Changes to houses in multiple occupation regulation

24/07/2018

Local Government analysis: Dean Underwood, barrister at Cornerstone Barristers, London, discusses the changing landscape of mandatory, additional and selective licensing concerning houses in multiple occupation (HMO).

What changes to HMO regulation are happening?

Part 2 of the Housing Act 2004 (HA 2004) enacts two schemes to regulate the letting and occupation of HMOs. Firstly, all HMOs of a certain description must be licensed by the local housing authority (LHA) under HA 2004, ss 55(1)–(2), 61(1).

As currently enacted, the scheme applies to certain, large HMOs only—generally, HMOs of three or more storeys, occupied by five or more persons living in two or more single households under HA 2004, s 55(2) and Article 3 of the Licensing of HMOs (Prescribed Descriptions) (England) Order 2006, SI 2006/371). The government estimates that approximately 60,000 HMOs fall within this description (Houses in Multiple Occupation and residential property licensing reform: Guidance for Local Housing Authorities, pg 4).

Secondly, concerning additional or discretionary HMO licensing, LHAs may describe other HMOs which must also be licensed under HA 2004, Pt 2.

They may, therefore, require smaller HMOs to be licensed, or HMOs that are otherwise excluded from the requirements of mandatory licensing. Some, but not all, LHAs in England and Wales have chosen to operate such a scheme.

The government has decided to extend the description of HMOs to which mandatory HMO licensing applies in England, in particular, by removing the ‘storey’ condition.

From 1 October 2018, therefore, the scheme will apply to all HMOs occupied by five or more persons living in two or more separate households that:

- meet the standard test under HA 2004, s 254(2)
- meet the self-contained flat test under HA 2004, s 254(3), but are not purpose-built flats in a block comprising three or more self-contained flats
- meet the converted building test under HA 2004, s 254(4) (Licensing of HMOs (Prescribed Description) (England) Order 2018, SI 2018/221, art 4)

The government has also prescribed the minimum size of rooms in HMOs in England, which may be used as sleeping accommodations and has enacted provisions to regulate the disposal of refuse generated by licensed HMOs (regulation 2 to the Licensing of HMOs (Mandatory Conditions of Licences) (England) Regulations 2018, SI 2018/616).

Accordingly, the holder of an HMO licence granted on or after 1 October 2018 will be required to ensure that the floor area of any sleeping accommodation used by:

- one person aged over ten years is not less than 6.51m^2
- two persons aged over ten years is not less than 10.22m^2
- one person aged under ten years is not less than 4.64m^2

The holder of an HMO licence will be required to ensure that any room with a floor area of less than 4.64m^2 is not used as a sleeping accommodation at all.

The licence holder will also be required to ensure that, where any room in the HMO is used as a sleeping accommodation:

- by persons aged over ten years only
- by persons aged under ten years only, or
- by persons aged over ten years and persons aged under ten years

Licence holders must also make sure that any room in the HMO is not used by more than the maximum number of such persons as the LHA specifies in the licence.

Further, it will be a condition of all such licences that the licence holder notifies the LHA of any room in the HMO with a floor area of less than 4.64m^2 and remedies any unwitting breach of the above conditions within such period, not exceeding 18 months, as the LHA may specify.

Lastly, where the HMO is in England, a licence granted on or after 1 October 2018 must include conditions requiring the licence holder to comply with any LHA scheme for the storage and disposal of household waste at the HMO—pending collection.

Both sets of reforms are subject to transitional provisions (Licensing of HMOs (Prescribed Descriptions) (England) Order 2018 SI 2018/212, art 5 and regulation 2 to the Licensing of HMOs (Mandatory Conditions of Licences) (England) Regulations 2018 SI 2018/616).

Why are the changes needed?

The government views the private rented sector as an important part of the housing market, accommodating an approximate 4.7 million households in England. It views HMOs as a vital part of that sector, 'often providing cheaper accommodation for people whose housing options are limited' and 'commonly occupied by students but … also a growing number of young professionals and migrant workers' (Houses in Multiple Occupation and residential property licensing reform: Guidance for Local Housing Authorities, pg 4).

