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Licensing the private rented sector:

**The law and practice of licensing designations under
the Housing Act 2004**

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- Additional and selective licensing designations under Parts 2 and 3, Housing Act 2004: law and practice -
 - assumes a basic knowledge of Parts 2 and 3 of the 2004 Act
 - provides a summary of LHA powers to designate areas as subject to additional and selective licensing under the 2004 Act
 - includes an overview of significant case law e.g.
 - *R (Peat) v Hyndburn District Council* [2011] EWHC 1739 (Admin)
 - *R (ota Regas) v Enfield LBC* [2014] EWHC 4173 (Admin)
 - *R (Croydon Property Forum Ltd) v Croydon LBC* [2015] EWHC 2403 (Admin)
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Mandatory HMO licensing – a brief word

Mandatory HMO licensing



- Key provisions:
 - Sections 55 and 254, 2004 Act
 - Licensing of HMOs (Prescribed Description) (England) Order 2018
 - Licensing of HMOs (Prescribed Descriptions) (Wales) Order 2006
- No designation required
- In England, applies to all HMOs –
 - occupied by five or more persons, living in two or more separate households
 - which meet –
 - standard test
 - self-contained flat (SCF) test, excluding purpose-built flats in blocks of three or more SCFs
 - converted building test
- Note: does not apply to section 257 HMOs



Additional HMO licensing designations

Additional licensing in overview



- Part 2, Housing Act 2004 gives LHAs power to regulate HMOs **not** covered by mandatory HMO licensing
- Intended to target **poorly managed** HMOs and those where conditions, occupants etc are **causing problems** to HMO occupants and/or others in the community
- Whether an HMO is included depends on the LHA designation
 - Many use additional HMO licensing to regulate smaller HMOs and section 257 HMOs
- **Consultation** is required before designation; and either General Approval or (in England) Secretary of State confirmation of designation
- Licence required if HMO falls within the designation: see section 61, 2004 Act



The power to designate: provisions, areas and grounds



- Key provisions:
 - Sections 56 to 60 and 254, 2004 Act
- Areas?
 - Either *the* area of the LHA's district or *an* area in its district
- Grounds (conditions)?
 - A significant proportion of the HMOs of a particular description (e.g. section 257 HMOs, small HMOs above commercial premises etc) are being managed sufficiently ineffectively as to give rise, or to be likely to give rise, to one or more particular problems either for those occupying the HMOs or for members of the public
- Focus?
 - The management of HMOs to which mandatory HMO licensing does not apply
 - Requires a causal connection between ineffective HMO management and at least one problem for the HMO occupants or the public



The power to designate: pre-conditions



- Before making a designation, LHAs must –
 - ensure that exercise of their power is consistent with their overall **housing strategy**
 - seek to co-ordinate their approach with their approach to **homelessness, empty properties and anti-social behaviour** affecting the PRS
 - not make a designation unless they have considered whether there **other effective methods** of dealing with the problem
 - consider that the **designation will significantly assist them** to deal with the problem
 - 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 power to designate: General approval or confirmation



- Designations require either –
 - **General Approval** or
 - Secretary of State / Welsh Assembly **confirmation**
- England - General approval granted for additional HMO licensing designations, provided LHA has consulted persons likely to be affected for not less than 10 weeks
 - *The Housing Act 2004: Licensing of Houses in Multiple Occupation and Selective Licensing of Other Residential Accommodation (England) General Approval 2015*
- Wales - General approval given for all additional HMO licensing designations
 - *The Housing Act 2004 (Additional HMO Licensing) (Wales) General Approval 2007*
- Ministerial confirmation rarely required, therefore, for additional HMO licensing designations, whether in England or Wales

Duration, review and revocation



- See section 60, 2004 Act
- As confirmation is rarely required, additional HMO licensing designations will usually come into force on the date specified by the LHA in the designation, but that date cannot be earlier than three months after the designation is made
- Designation may last **no longer than 5 years** from the date on which it comes into force
- Otherwise, designation comes to an end on the date it specifies
- LHAs must **from time to time review** the operation of the designation
- LHAs may revoke a designation following a periodic review

