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Consult in haste, repent at leisure: the essentials of additional and selective licensing consultations under the Housing Act 2004

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As local housing authorities in England and Wales consider introducing or renewing additional and selective licensing schemes, Dean Underwood identifies the essentials of lawful consultation.

The duty to consult

Parts 2 and 3 of the Housing Act 2004 ('the 2004 Act') which, respectively, provide the legal framework for additional and selective licensing schemes require local housing authorities ('LHAs') proposing to designate their area - or part of their area - for additional or selective licensing to:

- Take reasonable steps to consult persons, who are likely to be affected by the designation; and
- Consider any representations made in accordance with the consultation and not withdrawn.

The statutory duty is an important one, intended to ensure that those likely to be affected by a licensing designation – which may put them to expense and administrative inconvenience – have a chance to consider, comment upon and potentially shape the LHA's final proposal.

As the cost of unlawful consultation and an ineffective scheme designation is invariably significant, in terms of delay, wasted expenditure and reputational damage, it is critical that LHAs consult correctly.

So, what does the statutory duty involve; is there a yardstick by which LHAs can measure the lawfulness of a consultation; and how can LHAs assess whether they have taken the 'reasonable steps' required by the 2004 Act?

Procedural fairness and the *Sedley* criteria: the key to lawful consultation

The overriding consideration and, ultimately, measure of lawful consultation - whatever the source of the legal obligation - is procedural fairness²; and, to that end, the *Sedley* criteria have long been acknowledged as a four-step guide to its achievement.

The *Sedley* criteria³, endorsed by the Supreme Court in 2014, prescribe that LHAs:

- Consult at a time when their proposals are still at a formative stage;
- Give sufficient reasons for their proposals, to enable intelligent consideration and response;
- Allow adequate time for consideration and response; and
- Take responses into account conscientiously when finalising their proposals.

The devil is in the detail, even at a formative stage

The rationale for consulting at a proposal's formative stage requires little explanation: one purpose of consultation is to provide those likely to be affected by a proposal with an opportunity to influence its final shape – an opportunity that becomes more illusory the later that consultation occurs.

The need to consult at a relatively early stage does not, however, absolve LHAs of their obligation to flesh out the bones of their proposed designation. Guidance issued by the Department of Communities and Local Government ('DCLG') emphasises the need for consultation about detailed proposals. Its now-archived guidance of 2010, *Approval steps for additional and selective licensing designation in England*, provided that:

"During consultation, LHAs must give a detailed explanation of the proposed designation, explaining the reasons for the designation, how it will tackle specific problems, the potential

*benefits etc. For example, in the case of selective licensing, LHAs must be able to demonstrate what the local factors are that mean an area is suffering from low demand and/or anti-social behaviour, how those factors are currently being tackled and how the selective licensing designation will improve matters."*⁴

Its recent guidance *Selective licensing in the private rented sector – a guide for local authorities* (March 2015) takes up the refrain⁵. If further emphasis were required, the experience of Hyndburn Borough Council before the High Court provides it. In 2011, a lack of detail about the LHA's proposed designation led to the failure of its selective licensing scheme⁶. In a salutary lesson, McCombe J observed that consultation:

*"Does require some precision in the identification of what is to be designated and its consequences, so that the extent of the effect on those persons can be appreciated. In addition, it is hard to see how adequate steps can be taken to consult with persons affected unless one knows the likely licence conditions that will be imposed. Consultations as to general principles [are], in my judgment, insufficient. ... In order to comply with the [Sedley criteria], the consultees must be given sufficient information to enable them to reach an informed decision upon that which they are being consulted. Without some fleshing out of the reasons for the proposals, the nature of the proposals as regards the licence conditions and as to a fee structure, it seems to me that an informed response [is] really impossible."*⁷

Consultation about general principles will not, therefore, discharge a LHA's statutory duty and, even at a proposal's formative stage, LHAs will be expected to provide consultees with details about:

- The area or areas affected;
- The need for the proposed designation in each area;
- The alternatives to designation and the reason for their inadequacy;
- The alternative schemes available, their respective merits and demerits, the LHA's preferred choice and the reasons for its preference;
- Those likely to be affected by the designation;
- The likely effect of designation - and the LHA's preferred scheme in particular - on those affected;
- The process by which those affected may apply for and obtain a licence;
 - likely licence conditions; and
 - the proposed licence fee and fee structure.

² *R (Moseley) v Haringey LBC* [2014] UKSC 56 [2014] 1 WLR 3947 per Wilson JSC at [24].

