

ADDENDUM B

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Friday 9th January 2015

Dear Sir/Madam,

Islington – Proposals for an Additional Licensing Scheme for Houses in Multiple Occupation (HMOs).

I am writing on behalf of the Residential Landlords' Association (RLA), to make representations in response to the Council's proposal to designate an HMO additional licensing scheme in Islington.

The RLA objects to the proposed designation, on the following basis:

1. **The fee structure and the projected budget may be contrary to the European Services Directives and the ruling of the *Hemming (t/a Simply Pleasure) Limited v Westminster City Council* Court of Appeal case**

The decision of the Court of Appeal in the Westminster Sex Shop Fees case (*Hemming (t/a Simply Pleasure) Limited v Westminster City Council*¹) has radically altered the landscape so far as fixing fees for regulatory authorisations such as for HMO and selective licensing is concerned.

The court case looked at the way in which the European Services Directive (ESD) operates to curtail the ways in which domestic UK legislation provides for fees to be charged by local authorities to landlords for such licences.

When setting licensing fees the following principles should now apply:

- The Council cannot include the costs of enforcing the licensing scheme against unlicensed landlords in the licence fee. This is prohibited by the ESD.
- A Council can only charge for HMO licensing for :
 - The actual and direct administrative costs of investigating the background and suitability of the landlord applicant; and,
 - The cost of monitoring the compliance by licensed landlords with the terms of their licences.

¹ <http://cases.icr.co.uk/Subscr/search.aspx?path=WLR%20Dailies/WLRD%202011/wlr2013-203>

- Fees must be reasonable and proportionate.
- Under the ESD the fee must not exceed the cost of the authorisation procedures and formalities together with the monitoring costs (for licensed landlords).
- The Council can require an application to be accompanied by a fee fixed by the local authority. This is provided for under the Housing Act 2004 which stipulates that the Council, in fixing the fee, may take into account all costs incurred by the authority in carrying out their licensing functions. Importantly, however, the ESD curtails these powers.
- Surpluses and deficits for previous years in relation to permitted elements for which a fee can legitimately be charged can be carried forward, although this is questionable in the case of a standalone scheme, i.e. for discretionary licensing. Surpluses and deficits cannot be carried forward in respect of elements which are not properly chargeable.
- Fees can only cover the actual cost of the application process (plus monitoring); i.e. only the cost of processing the application and monitoring can be charged.
- Set up charges for the scheme cannot be recovered.
- Overheads and general administrative costs cannot be recovered. This means that the running and capital costs of the relevant council department cannot be charged as part of the fee.
- Fees can only be charged for the procedures themselves; i.e. steps which are followed in processing the application for a licence or for its renewal (plus monitoring of the licence holder) which means that the administrative costs involved for vetting applications and for monitoring compliance with licence terms.
- The Council is not allowed to make a profit.
- A formula can be used to set charges so long as it is based on the cost of the actual authorisation process (plus monitoring costs).

The Council must act lawfully and in accordance with any guidance given to it by the Court as to how the fee is to be determined. If it is necessary as a result for the Council to re-determine a fee then the same principles apply in relation to the re-determination.

Furthermore, it was always clear that costs associated with enforcing the Housing Health and Safety Rating System which operates alongside licensing could not be recovered via licensing fees.

A number of local authorities charge extra fees if an application is submitted late. This has always been highly questionable as a disguised penalty but it would appear that this would now be largely outlawed by the ESD. Discounted fees are often allowed for early applications. It may now have to be shown that the normal application fee is no more than the actual processing cost so that fees for an early application would have to be genuinely discounted. However, any discounts for applicants in the first year of the scheme may not be permissible as per the ESD.

It should also be noted that any element of the fee that cannot be recovered must fall on the Council Tax payer, i.e. the Council's general fund; not the general body of licensed landlords.

The ESD also deals with the time to be taken in processing applications. It requires local authorities to publically state the time to be taken to process the application. There is provision for extending the time limit in a case involving complexity. Subject to this if the authority failed to process the application within the stated time then the applicant can automatically assume that the application is granted.

Finally, should Islington Council chose to ignore the ESD and implement a HMO additional licensing scheme based on a proposed budget that does not adhere to the ESD, any impermissible overcharge can be recovered by way of a claim for restitution. The time limit for such a claim is six years and the normal three month time limit which applies to judicial review does not apply in this instance. As part of the process the Council may have to re-determine what is a reasonable charge in line with any guidance given by the Court. The amount overpaid will then have to be calculated. Giving credit by way of carry forward does not apply to an impermissible overcharge so it has to be refunded. Interest is payable in addition.

