

Court of Session Ruling on the Edinburgh Council Short-term Lets (STLs) Licensing Policy

What does this all mean?

We've finally had time to read the [decision](#) by the Court of Session to find parts of the City of Edinburgh Council STLs Licensing Policy unlawful and form our **opinion**.

We apologise for the long read but there is much to read and reflect on. This is our understanding of the decision.

While this decision will require changes to Edinburgh's licensing policy, we do not think this decision will materially change the outcome of the legislation **so long as it continues to hold those operators accountable for complying with planning requirements**. In addition a distinction should be included to protect amenity where a Certificate of Lawfulness (or similar exemption) exists and no assessment on amenity has been made.

Despite claims by some owners to the contrary, planning authorisation for change of use to STL is not a new requirement, and has only been strengthened by recent city and national planning policy. This distinction is made clear in the [planning circular 1/2023](#).

Court action did not challenge previous planning policy which applied to STLs, nor the introduction of the new planning policy through the Edinburgh City Plan, Edinburgh Short-term Let Control Area, or the new National Planning Framework.

The court action did challenge the lawfulness of four specific items contained within the City of Edinburgh Licensing Policy. The court also responded to additional points raised by the petitioners (STL owners).

We have tried to summarise these below:

1. **The rebuttable presumption against an STL licence for secondary letting in tenements (Unlawful)** - It was found unlawful that licensing would permit a scenario that if *planning permission* was obtained for secondary letting in a tenement, it would then be refused a *licence* purely on the basis that it was in a tenement. Secondary letting is where a property is not lived in as a main home, but used for short-term letting.

Lord Braid includes useful guidance with regard to this scenario in section [48]. He states, "It may be, too, (without expressing a concluded view on the point) that the respondent (the Council) is entitled to draw a distinction between cases where planning permission has been granted (and where amenity has been considered) and cases where there is simply a certificate of lawfulness of use, and

consequently, no consideration of amenity at the planning stage; however the policy does not seek to draw such a distinction.

2. **One year limit in relation to secondary letting (Lawful)** - “It is not irrational for the respondent to wish to scrutinise a secondary letting licence after a year”
3. **Rebuttable assumption against temporary licences for secondary letting (Unlawful)** - “... that secondary letting should be excluded from the scope of temporary licences, is unintelligible, particularly where temporary exemptions may be granted.”
4. **Floor coverings (Unlawful)** - “...the policy requires carpets for all secondary lets, including ground floor flats and detached houses, I consider that it is irrational...”
5. **The respondent has acted oppressively and irrationally in the manner in which it has introduced its licensing policy (Court disagrees)** - “I do not find that there is anything irrational or oppressive about the manner in which the respondent has acted.”
6. **It is irrational to treat STLs in a different manner to HMOs (Court disagrees)** - “I accept that there is a difference between the two activities, and whether it can properly be described as fundamental or not, it is sufficient to justify a different approach at least in relation to the duration of a licence.”
7. **The policy contravenes the Provision of Services Regulations 2009 (Court agrees)** - For the reasons described in 1,3 and 4, and an omission of the renewals policy.
8. **The policy amounts to an unlawful and disproportionate interference with their possessions in breach of their A1P1 (Court disagrees)** This means that STL owners aren't having their businesses disproportionately interfered with.

Moving forward

There has been wonderful work by the City of Edinburgh Council on this issue but stronger legal support will be needed to resist challenges to the policy. What we would like to see are:

- A. **Make the policy clear and ambiguous** - Our reading of the decision is that the court felt that it was obvious that most STLs in tenements were likely to be refused a licence, but that contradicted another part of the scheme which suggested that “all responsible operators would be given a licence”. Of course, many would argue that if a person is operating previously without necessary planning authorisation, would define an irresponsible operator.

- B. **Share the evidence from planning appeals** - There is overwhelming evidence from planning appeals that STLs materially diminish the living conditions of neighbours, particularly with properties with shared amenity e.g. tenements. This evidence was missing from the court submissions.
- C. **The right to adequate housing** - A more general concern was the lack of discussion of housing being removed from residential use, against the public interest.
- D. **The right to accessible housing** - Since residential tenements have been found to be unsuitable for short-term letting in appeals to the DPEA (Scottish Government) and this is two-thirds of Edinburgh housing, it is obvious that the remaining third, which often represents accessible housing, this limited housing stock must be protected. There is an accessible housing crisis.
- E. **Safe and secure homes and neighbourhoods** - The safety of STL customers was discussed at length but not the safety of residents. [Independent research](#) shows that increasing prevalence of Airbnb listings erodes the natural ability of a neighbourhood to prevent crime. [Planning appeal decisions](#) often cite the specific impact of STL activity on neighbour security.
- F. **Claims that the policy amounts to an unlawful and disproportionate interference with their possessions in breach of their A1P1** - STL owners purchase properties with planning obligations attached (and burdens in title deeds). If they have not sought necessary permissions for business use, it seems absurd to claim unlawful interference, simply because a licensing scheme holds them accountable for doing so.
- G. **International comparisons** - Many cities have controlled the number of STLs, and prohibited STLs in apartments. This has been upheld by the [Supreme Court of Justice](#).
- H. **Resist delays** - The real win is the delay. Even worse, the longer the delay, the more properties will become immune from planning enforcement under the 10 year rule by the STL obtaining a Certificate of Lawfulness.
- I. **Protecting residential amenity in cases where there is a Certificate of Lawfulness (why the rebuttable assumption in tenements was so important)** - There are a number of tenements which have been completely or almost completely turned over to STL use in recent years. There were no residents left to complain or report them for enforcement, sometimes those residents remaining were too intimidated to report. Many of these STLs can receive a Certificate of Lawfulness which means they will automatically receive planning authorisation without any assessment of amenity impacts. The rebuttable assumption in licensing against STLs in tenements allowed the Council to refuse them in these specific cases but it seems it was poorly explained in the policy. Lord Braid's comment in

section [48] suggests the rebuttable assumption could be lawful had the council made this distinction (and some other matters) clear.

- J. **Maintain accountability** - Lord Braid notes “While the petitioners’ witnesses all make valid points in their affidavits, **I would observe that, at least in part, their concerns derive from the anterior need to obtain planning permission as much as from the policy itself.**” We need licensing to hold secondary letting operators accountable for complying with planning requirements or we fear that most will not.

PLACE is a grassroots network finding the balance between short-term lets and protecting liveable, affordable communities in Edinburgh.

<https://placeedinburgh.org/>