³ Formulated by Stephen Sedley QC (as he then was) in *R v Brent LBC, ex parte Gunning* (1985) 84 LGR 168 and accepted by Hodgson J at 189. Endorsed by the Court of Appeal in *R v Devon CC, ex parte Baker* [1995] 1 All ER 73, *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 and *R (Royal Brompton & Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 [2012] 126 BMLR 134, in which the Court described the criteria at [9] as a "prescription for fairness". Endorsed by the Supreme Court in *R (Moseley) v Haringey LBC* (above) per Wilson JSC at [25].

⁴ *Approval steps for additional and selective licensing designation in England*, page 13.

⁵ *Selective licensing in the private rented sector – a guide for local authorities* at [48-49].

⁶ *R (Peat) v Hyndburn BC* [2011] EWHC 1739 (Admin).

⁷ *R (Peat) v Hyndburn BC* (above) at [50-52].

Clearly, LHAs will be unable to provide the necessary detail without first researching and obtaining evidence about their proposed designation and the potential alternatives. To that end, a period of informal consultation, or 'listening and engagement', such as that undertaken recently by the London Borough of Croydon (below), is often helpful and may assist LHAs to prove, in the event of later challenge, that they have complied with their obligation to 'take all reasonable steps' to consult.

However they go about the process, LHA's would be well-advised to heed the lessons learned by Hyndburn Borough Council (above) and the London Borough of Enfield (below) and not rush the process of consultation.

Wisely and slow, they stumble that run fast

In fact, in the context of additional and selective licensing, the need for LHAs to allow adequate time for consultation – a requirement echoed in the DCLG's archived and recent guidance - rarely causes difficulty.

If LHAs want to obtain the Secretary of State's General Approval⁸ for a licensing scheme and avoid the need for ministerial confirmation, they must consult formally for a period of at least 10 weeks⁹, a period that, in practice, often proves adequate to ensure compliance with the statutory duty.

Indeed, even in cases in which General Approval is not available, the DCLG recommends "*that if the scheme requires confirmation the local housing authority should aim to consult for at least 10 weeks unless there are special reasons for not doing so.*"¹⁰

Whether the *Sedley* criteria require any longer period of consultation, of course, will depend on a range of factors, not least the nature and extent of the proposed scheme and the number and geographical spread of those likely to fall within its scope.

What is now clear, however, is that periods of listening and engagement, during which a LHA is gathering evidence before consulting formally, are very unlikely to count towards formal consultation, not least because they will usually fall foul of the second *Sedley* criterion. They will not, therefore, bring a scheme about which a LHA has consulted for less than 10 weeks within the scope of the Secretary of State's General Approval.

In *R (Regas) v Enfield LBC*¹¹, the High Court quashed a decision to introduce borough-wide additional and selective licensing schemes in the London Borough of Enfield. The local authority had engaged in a period of 'listening and engagement' before consulting formally about its proposed schemes for a period of eight weeks. The Court

rejected the local authority's submission that it was appropriate to aggregate the two periods in order to bring the scheme within the scope of the General Approval. Applying *McCombe J's* approach in *Peat*, *McKenna HHJ* held that:

*"Superficially attractive though Enfield's argument is, in my judgement it is flawed. As McCombe J, as he then was, put it in Peat at [50] the statutory consultation requirement cannot be satisfied by a general engagement and listening exercise but requires a draft proposal which would require some precision in the identification of what is to be designated and its consequences so that the extent of the effect on the people can be appreciated. In addition, it is hard to see how adequate steps could be taken to consult with the persons affected unless they knew the likely licence conditions that would be imposed. That level of detail was conspicuously lacking in the first phase undertaken by Enfield and, in the circumstances, Enfield's argument cannot prevail, falling foul as it does, of the second of the Sedley principles."*¹²

Consideration never hurt anyone

As for the fourth *Sedley* criterion, it is plainly important that LHAs consider each response to their consultation with care. It is just as important that they record, statistically and otherwise, how that response has affected their final proposal, if at all.

LHAs are unlikely to need, it is suggested, to reply in detail to each response received though, for obvious reasons, they should at least acknowledge each response; and some responses will call for a more substantive reply.

When consultation has closed, however, LHAs are required to compile and publish a report summarising the responses they have received and explaining whether or not they have influenced their final proposal.

In that regard, DCLG's 2015 guidance is as applicable to additional licensing as it is to selective. It recommends that:

*"Consultees should be invited to give their views, and these should be considered and responded to. Once the consultation has been completed the results should then be published and made available to the local community. This should be in the form of a summary of the responses received and should demonstrate how these have either been acted on or not, giving reasons."*¹³

⁸ As to which, see section 58(1) and (6) of the 2004 Act for additional licensing, section 82(1) and (6) for selective licensing and the Housing Act 2004: licensing of houses in multiple occupation and selective licensing of other residential accommodation (England) General Approval 2015.

⁹ Note that General Approval is no longer available for selective licensing schemes that, themselves or in combination with other designations, cover more than 20% of the LHA's geographical area or affect more than 20% of the privately rented homes in the area, based on figures taken from census data.