2. The RLA has a number of general concerns about mandatory licensing

The RLA has several areas of concern in regards to HMO additional licensing, namely;

- i. Worrying trends are emerging in the case of discretionary licensing. Licensing entails a huge bureaucracy and much time, effort and expense is taken up in setting up and administering these schemes; rather than spending it on the ground and flushing out criminal landlords.
- ii. Increasingly, discretionary licensing is being misused to fund cash strapped housing enforcement services. The recent Westminster sex shop Court of Appeal (*Hemming (t/a Simply Pleasure) Limited v Westminster City Council*) has brought such funding into question (see paragraph 1).
- iii. Discretionary licensing is not being used for its intended purpose of a short period of intensive care; rather it is being used by the back door to regulate the PRS.
- iv. The level of fees which are ultimately passed on to tenants to pay is a major worry so far as it affects landlords.
- v. Despite high fee levels local authorities still lack the will and resources to properly implement licensing.
- vi. Little has been done to improve property management. Opportunities to require training have been ignored. As always it has become an obsession with regard to physical standards with very detailed conditions being laid down. No action is taken against criminal landlords.
- vii. We believe that a significant number of landlords are still operating under the radar without being licensed.
- viii. As always it is the compliant landlord who is affected by the schemes. They pay the high fees involved but do not need regulation of this kind.

- ix. Licensing is not being used alongside regeneration or improvement of the relevant areas. Insufficient resources are being employed to improve the areas.
- x. Where areas are designated for additional or selective licensing this highlights that they can be "sink" areas. This could well mean it would be harder to obtain a mortgage to buy a property in these areas.
- xi. Schemes are not laying down clear objectives to enable decisions to be made whether or not these have been achieved. Proper monitoring is not being put into place to see if schemes are successful or not.
- xii. There is little use of "fit and proper person" powers to exclude bad landlords.

3. RLA critique of Islington Council Additional HMO Licensing consultation documents and proposals

The RLA commends Islington Council in their objectives to improve living standards of under-performing properties, and limiting the scheme to two roads may improve chances of proposals succeeding. However, the RLA questions the methodology presented in consultation documents and the current level of enforcement throughout the area.

Consultation documents state that mandatory licensing is not being enforced properly: how can the Council be confident the scheme will work when enforcement of mandatory licensing is ineffective?

- In the "HMO Street Survey Report 1" consultation document on page 3, the Council says that they found six HMOs "whose owners were breaking the law by operating without a licence as required by the existing mandatory licensing scheme".
 - o This calls into question enforcement throughout the district. If the scheme is intended to improve standards, how will this be enforced and subsequently carried out? The Council should look to resolve issues of enforcement before implementing any further requirements.
 - o Can the council provide an outline as to why proposals will improve the sector or these properties in question?

On Page 1 of the "Additional Licensing Scheme FAQs" consultation document the council state: "Licensing places more emphasis on landlord to come forward and meet requirements through the licensing process. It also criminalises those landlords who do not licence and enables the council to focus its full range of powers on those criminal landlords."

RLA Response:

- What about an Additional HMO licensing scheme will compel criminal landlords to register when nationally mandatory licensing has not (see above)?
- Criminal landlords are exactly that because they operate outside of the law. Good landlords who wish to provide quality accommodation will sign up to this scheme whilst the criminals operate unabated while the council goes through administration of licensing applications.
 - o There is no clear methodology on enforcement of licensing, giving further confidence to criminal landlords to operate without licences.

The council doesn't appear to know how many HMOs are in the area, but has already assessed a large number of properties that require improvements. While this is good work by the council, it would make more sense for the council to improve these properties before moving onto other unknowns under the pretence that there could be issues.

Other specific issues that the RLA has found within the consultation documents include:

Fees: The RLA feels that the fees proposed are far too high for the scheme described. The RLA estimates that the scheme will generate anywhere from between £500,000 and £1million. This money can only be used for administration of licensing fees, and with the low level and quality of enforcement evident in Islington, this seems unnecessary for a licensing scheme limited to two roads within the Borough.

Conditions: The consultation documents regarding expected conditions are not only confusing but also onerous.

- Proposed kitchen conditions exemplify these critiques: the terminology around 'exclusive use' is confusing and other conditions go beyond legislation.

Best practice and minimum standards should be expected but the consultation documents presented as proposals for the basis of the scheme are overly complicated.

4. Conclusion

The RLA is opposed to the proposed HMO additional licensing scheme for the reasons outlined in this response. However, the Association is very keen to work with Islington Council to promote accreditation and the Landlord Forum to local landlords, and would welcome further dialogue with the Council on this issue.

I look forward to the Council's thorough consideration of the RLA's response.

Yours faithfully,

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