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## Licensing the private rented sector:

Aspects of mandatory, additional and selective licensing under the Housing Act 2004

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# Introduction



- Aspects of mandatory, additional and selective licensing under the Housing Act 2004
  - topical issues: consultation, fees, the licensable Part 3 house etc
  - recent case law
  - information exchange
- Don't turn off your phones!
- Take photos and tweet:
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# What's it all about?



- Broadly, concerned with improving condition and management of privately rented accommodation in local authority areas
- Requires 'landlords' of privately rented accommodation:
  - in HMOs meeting prescribed, statutory descriptions;
  - in HMOs meeting a local authority-prescribed description in local-authority designated areas;
  - in other houses meeting a local authority-prescribed description in local authority-designated areas,

to obtain and comply with a **local authority licence** to let the accommodation

- The licence gives the local authority a degree of control, exercised by use of **licence conditions** and **penalties** for non-compliance
- Three separate licensing schemes: **mandatory**, **additional** and **selective licensing**
- Works in tandem with housing strategy and the **Housing Health and Safety Rating System**, **Empty Dwelling Management Orders** etc, also introduced by 2004 Act.

# What's it all about?



“[The Bill will] help to create a fairer and better housing market and to protect the most vulnerable in housing. Together with other Government measures on housing and planning, it will make a major contribution to achieving the aims of the sustainable communities plan. The Bill is big in vision, scope and size.

That is why we are determined to take action through the Bill to curb the activities of a rogue element by introducing much needed reforms to...the private rented sector...

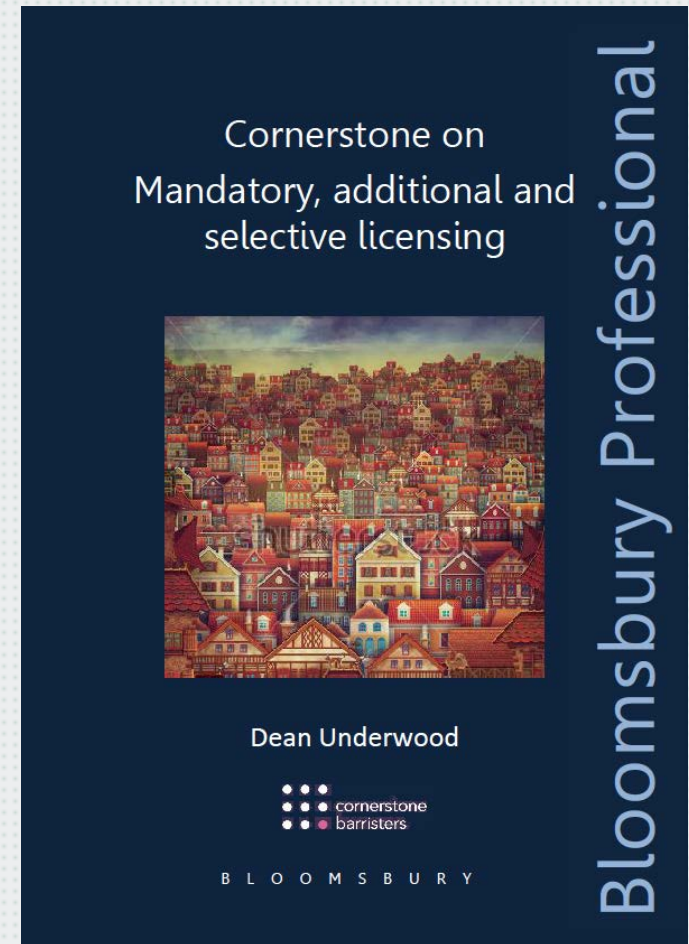
[The Bill will] give local authorities new powers selectively to license private landlords in such areas of low housing demand, or in other areas where there is a particular problem, perhaps of antisocial behaviour, for which licensing could be part of the solution. Local authorities will be able to set new and higher standards of management in such properties.”

Minister for Housing and Planning, Keith Hill MP, introducing the Bill for second reading  
[Hansard, 12.01.04, C.531, 536-537]

# What's it all about? ... A shameless plug



- A new book for your shelves ...
- Cornerstone on Mandatory, Additional and Selective Licensing
- Published by Bloomsbury Professional
- Part of the 'Cornerstone on ...' series
- Expected early 2018





## **Mandatory licensing**

Part 2, Housing Act 2004:

Licensing of houses in multiple occupation

# Mandatory licensing in overview



- Arguably, the most familiar licensing scheme – it is mandatory after all!
- In force for more than 11 years in England and Wales, since April 2006
- Governed by Part 2, Housing Act 2004
- Presently, restricted to larger HMOs which:
  - are 3 or more storeys high
  - contain 5 or more people in 2 or more households and
  - contain shared facilities such as a kitchen, bathroom or toilet
- Not quite that straightforward! ...and statutory exemptions apply
- Government intends to extend scope of mandatory licensing by removing storey criterion
- Licence required if HMO not exempt; with criminal sanctions in default

# Let's start at the very beginning ...



## 55 Licensing of HMOs to which this Part applies

- (1) This Part provides for **HMOs to be licensed** by local housing authorities where—
  - (a) they are HMOs to which this Part applies (see subsection (2)), and
  - (b) they are required to be licensed under this Part (see section 61(1)).
- (2) This Part applies to the following HMOs in the case of each local housing authority—
  - (a) any HMO in the authority's district which falls within any **prescribed description** of HMO,
  - (b) if an area is for the time being designated by the authority under section 56 as **subject to additional licensing**, any HMO in that area which falls within any description of HMO specified in the designation.
- (3) The appropriate national authority may by order prescribe descriptions of HMOs for the purposes of subsection (2)(a).
- (4) The power conferred by subsection (3) may be exercised in such a way that this Part applies to all HMOs in the district of a local housing authority.