Since HMO licensing came into force in 2006, the demand for HMO accommodation has increased significantly, as has the number of HMOs with fewer than three storeys. In particular, the government notes, there has been a significant increase in the use of two storey houses, originally designed for families and flats, as HMO accommodation. Some of these, it has found, have been used by 'opportunistic rogue landlords who exploit their vulnerable tenants, and rent sub-standard, overcrowded and potentially dangerous accommodation' Further, the 'growth of HMOs has had an impact on the local community, including where inadequate rubbish storage leads to pest infestation and health and safety problems' (Houses in Multiple Occupation and residential property licensing reform: Guidance for Local Housing Authorities, pg 4).

The recent reform of HMO licensing under HA 2004 is intended to address these particular problems.

What does the guidance suggest that LHAs should be doing to prepare for the changes?

The government has issued non-statutory guidance about the reforms, entitled Houses in Multiple Occupation and residential property licensing reform: Guidance for Local Housing Authorities (June 2018).

The Houses in Multiple Occupation and residential property licensing reform: Guidance for Local Housing Authorities reminds LHAs that they have a duty to implement mandatory licensing in their district effectively under HA 2004, s 55(5)(a)). To that end, it advises LHAs actively to promote licensing, for example in the local press and on their own websites, and to accept and process licence applications before 1 October 2018. In that regard, it provides guidance about how LHAs

should treat applications made in respect of HMOs that are not currently within the scope of mandatory licensing.

The Houses in Multiple Occupation and residential property licensing reform: Guidance for Local Housing Authorities states:

> 'If a licence is granted before October 2018 in respect of an HMO that will newly be subject to mandatory licensing from that date, the period for which the licence is granted should begin on 1 October 2018—the date from which the HMO is required to be licensed under the Prescribed Description Order 2018. In the circumstance where an unlicensed HMO which is currently subject to selective licensing makes an application prior to 1 October 2018, the local housing authority should grant a mandatory HMO licence to begin from 1 October 2018' (pg 10).

All such applications must be determined within a reasonable time of receipt.

The Houses in Multiple Occupation and residential property licensing reform: Guidance for Local Housing Authorities also expresses the government's expectation that LHAs will, 'provide guidance to landlords on the types of conditions they will be legally obliged to meet if their HMO is required to be licensed under Part 2'.

Given the consequences of failing to comply with such conditions, it is suggested, which include an unlimited fine upon conviction, or a financial penalty of up to £30,000, the need for such guidance is clear.

What should landlords be doing to prepare for the changes?

The primary concern of those managing or controlling an HMO to which the requirements of mandatory licensing will apply from 1 October 2018 will be to ensure that they apply for a Part 2 licence by that date. If they do not, they will be guilty of an offence under HA 2004, s 72 and liable to an unlimited fine upon summary conviction, or a financial penalty under the Housing and Planning Act 2016 (HPA 2006) of up to £30,000.

How do these changes fit in with the banning orders and other rogue landlord provisions which recently came into force?

The recent reforms are intended to complement those enacted by LPA 2016—the introduction of banning orders and financial penalties, for example—all of which are intended to disrupt the business model of so-called rogue landlords and improve the management and condition of HMO accommodation in the private rented sector.

The government has indicated that it wants to review selective housing arrangements. How will it do that and what is likely to happen?

On 20 June 2018, the government announced that it would undertake a review of selective licensing under HA 2004, Pt 3, to ascertain how the scheme is being used and how well it is working.

The review—the findings of which will be published in the spring of 2019—will involve independent commissioners gathering evidence from LHAs and bodies representing landlords, tenants and housing professionals.

It is impossible to predict the likely outcome of the review—even its full extent is unclear at present. One issue that clearly requires consideration, however, is the selective licensing of flats in common ownership or control—an issue raised, but ultimately not resolved, by the Divisional Court in *Tuitt v Waltham Forest LBC* CO/612/2017.

If one person has control of two or more flats in the same building, do they require just one licence to authorise the occupation of all of them, or one licence for each? While HA 2004, s 79(2)(b), read with

HA 2004, s 99, lends clear support to the proposition that LHAs have a choice in such circumstances, and may in their discretion identify one or more flats as the Part 3 house requiring a licence, those in control of the flats contend otherwise—only one licence, they aver, is required. Financially, the difference between the two interpretations of HA 2004 is potentially significant, to LHAs and landlords alike. Indeed, in one current case, it is the difference between either £500 for just one licence, or £74,500 for 149.

In the absence of judicial interpretation, therefore, guidance from the government would be welcomed.

Interviewed by Tracey Clarkson-Donnelly.

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