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Monday 23 December 2013

Dear Sir/Madam,

QUEENSGATE – A proposed Selective Licensing Scheme for HMOs in Burnley

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 selective licensing scheme in Burnley.

Summary

The RLA has a number of general concerns about licensing

The RLA has several areas of concern in regards to selective 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 activity; rather it is being used by the back door to regulate the PRS for the sake of exercising control.

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 or selective 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.
- 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.

Finally, should Burnley Council chose to ignore the ESD and implement a selective licensing scheme in Queensgate 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. Selective licensing is ineffective at reducing incidents of anti-social behaviour

Landlords are not directly responsible for the behaviour of their tenants, and attempting to impose a licensing scheme on them to resolve anti-social behaviour will not work.

As a House of Commons briefing note recently stated, "As a general rule, landlords are not responsible for the actions of their tenants as long as they have not 'authorised the anti-social behaviour. Despite having the power to seek a court order for eviction when tenants exhibit anti-social behaviour, private landlords are free to decide whether or not to take action against their tenants. The question of whether a landlord can be held liable for the nuisance of its tenants has been considered in a number of cases."³

The paper continues, "It is established that no claim can be sustained in nuisance where the nuisance is caused by an extraordinary use of the premises concerned, for example by the tenants being noisy or using drugs on the premises. The rationale behind this approach is that it is up to the victim of the nuisance to take action against the perpetrator. To found an action in negligence against a landlord the victim must show that there has been a breach of a duty of care owed by the alleged perpetrator."

The briefing paper also notes the court decision of *O'leary v London Borough of Islington*⁴ case, in which, "...it was held that a term to enforce nuisance clauses could not be implied into a tenancy agreement. This indicates that landlords cannot be sued for breach of contract unless there is an express term in the tenancy agreement that obliges him or her to "take all reasonable steps to

³ "Anti social neighbours in private housing" (2013) House of Commons Library, p.3, para.1.1. [SOURCE: <http://www.parliament.uk/briefing-papers/SN01012>]

⁴ *Ibid*, p.3, para.1.1.

selective licensing itself add anything extra? We believe not, other than to superimpose an expensive bureaucracy.

6. Monitoring

Not only are no outcomes specified but there is no suggestion of any kind of effective monitoring for the success or otherwise of the scheme. In relation to selective licensing scheme in Leeds we worked closely with officers of Leeds City Council to put in place monitoring agreeing with them on various measures for example, improvements in property values and increases in rental levels. They put in place a control area which was the most appropriate area to monitor the same measures to give some idea of the achievements as a result of selective licensing. Clearly, the Council seems to have ambitions to extend selective licensing but unless there are proper defined outcomes and monitoring it would seem hard to justify an extension if you failed to measure the effectiveness of the current proposals should they be implemented.

7. Size of the Areas

Although we have objections in principle to the concept we would consider that if the scheme is likely to succeed then it needs to be confined to a small area. We are always concerned with the danger that areas are too large simply to secure a larger fee income for landlords. It would seem far more sensible to concentrate on just one area if the scheme is to be introduced in the first instance rather than dissipate resources which the Council admits are scarce across a wider area. This is particularly important because of the Council's apparent inability to provide additional resources and deal with matters such as environmental improvements.

8. Displacement effect

We believe that there is a very real likelihood that those who are excluded from the area as a result of these measures will simply be displaced into other areas and that the problems which the Council say are apparent in this area will be transferred elsewhere to the detriment of the residents of those areas.

9. Comments on the consultation documents

Below is the RLA's review of the Burnley Borough Council's Queensgate Selective Licensing consultation document.

#	Paragraph number & Consultation document quotation	RLA critique
1	48. The Council proposes designate a Selective Licensing area in the Queensgate area of Burnley because the area is, or is likely to experience low housing demand and the local authority is satisfied that 'designating' the Queensgate area will, when	The Council are unclear what they mean with the phrase "...lead to improved social, economic, and environmental conditions'.

		<p>are part of the private rented sector.</p> <p>The RLA wonders what will be done with the empty homes within the area that do not belong to private landlords? Will the council charge itself for mismanaging properties?</p>
5.	67. These figures are supported by Council Tax data. 259 homes of all homes in Queensgate were empty in 2012. This figure represents a fall of 7.5% (24 homes) from 2011.	The falling level of empty properties demonstrates that this factor does not support the designation.
6.	70. Within the proposed Queensgate selective licensing boundary, which covers property outside of the "old" Queensgate ward, 259 of the homes are empty; 15.7% of the homes in the area. In this area homes are more likely to remain empty for longer. 81 homes (31.3%) had been empty for 6 months to 2 years, and 68 (26.3%) empty for more than two years.	It is confounding that the Council would target private landlords with high licence rates to provide housing in an area of such distinct need. Charging landlords such high rates for licenses will result in costs being passed onto tenants who may not be able to afford inflated fees. This will not help reducing the number of empty properties.
7.	71. The profile of the housing stock in the Queensgate ward means that the residents are disproportionately likely to be living in low-value homes.	The council is assuming that its housing stock is of a poor quality. In Newham, similar fears led to the local authority introducing draconian licensing measures across the entire borough. However, the RLA has been informed by the Council that in the eleven months that the scheme has been operating they have found a private rented sector that has higher standards than was previously envisaged. In other words, predetermined fears have not matched the reality of the situation.
8.	73. It is well documented how house prices in Burnley, particularly inner Burnley, have been consistently some of the lowest in the country.	Council proposals for Selective Licensing do not make it clear how this will solve the issue with empty homes and poor standards. The argument is that Selective Licensing will improve the quality of homes but with the selective licensing fees it will create additional costs to prospective owners/buyers thus negating the point of selective licensing enticing