# What is a house in multiple occupation?



- Familiar concept: traditional bedsit accommodation, shared houses etc
- Main form of housing in PRS for those on low income, students, foreign nationals
- Estimated to be about 463,000 HMOs in England
- Sections 77 and **254** to 259: **Meaning of “house in multiple occupation”**
  - (1) For the purposes of this Act a building or a part of a building is a “house in multiple occupation” if—
    - (a) it meets the conditions in subsection (2) (“**the standard test**”);
    - (b) it meets the conditions in subsection (3) (“**the self-contained flat test**”);
    - (c) it meets the conditions in subsection (4) (“**the converted building test**”);
    - (d) an HMO declaration is in force in respect of it under section 255; or
    - (e) it is a converted block of flats to which section 257 applies.

# What is a house in multiple occupation?



## The standard test

- (2) A building or a part of a building meets the standard test if–
- (a) it consists of one or more units of living accommodation **not** consisting of a **self-contained flat or flats**;
  - (b) the living accommodation is occupied by persons who do **not** form a **single household** (see section 258);
  - (c) the living accommodation is occupied by those persons as their **only or main residence** or they are to be treated as so occupying it (see section 259);
  - (d) their occupation of the living accommodation constitutes the **only** use of that accommodation;
  - (e) **rents are payable** or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
  - (f) two or more of the households who occupy the living accommodation **share** one or more basic amenities or the living accommodation is **lacking in one or more basic amenities**.

# What is a house in multiple occupation?



## The self-contained flat and converted building tests

- (3) A part of a building meets the **self-contained flat test** if—
  - (a) it consists of a self-contained flat; and
  - (b) paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat).
  
- (4) A building or a part of a building meets the **converted building test** if—
  - (a) it is a converted building;
  - (b) it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);
  - (c) the living accommodation is occupied by persons who do not form a single household;
  - (d) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it;
  - (e) their occupation of the living accommodation constitutes the only use of that accommodation; and
  - (f) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation.

# See further ...



- Section 255 to 256: for **HMO declarations** and their revocation
- Section 257: concerning the status of **converted blocks** of flats
  - broadly, applies to poorly converted blocks of flats in which less than two thirds of the flats are occupied by owners
- Section 258: for persons not forming a **single household**
- Section 259: for persons **treated as occupying** premises as their only or main residence

# Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006



## 3. Description of HMOs prescribed by the Secretary of State

- (1) An HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act where it satisfies the conditions described in paragraph (2).
- (2) The conditions referred to in paragraph (1) are that—
  - (a) the HMO or any part of it comprises **three storeys or more**;
  - (b) it is **occupied by five or more persons**; and
  - (c) it is occupied by **persons living in two or more single households**.

# Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006



- (3) The following **storeys** shall be taken into account when calculating whether the HMO or any part of it comprises three storeys or more—
- (a) any **basement** if—
- (i) it is used wholly or partly as living accommodation;
  - (ii) it has been constructed, converted or adapted for use wholly or partly as living accommodation;
  - (iii) it is being used in connection with, and as an integral part of, the HMO; or
  - (iv) it is the only or principal entry into the HMO from the street.
- (b) any **attic** if—
- (i) it is used wholly or partly as living accommodation;
  - (ii) it has been constructed, converted or adapted for use wholly or partly as living accommodation, or
  - (iii) it is being used in connection with, and as an integral part of, the HMO;

Continued ...

# Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006



... continued

- (c) where the living accommodation is situated in a part of a building **above business premises**, each storey comprising the business premises;
- (d) where the living accommodation is situated in a part of a building **below business premises**, each storey comprising the business premises;
- (e) any **mezzanine floor** not used solely as a means of access between two adjoining floors if—
  - (i) it is used wholly or mainly as living accommodation; or
  - (ii) it is being used in connection with, and as an integral part of, the HMO; and
- (f) any other storey that is used wholly or partly as living accommodation or in connection with, and as an integral part of, the HMO.

# The licence requirement



## 61 Requirement for HMOs to be licensed

- (1) Every HMO to which this Part applies must be licensed under this Part unless—
  - (a) a temporary exemption notice is in force in relation to it under section 62, or
  - (b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.
- (2) A licence under this Part is a licence authorising occupation of the house concerned by not more than a maximum number of households or persons specified in the licence.
- (3) Sections 63 to 67 deal with applications for licences, the granting or refusal of licences and the imposition of licence conditions.
- (4) The local housing authority must take all reasonable steps to secure that applications for licences are made to them in respect of HMOs in their area which are required to be licensed under this Part but are not. ....