¹⁰ Selective licensing in the private rented sector – a guide for local authorities at [47].

¹¹ *R (Regas) v Enfield LBC* [2014] EWHC 4173 (Admin) [2015] HLR 14.

¹² *R (Regas) v Enfield LBC* (above) at [47].

¹³ Selective licensing in the private rented sector – a guide for local authorities at [48-49].

Reasonable steps require a tailored approach

The Housing Act 2004 applies a statutory gloss to the duty to consult, obliging LHAs to take 'reasonable steps' to consult those likely to be affected by their proposed designation.

The Act does not describe what constitutes or is likely to constitute reasonable steps. Like the proverbial cloth cutter, LHAs will need to tailor the steps that they take to suit the circumstances of their proposed designation and consultation. As McKenna HHJ observed in *Regas*, about the pool of potential consultees "the breadth of the specified group will depend on the nature and extent of the proposed designation in any given case."¹⁴

The duty is, however, limited in scope. As Sir Stephen Silber observed in *R (Croydon Property Forum Ltd) v Croydon LBC*¹⁵, the obligation is only to take 'reasonable steps' to consult those likely to be affected and does not extend to taking every step, all steps or even all reasonable steps.

In that regard, LHAs will find some assistance with the scope of their duty in DCLG guidance. Like its 2010 guidance on both additional and selective licensing, the DCLG's 2015 guidance recommends that LHAs consult:

*"local residents, including tenants, landlords and where appropriate their managing agents and other members of the community who live or operate businesses or provide services within the proposed designation. It should also include local residents and those who operate businesses or provide services in the surrounding area outside of the proposed designation that will be affected. Local housing authorities should ensure that the consultation is widely publicised using various channels of communication."*¹⁶

The importance of consulting out-of-borough and publicising the consultation widely should not be overlooked. The Act requires LHAs to take reasonable steps to consult 'persons likely to be affected' by the proposed designation. As the local authority learned to its cost in *Regas*, the group affected by a designation is likely to include persons running businesses and providing services in areas outside the proposed area of designation. With that in mind, the wider the consultation is publicised - in both designated and surrounding areas - the better the prospect of demonstrating compliance with LHAs' statutory duty.

Like the requirements of many obligations, the demands of the 2004 Act's duty to consult are illustrated acutely by the misfortunes of others. Case law provides many salutary lessons, of which *Peat* and *Regas* are but two. Just as salutary, however, are the lessons learned from lawful consultations that have survived judicial scrutiny. The consultation challenged in *R (Croydon Property Forum Ltd) v Croydon LBC* is a prime example.

In 2014, the LHA began a lengthy consultation about a proposed, borough-wide selective licensing scheme. The exercise lasted from 1 September 2014 to 2 March 2015 and had three stages:

- A general, non-statutory consultation, which lasted for two months, from 1 September 2014 to 31 October 2014, in which the LHA engaged with private sector landlords, managing agents and associations that either supported private landlords or had an interest in private landlord affairs, to determine the level of support for the LHA's proposals. To that end, it made information about the proposed designation and its cost available on its website, undertook a postal survey and hosted a workshop with landlords and their agents to obtain feedback on the proposals.
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- The LHA then undertook a four-week period of formal consultation, in which it identified four scheme options and explained its preference for a borough-wide scheme. It publicised the consultation widely and in a variety of ways including: on its website, by email and social media, by distributing posters and flyers in public places, by placing advertisements in newspapers and by press release. It also hosted a further workshop to discuss the proposals publicly and undertook a face-to-face survey of more than 1000 households.
- Following the decision in *Regas*, the LHA then engaged in a further ten week period of formal consultation about its four proposed options, targeting those in neighbouring boroughs and, generally, those with connections to the borough. It publicised the consultation in many of the ways used at stage 2 and facilitated an online survey for those in neighbouring boroughs, as well as placing an advertisement in the newspapers of its neighbouring boroughs.

The exercise undertaken by Croydon is, it is suggested, an excellent example of lawful consultation; and LHAs proposing to introduce or renew a scheme of additional or selective licensing could do far worse than to follow it.

Whatever steps they propose to take to comply with their statutory obligation, however, the bare minimum for which LHAs should aim is compliance with DCLG guidance. As McCombe J held in *Peat*,

¹⁴ *R (Regas) v Enfield LBC* (above) at [37].

¹⁵ *R (Croydon Property Forum Ltd) v Croydon LBC* [2015] EWHC 2403 (Admin) [2015] LLR 812 at [45].

¹⁶ Selective licensing in the private rented sector – a guide for local authorities at [46].

