Judicial review of short term lets – council argues they are lawful

Edinburgh Council has defended its new rules for short-term lets, telling a court they “meet the test of lawfulness”.

The council’s defence of its licensing scheme was heard as part of a judicial review lodged by a group of accommodation providers who have railed against the policy.

And a lawyer representing the council insisted that concerns of ‘risk’ over the requirement for a licence to be renewed every year were not unique to the policy, and said applying for a licence would be an “interactive process” between the council and operators.

The case centred around the petitioners’ opposition to a presumption against allowing entire flats within the city’s tenements to be used as holiday lets. Their lawyer said this was “in essence why they are here” and added her clients were seeking a “level playing field”.

On the second and final day of the hearing at the Court of Session on Friday James Mure KC presented evidence before Lord Braid on behalf of the council in support of the scheme which was approved last September.

Rolled out in response to concerns about the impact of a rise in properties being used as short-term lets (STLs), particularly in the city centre, the scheme requires hosts to

apply for a licence by October. Those who list entire properties on Airbnb and similar sites also need to seek planning permission from the council, or just a ‘certificate of lawfulness’ if used as an STL for more than 10 years.

Mr Mure said the reubttable presumption against holiday lets in tenements was agreed by councillors with a “very firm basis”.

The policy states that “secondary letting in tenement or shared main door accommodation is considered as unsuitable” and the burden would be on the applicant to demonstrate why they should be exempt from the rule.

Morag Ross KC, counsel for the petitioners, said this element of the scheme was “perverse” and could see a licence refused despite the planning department already deeming the property appropriate for use as an STL.

But Mr Mure said it was “simply a presumption which is rebuttable by the applicant,” adding that exemptions could be based on letters of support, length of time operated for and the volume of complaints amongst other factors.

He said applicants would be invited to submit evidence to the licensing sub-committee to support their case.

“That’s what the policy is,” he said, “to require of applicants to engage with the council to understand what steps have been taken to address the neighbour concerns which the Scottish Government says is on rationale for the introduction of the licensing scheme.”

He said it was “important to distinguish between a certificate of lawfulness and planning permissions”.

He added: “If one were applying for planning permission then the planning application would be required…it would be a normal planning application for change of use. The planning

authority can impose conditions on planning permission should it be granted."

He said a "sizeable number of existing hosts" would be granted a certificate as many have operated in the sector for more than a decade and therefore planning policies would "simply not be considered" in these cases.

"It's important that one understands that," he added. "For many of the operators in Edinburgh the issues of amenity won't be examined by the planning authority."

However Lord Braid said the difference between planning permission and certificate of lawfulness "doesn't seem to be reflected in the policy".

Mr Mure said the licensing and planning systems – which work in tandem under the STL scheme – serve two different purposes, adding the former is "far more flexible".

He said: "Planning permission and its conditions are not appropriate to control how one operates its premises.

"Just because you have one permission, you don't automatically get the other.

"There are matters that licensing can look at that could be matters that as planning authority it is separately looked at. But that does not mean they are not relevant considerations or shouldn't be taken into account."

Picking up on the petitioners' concerns about the requirement for secondary let licences to be renewed every year, Mr Mure KC said: "It was said yesterday that a duration of one year creates uncertainty.

"There is an inherent uncertainty in any [licensing] scheme…I'm simply making the point, my lord, that once you're in any licensing scheme there is uncertainty about renewal.

“Risk is inherent in any legislative scheme.

“Businesses do operate successfully under different comparable licensing schemes.”

He told the court that renewal of licences by an authority “tends to be a different process from the application initially”.

He added once the council granted one it would be “extremely likely to renew on the same basis unless there has been a material change of circumstances”.

He said a “good reason” would be required to refuse a renewal application which could include “serious of complaints or an objection to the way the activity has been carried out”.

Lord Braid interjected that the policy “doesn’t distinguish between new application and renewals”.

Mr Mure said it had also been suggested during presentation of the petitioner’s evidence that if a licence application is knocked back then “nothing could be done” for another year.

But he said the council provided “reasonable advice and guidance to applicants”.

He said: “It’s just the beginning of a process, the licensing service checks applications that come in and will advise if further information is required.”

He added councillors on the licensing sub-committee “often enter into a dialogue with the applicant” and can “continue application if more information is needed”.

He said it “is not a one attempt application online then months later you get a refusal or a grant,” adding it was an “interactive process”.

Lord Braid said it would be “rash” to predict how long it

would take him to make a final judgement on the case but would deliver the ruling “as soon as possible”.

The petitioners have said it could “potentially take up to three months to receive the judge’s decision”.

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