# Extension of mandatory licensing



- Prime Minister's speech, May 2015, announced Government intention to, "crack down on unscrupulous landlords who cram houses full of illegal immigrants, by introducing a new mandatory licensing scheme."
- Paper, August 2015: *Tackling Rogue Landlords and Improving the Private Rented Sector*
- Consultation from November to December 2015:
  - *Extending mandatory licensing of Houses in Multiple Occupation (HMOs) and related reforms: a technical discussion document*
- Aim?
  - "... to make it easier for local authorities to raise standards in smaller HMOs where there is a need for improvement and identify the rogues who currently operate below the radar ..."
- Government response in October 2016 noted strong support for extending scope by:
  - removing storey criterion, so all HMOs occupied by 5 persons or more in more than one household are included; and including flats above and below business premises
- Further, intention to clarify by Regulations that the minimum room size of 6.5m<sup>2</sup> for sleeping accommodation applies to all HMOs

# Recent cases: Cohesive living lives on

## Nottingham City Council v Parr [2017] EWCA Civ 188



### Essential facts:

- 2 houses let to students
- Limited floor space in loft rooms
- Licence prohibited use of rooms for sleeping
- FTT allowed appeal
- Houses had enough shared space to counter bedrooms' size and, living "cohesively" students would use that space
- Condition in one licence varied: use as bedroom only by full-time student living there for 10m maximum
- UT upheld that condition on appeal and applied it to second house

### On appeal:

- Condition not outside ambit of s67: nothing inimical to HMO regime in investigating occupiers' characteristics
- Condition did not allow students to live in substandard accommodation. UT entitled to find that, with shared space, rooms were not substandard.
- Condition was not irrational. UT had not attempted to define "cohesive living" as a concept; and the regime was merely intended to ensure the *availability* of adequate facilities, not to compel occupiers to use them.

# Recent cases: a declared success for Hertfordshire Hertfordshire Council v Rohde [2016] UKUT 39 (LC)



## Essential facts:

- 1960s semi-detached house
- Inspection in 2014: 3 lockable bedrooms, occupied by three men
- HMO declaration made under section 255
- Rohde appealed to FTT
- FTT inspected in February 2015
- HMO found in poor condition, but lack of evidence of anyone living there
- FTT concluded: no evidence of occupation by more than 2 people on date of inspection
- Declaration revoked

## Held on appeal

- Aside from failing to consider and reverse LA's decision, FTT made decision solely on evidence obtained from inspection in February 2015
- Should have taken into account all evidence available to LA when it made declaration, as well as that obtained subsequently
- FTT also failed to consider the 'significant use' test in section 255, or the presumption (section 260) that the test is met unless the contrary is shown
- Declaration confirmed

# Not-so-recent cases



*London Borough of Islington v Unite Group plc* [2013] EWHC 508 (Admin) [2013] HLR 33

Westlaw UK summary:

For the purpose of deciding whether a HMO required a licence from the local authority under the Licensing of HMOs (Prescribed Descriptions) (England) Order 2006 Article 3, it was the HMO that had to comprise three storeys and not the building in which the HMO happened to be found. The Order was not intended to apply to purpose-built flats in tower blocks.

*Bristol City Council v Digs (Bristol) Limited* [2014] EWHC 869 (Admin) [2014] HLR 30

Westlaw UK summary:

The word "storey" in the Licensing of HMOs (Prescribed Descriptions) (England) Order 2006 Article 3 should ordinarily be understood as meaning the whole floor, namely the space on a given level within a building. Stairs between floors could not, in themselves, be "storeys" unless they were within Article 3(3)(f) because they were used as living accommodation, or were used as an integral part of the house in multiple occupation.



## **Additional licensing**

Part 2, Housing Act 2004:

Licensing of houses in multiple occupation

# Additional licensing in overview



- Part 2, Housing Act 2004 gives local authorities power to introduce licensing schemes for HMOs **not** covered by mandatory licensing
- Intended to target **poorly managed** HMOs and those whose occupants are **causing problems** to others in the community
- Whether a HMO is included in a scheme depends on the local authority designation, e.g.
  - Newham LBC included all HMOs in a borough-wide scheme, subject to statutory exemptions
  - Hounslow LBC included only HMOs of 2 or more storeys, occupied by 4 or more people in two or more households
- **Consultation** required before designation; and either General Approval or Secretary of State confirmation of designation
- Licence required if HMO falls within the designation: see section 61 (*ante*)
- About 1/3 of London local authorities running additional licensing schemes

# Back to the beginning ...



## 56 Designation of areas subject to additional licensing

- (1) A local housing authority may designate either—
  - (a) the area of their district, or
  - (b) an area in their district,

as subject to additional licensing in relation to a description of HMOs specified in the designation, if the requirements of this section are met.

- (2) The authority must consider that a significant proportion of the HMOs of that description in the area 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.

Continued ...

# Consultation requirements



...continued

- (3) Before making a designation the authority must—
  - (a) **take reasonable steps to consult** persons who are likely to be affected by the designation;
  - (b) **consider any representations** made in accordance with the consultation and not withdrawn.
- (4) The power to make a designation under this section may be exercised in such a way that this Part applies to all HMOs in the area in question.
- (5) In forming an opinion as to the matters mentioned in subsection (2), the authority must have regard to any information regarding the extent to which any codes of practice approved under section 233 have been complied with by persons managing HMOs in the area in question.
- (6) Section 57 applies for the purposes of this section.