Notification requirements



- See –
 - section 59, 2004 Act
 - Licensing and Management of HMOs and Other Houses (Misc. Provisions) (England / Wales) Regulations 2006
- As soon as designation is confirmed or, if confirmation not required, is made LHA must **publish notice in a prescribed manner** stating -
 - that the designation has been made
 - details of either the Ministerial confirmation or applicable General Approval
 - the date on which the designation comes into force
 - any such information as is prescribed
- Prescribed information? See regulation 9, 2006 Regulations above
- Copy of designation and prescribed information must be made available to public while designation is in force

General LHA duties post-designation



- See sections 55 and 61, 2004 Act
- 2004 Act imposes several duties on LHAs upon designation (and in respect of mandatory HMO licensing):
 - to make such arrangements as are necessary to **secure the effective implementation** of the licensing regime(s) provided for by Part 2, 2004 Act
 - to take all reasonable steps to **secure that licence applications are made** in respect of HMOs which are required to be licensed under Part 2 but are not
 - to **ensure that all licence applications and other issues** falling to be determined by them under Part 2 are **determined within a reasonable time**
 - to satisfy themselves, as soon as is reasonably practicable, that there are **no Part 1 functions that ought to be exercised** in relation to HMOs in respect of which applications are made

Successful designation under Part 2, 2004 Act



- Evidence the designation properly
 - Remember
 - Focus is on the **ineffective management** of HMOs, in particular smaller and section 257 HMOs, not merely on problems in HMO-heavy areas
 - Must be a **causal connection (or likely causal connection)** between ineffective HMO management and one or more problems e.g. housing hazards; nuisance; environmental issues (waste disposal, graffiti etc); ASB; crime etc
 - **Identify the class of HMO** causing the problem(s) using a range of data e.g.: LHA records (hazards, ASB complaints, licensing, management orders etc); police records
 - Part 2 only requires a **significant proportion** of the class to be “problematic”
- Consult lawfully
 - See the slides below: Consultation is a cornerstone of lawful designation



Selective licensing designations

Selective licensing in overview



- Sections 79-81, Part 3, Housing Act 2004 give LHAs power to make selective licensing designations to regulate **other houses outside of Part 2**
- Originally intended to address the impact of sub-standard PRS accommodation and management in areas of **low housing demand**; and **anti-social tenants**
- Conditions for designating extended by **2015 Regulations**
- *But* neither borough-wide nor large designations now approved generally
- **Consultation is required** before designation, as with additional HMO licensing
- In designated areas, private landlords must obtain a licence
- Enforcement action available in default of a licence or attainment of acceptable management standards

The power to designate: provisions, areas and grounds



- Key provisions:
 - Sections 80 to 84 and 99, 2004 Act
 - Selective Licensing of Houses (Additional Conditions) (England) Order 2015
 - Selective Licensing of Houses (Additional Conditions) (Wales) Order 2006
- Areas?
 - Either *the* area of the LHA's district or *an* area in its district
- Grounds (conditions)?
 - For England and Wales, two general conditions -
 - area is, or is likely to become, one of **low housing demand**
 - area is experiencing a significant and persistent problem caused by **anti-social behaviour**, that some or all PRS landlords are failing to combat
 - Note: General conditions do not require relatively high proportion of properties in PRS

The power to designate: provisions, areas and grounds



- Grounds (conditions)?
 - For England, four additional conditions, all of which require a relatively high proportion of properties in the PRS, that are let on assured tenancies or licences
 - Housing conditions
 - Migration
 - Deprivation
 - Crime
 - For Wales, two additional conditions -
 - **Renewal area** declared, or **certain housing assistance** given
 - Relatively **high proportion (25% minimum)** of properties in PRS

The power to designate: pre-conditions, approval, confirmation etc



- Same pre-conditions apply under Part 3 as under Part 2, when LHAs exercise power to designate an area for selective licensing (see slide on pre-conditions for additional HMO licensing, above, and section 81, 2004 Act)
- As under Part 2, LHAs have the same obligation to **consult and consider representations** about the designation proposal: section 80
- For effect, designations require either **general approval or confirmation**: section 82
- LHAs in **Wales** have general approval for any selective licensing designations they make: *The Housing Act 2004 (Selective Licensing) (Wales) General Approval 2007*
- In **England** Secretary of State now gives only limited general approval (see over)
- Same provisions apply in respect of the **duration, review, revocation and notification** of selective licensing designations as apply to additional HMO licensing designations under Part 2, and **duties owed by LHAs** are identical, save for the duty obliging LHAs to satisfy themselves about the need to exercise Part 1 functions