*"While I agree ... that the guidance issued in the present case has a lesser status than that in issue in the Munjaz case, it does provide a helpful, objective yardstick as to the steps that might well be considered reasonable in the consultation process and the absence of which might well be considered to demonstrate a failure to take reasonable steps."*¹⁷

Pointers in the right direction

So, how can LHAs improve the prospect of complying with their statutory duty and mitigate the risk of subsequent challenge? A few brief pointers may assist.

1. **Follow the DCLG's guidance.** It is, as McCombe J held, a helpful measure of the steps likely to be considered reasonable in the consultation process.

2. **Do not rush into consultation.** Formal consultation requires a detailed, evidence-based proposal. Time and resources permitting, LHAs should first undertake a listening and engagement exercise, as a pre-cursor to formal consultation¹⁸. The exercise is very unlikely to qualify as consultation, but will assist LHAs to research and gather evidence to support their proposal. It will also forewarn interested parties of the LHA's intention to designate an area for additional or selective licensing and assist LHAs to demonstrate, subsequently, that they have complied with their consultation obligation. In particular, it will assist them to rebut claims – such as those made successfully in *Regas* – that interested parties would only have become aware of the consultation by pure happenstance¹⁹.

3. **Publicise the consultation using a wide range of communication as wide a range as possible:**

- LHA publications
- Press releases
- Email and postal correspondence targeted at known private landlords, private landlords' associations - e.g. the Residential Landlords Association and National Landlords Association - and managing agents
- Online, postal, telephone and face-to-face surveys
- Public meetings and workshops
- Advertisements in local newspapers and those of neighbouring boroughs
- Publicity in social media, such as Twitter, LinkedIn and Facebook
- Posters and flyers distributed in public places – libraries, shopping centres, town centres etc - in both the local authority's area and those of neighbouring boroughs

- Information in the footer to all the local authority emails
- Information on plasma display schemes in public areas

4. **Time and resources permitting, consult formally for longer than the 10-week period required for General Approval, or recommended for ministerial confirmation.** The longer the consultation, the longer its likely shelf life – a factor that may be important if there is a delay between the close of consultation and subsequent designation. As McCombe J observed in *Peat*²⁰, "if the council's consultation is a shallow one, as in my view this one was, its usefulness is likely to have a much shorter sell-by date."

5. **Provide detailed reasons for either accepting or rejecting the representations of consultees.** Time spent explaining the rationale for the LHA's final proposal after the close of consultation is likely to save time later, responding to letters before action and claims for a judicial review.

Solace in a high threshold?

So, how can LHAs improve the prospect of complying with their statutory duty and mitigate the risk of subsequent challenge? A few brief pointers may assist

There is little doubt that the job of ensuring a lawful consultation is time-consuming and demanding, requiring LHAs to research and gather evidence for a detailed proposal and ensure compliance with the *Sedley* criteria at all stages of the exercise.

LHAs may find solace in the knowledge that the threshold above which courts will consider a consultation exercise unlawful is a high one. LHAs have a wide discretion about the way in which they consult and an exercise which is flawed in one or even a number of respects will not necessarily be so unfair as to be unlawful. That it might have been better is emphatically not the test: it will not be considered unlawful unless something goes clearly and radically wrong²¹. Indeed, "in order to be unlawful, the nature and extent of the process must be so narrow that no reasonable council, complying with the principles set out above, would have adopted it"²².

Nevertheless, LHAs will want to take time to ensure that they consult lawfully and thoroughly. The cost of rushing the process is likely to be significant and, as history demonstrates, those who hasten to consult tend to repent at their leisure.

¹⁷ *R (Peat) v Hyndburn BC* (above) at [53].

¹⁸ *R (Regas) v Enfield LBC* (above) at [47-48].

¹⁹ *R (Regas) v Enfield LBC* (above) at [39]; "anyone outside the borough who might have had their attention drawn to the proposals had that attention drawn entirely by chance if they happened to have seen a reference to the proposals in media circulating outside the borough (with the possible exception of the national landlord's association) or happened to drive through the borough and saw one of the posters or the like. As counsel for the claimant characterised it, there was no strategy for the consultation of anyone outside the borough and it was a matter of pure happenstance if they became aware of the proposals."

²⁰ *R (Peat) v Hyndburn BC* (above) at [56].

²¹ *R (Wainwright) v Richmond upon Thames LBC* [2001] EWCA Civ 2062 [2001] All ER (D) 422 (Dec) per Clarke LJ; *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) [2007] Env LR 623, per Sullivan J at [62-63]; *R (Peat) v Hyndburn BC* [2011] EWHC 1739 (Admin) [2011] All ER (D) 86 (Jul) per McCombe J; *R (Croydon Property Forum Ltd) v Croydon LBC*, per Sir Stephen Silber at [59].

²² *R (Wainwright) v Richmond upon Thames LBC* (above), per Clarke LJ at [11].