# Further considerations: sections 57 and 58



- When exercising power under section 56, local authorities 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 private rented sector
  - 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.
- Designations require either **General Approval** or Secretary of State **confirmation**
- *The Housing Act 2004: Licensing of Houses in Multiple Occupation and Selective Licensing of Other Residential Accommodation (England) General Approval 2015*
  - In force on 1<sup>st</sup> April 2015 and revoked the 2010 General Approval
  - General Approval granted for additional licensing schemes, subject only to condition that the local authority has consulted persons likely to be affected by them, under section 56(3)(a), for not less than 10 weeks.

# Duration, review and revocation



- Section 60 of the 2004 Act
- 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
- Local authorities must **from time to time review** the operation of the designation
- Local authorities may revoke a designation following a periodic review

# Not-so-recent cases



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

Westlaw UK summary:

A local authority's consultation on a proposal to designate the entire borough for additional licensing of houses in multiple occupation and selective licensing of private rented sector properties had been inadequate because it had not involved potentially interested parties in adjoining parts of the neighbouring boroughs and had not lasted long enough.

*R (East Midlands Property Owners Ltd) v Nottingham City Council* [2015] EWHC 747 (Admin)

Concerning fees (though not in respect of HMO licensing):

*R (Hemming (t/a Simply Pleasure Ltd)) v Westminster CC* [2015] UKSC 25 [2015] 2 WLR 1271



## **Selective licensing**

Part 3, Housing Act 2004:

Licensing of other residential accommodation

# Selective licensing in overview



- Sections 79-81, Housing Act 2004 give local authorities power to introduce selective licensing schemes for **other houses falling outside of Part 2**
- Originally intended to address the impact of poor quality private landlords in areas of **low housing demand**; and **anti-social tenants**
- Conditions for introducing scheme now extended by **2015 Regulations**
- *But* borough-wide schemes no longer approved generally
- **Consultation is required** before designation, as with additional licensing
- In designated areas, private landlords must obtain a licence
- Enforcement action available in default of a licence or attainment of acceptable management standards

# When does Part 3 apply?



## 79 Licensing of houses to which this Part applies

- (1) This Part provides for **houses** to be licensed by local housing authorities where—
  - (a) they are houses to which this Part applies (see subsection (2)), and
  - (b) they are required to be licensed under this Part (see section 85(1)).
- (2) This Part applies to a house if—
  - (a) it is **in an area that is for the time being designated** under section 80 as subject to selective licensing, and
  - (b) the whole of it is occupied either—
    - (i) under a single tenancy or licence that is not an exempt tenancy or licence under subsection (3) or (4), or
    - (ii) under two or more tenancies or licences in respect of different dwellings contained in it, none of which is an exempt tenancy or licence under subsection (3) or (4).

Continued ...

# When does Part 3 apply?



- (3) A tenancy or licence is an **exempt** tenancy or licence if —
  - (a) it is granted by a non-profit registered provider of social housing,
  - (b) it is granted by a profit-making registered provider of social housing in respect of social housing (within the meaning of Part 2 of the Housing and Regeneration Act 2008), or
  - (c) it is granted by a body which is registered as a social landlord under Part 1 of the Housing Act 1996 (c. 52).
- (4) In addition, the appropriate national authority may by order provide for a tenancy or licence to be an **exempt** tenancy or licence—
  - (a) if it falls within any description of tenancy or licence specified in the order; or
  - (b) in any other circumstances so specified.
- (5) Every local housing authority have the following **general duties**—
  - (a) to make such arrangements as are necessary to **secure the effective implementation** in their district of the licensing regime provided for by this Part; and
  - (b) to ensure that all **applications** for licences and other issues falling to be determined by them under this Part are **determined within a reasonable time**.

# The licence requirement



## 85 Requirement for Part 3 houses to be licensed

- (1) **Every Part 3 house must be licensed** under this Part unless—
  - (a) it is an HMO to which Part 2 applies (see section 55(2)), or
  - (b) a temporary exemption notice is in force in relation to it under section 86, or
  - (c) a management order is in force in relation to it under Chapter 1 or 2 of Part 4.
- (2) A licence under this Part is a licence authorising occupation of the house concerned under one or more tenancies or licences within section 79(2)(b).
- (3) Sections 87 to 90 deal with applications for licences, the granting or refusal of licences and the imposition of licence conditions.
- (4) The **local housing authority must take all reasonable steps** to secure that applications for licences are made to them in respect of houses in their area which are required to be licensed under this Part but are not so licensed.



# Flats in common ownership: just one licence?



- Consider sections 79 and 99
- What is the Part 3 house requiring a Part 3 licence?
  - Does Part 3 *mandate* that it comprises all non-excluded flats in common ownership,
  - or does the LHA have a *choice* to license non-excluded dwellings either individually or collectively?
- No easy answer: *Tuitt v Waltham Forest LBC* [2017] EWHC (...) Admin
- Practice varies nationwide
- Issue remains unresolved .... so, watch this space!

# Designation of selective licensing areas



## 80 Designation of selective licensing areas

(1) A local housing authority may designate either–

- (a) the **area of their district**, or
- (b) an **area in their district**,

as subject to selective licensing, if the requirements of subsections (2) and (9) are met.

