the requirement for planning permission already covers off these issues. See (i) *Short Term Lets in Scotland Licensing Scheme – Part 1. Guidance for Hosts and Operators* at paras 2.3 – 2.5, (ii) *Short Term Lets in Scotland Planning Guidance for Hosts and Operators* at para 2.12, and (iii) *Planning Circular 1/2023: Short-Term Lets and Planning* at paras 3.1 – 3.2, and 4.2 – 4.4.

3.2 However, this Guidance could be improved by including and explaining (i) the presumption in favour of an application being accepted where there is no history of planning enforcement, and (ii) the separation between licensing and planning, and the continuing requirement to comply with planning control, notwithstanding the grant of a licence.

4 **CONCLUSION**

4.1 The interaction between licensing and planning in the control of short-term lets is complicated and not well-understood. In our opinion, the amendments we have proposed would bring clarity to the role of the licensing authority when considering planning matters in the assessment of licensing applications.

4.2 We would be very happy to discuss our proposed amendments further as part of a short-life working group should that be possible.

Burness Paull LLP