Approval, confirmation and guidance



- Since 1 April 2015 **General Approval** applies only to selective licensing designations in England that, whether singly or jointly -
 - cover no more than 20% of LHA's geographical area, or
 - affect no more than 20% of privately rented homes in LHA's area
- See *The Housing Act 2004: Licensing of HMOs and Selective Licensing of Other Residential Accommodation (England) General Approval 2015*
- For all other designations in England, Secretary of State's confirmation is needed
- Non-statutory guidance:
 - *Selective licensing in the private rented sector – A guide for local authorities*
 - Applications for confirmation will have to **set out rationale** for adopting a large scale designation
 - Local authorities will need to provide “**robust evidence** to support the reasons for making the decision.”

Approval, confirmation and guidance



- Further ...

“59. ... the Secretary of State will take into account in deciding whether to confirm a scheme, the **robustness** of the proposed measures to ensure compliance. In particular, the Secretary of State will expect to be assured there are systems in place to monitor compliance, and enforcement measures are in place where there is non-compliance. He will also take account when considering confirmation of a new scheme whether there has been **sufficient compliance** with other licensing schemes operating in the local housing authority area.

60. It is important that licensing schemes that exist are **robustly enforced** and if a local housing authority is unable to show compliance this will cast doubt on its ability to ensure compliance with the application scheme.”

Successful designation under Part 2, 2004 Act



- Evidence and rationalise the designation properly
 - **Use statutory provisions as a guide**, create a checklist, and ensure that each item - including each of the statutory pre-conditions, above - is covered
 - Take **no shortcuts**: Secretary of State expects robust evidence to support and justify large designations
- Consult lawfully
 - See the slides below: **Consultation** is a cornerstone of lawful designation
- Make an accessible and cogent case for confirmation
 - **Make DLUHC life easy**: Structure (summary, headings, sub-headings, tables etc), contents, pagination, plain English, conciseness, evidence in appendices
 - **Emphasise LHA record** of licensing implementation and enforcement; and the **community offer** – what *extra* will selective licensing enable the LHA to offer the community (e.g. additional support for tenants, regular landlord training, discounted community services for licence holders etc)



Consultation

Consultation



- Remember the 4 *Sedley criteria*: *R v Brent LBC, ex parte Gunning* (1985) 84 LGR 168
 - consultation must occur at a time when proposals are still at a formative stage
 - sufficient reasons must be given, to allow intelligent consideration and response
 - adequate time must be allowed for consideration and response
 - responses must be conscientiously taken into account
- *R (Peat) v Hyndburn District Council* [2011] EWHC 1739 (Admin)
 - Local authorities must identify with sufficient precision:
 - the proposed area(s) of designation;
 - details of the proposed licence conditions;
 - details of the proposed fee structure; and
 - the reasons for the introduction of selective licensing
 - Consultations about general principles will not be sufficient

Consultation



- *R (ota Regas) v Enfield LBC* [2014] EWHC 4173 (Admin) [2015] HLR 14
 - LHAs cannot aggregate periods of ‘listening and engagement’ with periods of actual consultation to meet the requirements of a General Approval
 - LHAs will need to – and should - consult those living and working outside of their area
- *R (Croydon Property Forum) v Croydon LBC* [2015] EWHC 2403 (Admin); [2015] LLR 812
 - Salutory lessons for LHAs, and a must-read for those embarking on licensing consultations
- Don’t lose heart -
 - Duty is to take **reasonable steps**, not every step, nor all steps, nor even all reasonable steps: see *Croydon Property Forum* above at [45]
 - Courts tend to be slow to intervene: see e.g. *R (ota Rotherham Action Group Ltd) v Rotherham MBC* [2015] EWHC 1216 (Admin); [2015] HLR 34



Questions



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