(2) The authority must consider that–

- (a) the **first or second set of general conditions** mentioned in subsection (3) or (6), or
- (b) **any conditions specified in an order** under subsection (7) as an additional set of conditions,

are satisfied in relation to the area.

# Designation of selective licensing areas



## First set of general conditions: areas of low housing demand

- (3) The **first set of general conditions** are—
  - (a) that the area is, or is likely to become, an area of **low housing demand**; and
  - (b) that making a designation will, when combined with other measures taken in the area by the local housing authority, or by other persons together with the local housing authority, contribute to the improvement of the social or economic conditions in the area.
- (4) In deciding whether an area is, or is likely to become, an area of low housing demand a local housing authority must take into account (among other matters)—
  - (a) the value of residential premises in the area, in comparison to the value of similar premises in other areas which the authority consider to be comparable (whether in terms of types of housing, local amenities, availability of transport or otherwise);
  - (b) the turnover of occupiers of residential premises;
  - (c) the number of residential premises which are available to buy or rent and the length of time for which they remain unoccupied.
- (5) The appropriate national authority may by order amend subsection (4) by adding new matters to those for the time being mentioned in that subsection.

# Designation of selective licensing areas



## Second set of general conditions: anti-social behaviour

- (6) The **second set of general conditions** are—
- (a) that the area is experiencing a significant and persistent problem caused by **anti-social behaviour**;
  - (b) that some or all of the private sector landlords who have let premises in the area (whether under leases or licences) are failing to take action to combat the problem that it would be appropriate for them to take; and
  - (c) that making a designation will, when combined with other measures taken in the area by the local housing authority, or by other persons together with the local housing authority, lead to a reduction in, or the elimination of, the problem.

*“Private sector landlord”* does not include a non-profit registered provider of social housing or a registered social landlord within the meaning of Part 1 of the Housing Act 1996 (c. 52).

# Designation of selective licensing areas



## Additional sets of conditions and consultation

- (7) The appropriate national authority may by order provide for any conditions specified in the order to apply as an **additional set of conditions** for the purposes of subsection (2).
- (8) The conditions that may be specified include, in particular, conditions intended to permit a local housing authority to make a designation for the purpose of dealing with one or more specified problems affecting persons occupying Part 3 houses in the area.  
  
*“Specified”* means specified in an order under subsection (7).
- (9) Before making a designation the local housing authority must—
  - (a) **take reasonable steps to consult** persons who are likely to be affected by the designation; and
  - (b) **consider any representations made** in accordance with the consultation and not withdrawn.
- (10) Section 81 applies for the purposes of this section.

# Further considerations, duration etc



- By section 81, the same **further considerations** apply under Part 3 as under Part 2, when local authorities exercise power to designate an area for additional licensing (see Additional Licensing, Further considerations)
- For effect, the designation requires either **General Approval or confirmation**: section 82
- The same provisions apply in respect of the **duration, review and revocation** of selective licensing designations as apply to additional licensing designations: section 84
- Provisions governing the **making, grant and refusal** of applications for licences and related fitness and 'suitability of management arrangements' tests correspond broadly with those for additional licensing: sections 87 to 88

# Selective Licensing of Houses (Additional Conditions) (England) Order 2015/977



## 3. Conditions specified for the purposes of section 80(2)(b) of the 2004 Act

- (1) The following conditions are specified as **additional conditions** for the purposes of section 80(2)(b) of the 2004 Act, which a local housing authority must consider are satisfied in relation to the area before making a selective licensing designation under this provision—
  - (a) that the area contains a **high proportion of properties in the private rented sector**, in relation to the total number of properties in the area;
  - (b) that the properties referred to in sub-paragraph (a) are occupied either under **assured tenancies or licences** to occupy; and
  - (c) that **one or more of the sets of conditions** in articles 4 to 7 is satisfied.
- (2) For the purposes of this article, a property shall not be regarded as being in the private rented sector where the landlord is a private registered provider of social housing, as defined by section 80 of the Housing and Regeneration Act 2008.

# The first set of conditions: housing conditions



## 4. Conditions in relation to housing conditions

The first set of conditions is—

- (a) that having carried out a review of housing conditions under section 3(1) of the 2004 Act, the local housing authority considers it would be **appropriate for a significant number of the properties referred to in article 3(1)(a) to be inspected**, with a view to determining whether any category 1 or category 2 hazards exist on the premises;
- (b) that the local housing authority **intends to carry out such inspections** as referred to in paragraph (a), with a view to carrying out any necessary enforcement action; and
- (c) that making a **designation will**, when combined with other measures taken in the area by the local housing authority, or by other persons together with the local housing authority, including any licence conditions imposed under section 90 of the 2004 Act, **contribute to an improvement in general housing conditions in the area**.



# The second set of conditions: migration



## 5. Conditions in relation to migration

The second set of conditions is—

- (a) that the area has recently experienced or is experiencing an **influx of migration** into it;
- (b) that a **significant number of the properties** referred to in article 3(1)(a) are **occupied by those migrants** referred to in paragraph (a); and
- (c) that making a **designation will**, when combined with other measures taken in the area by the local housing authority, or by other persons together with the local housing authority, **contribute to**—
  - (i) the preservation or improvement of the social or economic conditions in the area; and
  - (ii) ensuring that the properties referred to in article 3(1)(a) are properly managed, and in particular, that overcrowding is prevented.

# The third set of conditions: deprivation



## 6. Conditions in relation to deprivation

(1) The third set of conditions is—

- (a) that the area is suffering from a high level of deprivation, which affects a significant number of the occupiers of properties referred to in article 3(1)(a); and
- (b) that making a designation will, when combined with other measures taken in the area by the local housing authority, or by other persons together with the local housing authority, contribute to a reduction in the level of deprivation in the area.

(2) In determining whether an area is suffering from a high level of deprivation, the local housing authority may have regard to the following factors in relation to the area—

- (a) the employment status of adults;
- (b) the average income of households;
- (c) the health of households;
- (d) the availability and ease of access to education, training and other services for households;
- (e) housing conditions;
- (f) the physical environment; and
- (g) levels of crime.

# The fourth set of conditions: crime



## 7. Conditions in relation to crime

The fourth set of conditions is—

- (a) that the area suffers from **high levels of crime**;
- (b) that the criminal activity **affects those living in the properties** referred to in article 3(1)(a), **or other households** and businesses in the area; and
- (c) that making a **designation will**, when combined with other measures taken in the area by the local housing authority, other persons together with the local housing authority or by the police, **contribute to a reduction in the levels of crime** in the area, for the benefit of those living in the area.

# Approval, confirmation and guidance



- From 1 April 2015, **General Approval** requires local authorities to obtain Secretary of State confirmation for any selective licensing scheme either:
  - covering more than 20% of their area or
  - affecting more than 20% of privately rented homes in their area
- New, 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 scheme
  - 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.”

# Recent cases: Breach of duty is no reasonable excuse

## Thanet DC v Grant [2015] EWHC ... Admin



- Failure to obtain a licence for a licensable HMO
- Successful defence to prosecution under section 95(1):
  - LA's failure to comply with duty to take all reasonable steps to secure that licence applications were made in respect of houses in a licensing area (in particular, failure to adequately publicise the scheme to defendant) gave defendant a reasonable excuse under section 95(4)
- Appeal by way of case stated
- Appeal allowed:
  - Duty under section 85(4) not focused on any relevant landlord
  - It is a targeted duty; not a duty to each and every landlord in the area
  - Breach of duty might impact on assessment of whether defendant had a reasonable excuse, but would not necessarily furnish him with one
  - Court erred in finding that LA had failed to communicate with defendant

# Recent cases: The relevance of planning

## Waltham Forest LBC v Khan [2017] UKUT153 (LC)



### Essential facts:

- Borough-wide selective licensing scheme
- K, professional landlord
- Converted 2 properties into flats
- No planning permission
- Applied for a Part 3 licence
- Licences granted for 1 year
- K expected to regularise planning position within the year
- On appeal, FTT held: planning compliance irrelevant to licensing
- Licences extended to 5 years

### Held on appeal:

- FTT wrong to hold K's compliance with planning requirements irrelevant to licensing
- In light of selective licensing aims, not possible to hold otherwise
- Concerns of licensing and planning control overlapped
- Legitimate for LHA to consider planning status when considering licence application and terms
- Permissible to refuse to determine application until position regularised



# 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
  - cannot aggregate periods of ‘listening and engagement’ with periods of actual consultation
  - may need to consult outside of local authority area
- Don’t lose heart: courts tend to be slow to intervene. See:
  - *R (ota Rotherham Action Group Ltd) v Rotherham MBC* [2015] EWHC 1216 (Admin); [2015] HLR 34



# Licence applications and conditions

# The licence application: sections 63 and 87



- Application for a licence must:
  - be made to the local authority **in accordance with its specified requirements**; and
  - be accompanied by the application **fee**
- When fixing the fee, local authorities may take into account all costs incurred in:
  - carrying out functions under Part 2 or, as the case may be, Part 3; and
  - carrying out functions under Chapter 1 of Part 4 in relation to HMOs or, as the case may be, Part 3 houses (so far as not recoverable under Chapter 1, Part 4)
- See further:
  - Licensing and Management of HMOs (Additional Provisions) (England) Regulations 2007/1093
  - Licensing and Management of HMOs and other houses (Miscellaneous Provisions)(England) Regulations 2006/373
  - *R (ota Hemming (t/a Simply Pleasure Ltd)) v Westminster CC* [2015] UKSC 25 [2015] 2 WLR 1271

# The licence fee: sections 63 and 87



## Section 63

- (1) An application for a licence must be made to the local housing authority.
- (2) The application must be made in accordance with such requirements as the authority may specify.
- (3) The authority may, in particular, require the application to be accompanied by a fee fixed by the authority.
- (4) The power of the authority to specify requirements under this section is subject to any regulations made under subsection (5).
- (5) The appropriate national authority may by regulations make provision about the making of applications under this section.
- (6) Such regulations may, in particular– .....
  - (d) specify the maximum fees which are to be charged (whether by specifying amounts or methods for calculating amounts);
  - (e) specify cases in which no fees are to be charged or fees are to be refunded.
- (7) When fixing fees under this section, the local housing authority may (subject to any regulations made under subsection (5)) take into account–
  - (a) all costs incurred by the authority in carrying out their functions under this Part, and
  - (b) all costs incurred by them in carrying out their functions under Chapter 1 of Part 4 in relation to HMOs (so far as they are not recoverable under or by virtue of any provision of that Chapter).

## Section 87

In identical terms (save that the expression 'Part 3 houses' appears in lieu of 'HMOs' in sub-section (7)(b))

# The licence fee: one fee or split fee?



- *R (ota Hemming (t/a Simply Pleasure Ltd)) v Westminster CC* [2015] UKSC 25
- Provision of Services Regulations 2009 give effect to Council Directive 2006/123/EC - concerns provision of services in European internal market and procedures by which authorisation to carry out services granted
- Regulations 18(2) and (4):
  - procedures and formalities of authorisation scheme must not be dissuasive or unduly complicate or delay provision of service to which they relate;
  - fee charged for authorisation must be reasonable;
  - must be a proportionate relationship between fee and cost of authorisation procedures; and
  - fee cannot exceed a proportion of the cost of the authorisation procedures
- Type B fee (one up-front fee for all applicants, inc. costs of running scheme) struck down
- Type A split fee approved ... but is this permissible under Housing Act 2004; and what is the effect of a failure to pay?

# Grant or refusal: sections 64 and 88



## 64 Grant or refusal of licence

- (1) Where an application in respect of an HMO is made to the local housing authority under section 63, the **authority must either**—
  - (a) **grant** a licence in accordance with subsection (2), or
  - (b) **refuse** to grant a licence.
  
- (2) If the authority are satisfied as to the matters mentioned in subsection (3), they may grant a licence either—
  - (a) to the applicant, or
  - (b) to some other person, if both he and the applicant agree.

## 88 Grant or refusal of licence:

subsections (1) and (2) concerning Part 3 houses are in corresponding terms

Continued ...

# Grant or refusal: the sub-section (3) matters



- Under **Part 3**, the local authority must grant a licence if:
  - the proposed licence holder is a **fit and proper person** to be the licence holder **and the most appropriate person** to be the licence holder;
  - the proposed manager of the house is either the person having control of the house, or a person who is an agent or employee of the person having control of the house; and is a fit and proper person to be the manager of the house; and
  - the proposed management arrangements for the house are otherwise satisfactory.
- Under **Part 2**, the local authority must grant a licence if:
  - the above conditions are satisfied; and
  - the house is reasonably suitable for occupation by not more than the maximum number of households or persons mentioned in subsection (4) or that it can be made so suitable by the imposition of conditions under section 67.
- Subsection (4)? Maximum number is that specified in the application or by the local authority



# Other matters ...



- Grant and refusal of licences:
  - test as to 'suitability for multiple occupation' under Part 2: section 65
  - tests for fitness and satisfactory management arrangements: sections 66 and 89
  - licence conditions (mandatory and discretionary): sections 67 and 90
  - general requirements and duration: sections 68 and 91
  - variation and revocation: sections 69 and 70; 92 and 93
  - appeals against licence decisions: sections 71 and 94 and Schedule 5

# Required licence conditions: Schedule 4



## 1 Conditions to be included in licences under Part 2 or 3

- (1) A licence under Part 2 or 3 must include the following conditions.
- (2) Conditions requiring the licence holder, if gas is supplied to the house, to produce to the local housing authority annually for their inspection a gas safety certificate obtained in respect of the house within the last 12 months.
- (3) Conditions requiring the licence holder—
  - (a) to keep electrical appliances and furniture made available by him in the house in a safe condition;
  - (b) to supply the authority, on demand, with a declaration by him as to the safety of such appliances and furniture.
- (4) Conditions requiring the licence holder—
  - (a) to ensure that smoke alarms are installed in the house and to keep them in proper working order;
  - (b) to supply the authority, on demand, with a declaration by him as to the condition and positioning of such alarms.
- (5) Conditions requiring the licence holder to supply to the occupiers of the house a written statement of the terms on which they occupy it.

## 2 Additional conditions to be attached to licences under Part 3

A licence under Part 3 must include conditions requiring the licence holder to demand references from persons who wish to occupy the house.

# Licence characteristics: sections 68 and 91



## 91 Licences: general requirements and duration

- (1) A licence may not relate to more than one Part 3 house.
- (2) A licence may be granted before the time when it is required by virtue of this Part but, if so, the licence cannot come into force until that time.
- (3) A licence—
  - (a) comes into force at the time that is specified in or determined under the licence for this purpose, and
  - (b) unless previously terminated by subsection (7) or revoked under section 93, **continues in force for the period that is so specified or determined.**
- (4) That period **must not end more than 5 years** after—
  - (a) the date on which the licence was granted, or
  - (b) if the licence was granted as mentioned in subsection (2), the date when the licence comes into force.

# Licence characteristics: sections 68 and 91



- (5) Subsection (3)(b) applies even if, at any time during that period, the house concerned subsequently ceases to be a Part 3 house or becomes an HMO to which Part 2 applies (see section 55(2)).
- (6) A licence **may not be transferred to another person**.
- (7) If the holder of the licence dies while the licence is in force, the licence ceases to be in force on his death.
- (8) However, during the period of 3 months beginning with the date of the licence holder's death, the house is to be treated for the purposes of this Part as if on that date a temporary exemption notice had been served in respect of the house under section 86.
- (9) If, at any time during that period ("the initial period"), the personal representatives of the licence holder request the local housing authority to do so, the authority may serve on them a notice which, during the period of 3 months after the date on which the initial period ends, has the same effect as a temporary exemption notice under section 86.
- (10) Subsections (6) to (8) of section 86 apply (with any necessary modifications) in relation to a decision by the authority not to serve such a notice as they apply in relation to a decision not to serve a temporary exemption notice.



# Enforcement and Penalties

# Enforcement and penalties



- **Failure to license** a property under Parts 2 and 3 is an offence: sections 72(1) and 95(1). Maximum fine was £20,000 but is now unlimited.
- A person having control of- or managing a **HMO** licensed under Part 2 commits an offence if he knowingly permits another to occupy the house and the house becomes **occupied by more persons or households** than is authorised: section 72(2).
- **Failure to comply with the licence conditions** is an offence: sections 72(3) and 95(2). Maximum was fine £5,000 per offence but is now unlimited.
- Defences limited: “**reasonable excuse**”, sections 72(5) and 95(4)
- **Revocation of licence** (as person may no longer be fit and proper)
- **Rent repayment orders**: sections 73 and 96
- **Restrictions** on tenancy termination: sections 75 and 98

# Recent case law on selective licensing



- *R (Regas) v Enfield LBC* [2014] EWHC 4173 (Admin) [2015] HLR 14
- *R (Croydon Property Forum Ltd) v Croydon LBC* [2015] EWHC 2403 (Admin)
- *R (Rotherham Action Group Ltd) v Rotherham MBC* [2015] EWHC 1216 (Admin) [2015] LLR 575

..... and concerning licence fees:

- *R (Hemming (t/a Simply Pleasure Ltd)) v Westminster CC* [2015] UKSC 25 [2015] 2 WLR 1271



## Through the crystal ball

What next in additional and selective licensing?



# The crystal ball



- What does the future hold?
- More additional and selective licensing schemes expected
- Easier to implement additional and selective licensing in small, targeted, geographical areas
- More difficult to implement borough-wide additional and selective licensing schemes
  - note the Guidance requirement for 'robust' evidence to justify any future borough-wide scheme
- Blocks in common ownership: one licence for the block, or one for each flat within?
- Disputes concerning new conditions for selective licensing; and the proportionality of fee increases, designed to cover the scheme and enforcement costs?

# Useful sources of information

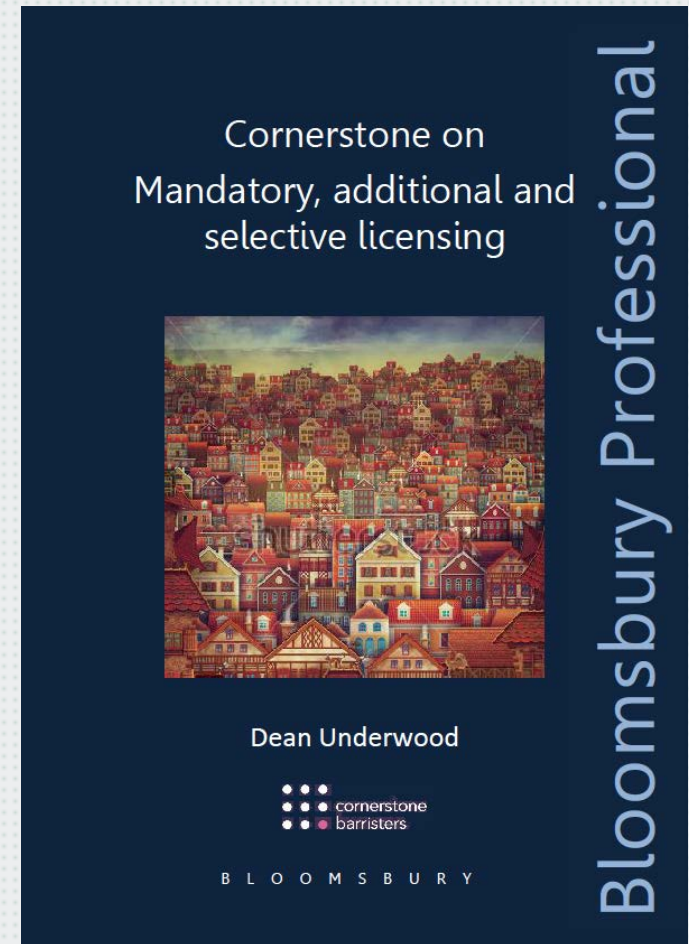


- [Housing Act 2004 Explanatory Notes](#)
- [Review of property conditions in the private rented sector](#), DCLG, February 2014
- [Selective licensing in the private rented sector: a guide for local authorities](#), DCLG, March 2015
- [Selective licensing of privately rented housing](#), House of Commons Library, March 2015
- [HMOs England and Wales](#), House of Commons Library, July 2017

# And don't forget ...



- A new book for your shelves ...
- Cornerstone on Mandatory, Additional and Selective Licensing
- Published by Bloomsbury Professional
- Part of the 'Cornerstone on ...' series
- Expected early 2018





cornerstone



barristers

## Licensing the private rented sector:

Aspects of mandatory, additional and selective licensing under the Housing Act 2004

Dean Underwood