		suggest it is 'likely' that private rented tenants will live in homes with hazards; there is no indication that this is a certainty.
13.	95. Latest figures for Queensgate show the high number of complaints the council has had to deal with relating to properties being open to access (211); defective premises (83); accumulations on domestic property (702) – usually fly tipped backyards; and ASB and dog related complaints. Mapping these incidents and the private rented home sin the area shows that many of these complaints emanate from poorly managed private rented homes.	As mentioned in paragraph 1, it is very difficult for landlords to control the behaviour of their tenants. Defective premises also rank as the lowest 'Enviro-crime' recorded after dogs, which could easily be attributed with ASB related concerns expressed by residents, suggesting that private landlords are actually not as culpable as the report suggests regarding the quality of homes.
14.	96. As previously outlined, Burnley ranks as the 11th most deprived district out of the 354 districts in England. The three lower super output areas within the Queensgate boundary rank as the 2,866th, 5,516th and 6,268th most deprived areas out of 26,593 super output areas in the country.	This statistic makes it appear much less of an issue of landlords and a issue for the area as a whole. Implementing Selective Licensing in much more affluent areas has been met with hostility and the Burnley proposed fees are very high prompting a question of why the scheme is being proposed in the first place. Incentives to invest should be emphasised rather than restrictions and increased economic burdens.
15.	103. The proportion of households in Queensgate ward that are comprised of a single adult aged between 16 and 34 years of age is 7.3% with that for the Borough at 4.8%, this figure is in line with that for the North West (4.7%). In total, 20% of all single person households in the three LSOAs have a single adult between 16 and 34.	Since when can landlords via selective licensing be required to introduce a second adult into a property? This smacks of social engineering.
16.	104. This is an important factor to be considered in the light of the Selective Licensing proposal. Such a concentration of single person younger adult households is usually associated with the private rented sector and a higher level of turnover of stock/tenancies. It is also potentially very important given recent changes to the Housing Benefit system, which have capped the maximum amount of benefit payable to single person households where the tenant is aged between 25 and 34 years of age.	Flexibility and affordability are key facets of the private rented sector. These social conditions are a fact of life and the PRS is meant to cater for this kind of occupier. Where are the tenants meant to live if they are not provided for through PRS provision. Additionally, if Burnley wants to emphasise a modern economy it will have to cater

		and demands. Providing this accommodation, rather than restricting it through selective licensing schemes, is imperative.
21.	121. Selective licensing can make a valuable contribution to the creation of clean and safe neighbourhoods and the strategic plan contains the specific action to "Improve condition and management systems across the private rented sector".	<p>Whilst this is an admirable objective, selective licensing does not promise any such outcome. Charging already compliant and professional landlords to continue to do their jobs will exacerbate the economic difficulties that many tenants may be experiencing because costs may ultimately be passed down to them.</p> <p>Additionally, criminal landlords who flout the law will avoid inspections and check-ups while good landlords continue to face the scrutiny of officers that have to show something is being done.</p>
22.	122. Under the Council's overarching vision are a series of objectives including to "make the Borough a place of choice" and "prompting transformational economic change for Burnley". are supported by the <u>Council's proposal for Selective Licensing in Queensgate will help achieve these objectives by reducing the impact of the private rented sector in the area and making it a more attractive place to live.</u>	<p>There is strange wording in this point. It would be appreciated if there was clarity for what the Council means when they say 'reducing the impact of the private rented sector in the area and make it more attractive place to live'. This is a sinister phrase. It smacks of using selective licensing to make life as difficult as possible for PRS landlords without any kind of justification. Is it the intention of the Council to drive PRS out of these areas? This is how it reads despite the protestations to the contrary elsewhere in the consultation document.</p> <p>Does this mean to say that the private rented sector makes Queensgate an unattractive place to live? It is widely known that a large majority of people rely on privately rented accommodation to supply their need of flexible and affordable accommodation. If the Council are as keen on having a 'modern economy'</p>

	borough.	over from not paying license fees to drive competition up by improving homes and living conditions. The consultation document refers to a reduced level of ASB in the area.
26.	132. The Council are clear that the private rented sector has a central role to play in meeting housing need across the borough. As owner occupation becomes increasingly more difficult to achieve it is not an option or indeed the choice for everyone. As we see a significant rise in the number of households choosing to rent privately from 9.26% in 2001 to 17.7% in 2011 (Census 2001 & 2011) it is crucial that this sector can offer a decent alternative to owner occupation or social rented housing.	The PRS is certainly one option that needs to be maximised when looking to cater to the housing needs of an expanding population and homelessness is a massive issue. However, the shortage of suitable social housing and increased regulatory and economic pressures (for example, selective licensing) on private landlords creates disincentives to invest in a sector that would otherwise be beneficially for the tenants, council and landlords alike. Each £1 spent on a licence fee is £1 less to spend on the property.
27.	136. Tackling empty homes has been an intrinsic part of the Council's wider housing strategy to address low demand for many years and is highlighted as a key priority in the Pennine Lancashire Housing Strategy. The vacant property section of this document sets out the challenges faced by the borough and there are a number of strategic initiatives that the Council use to address the problem, ranging from information and advice through to enforcement.	Incentivising investment in the PRS could be a more attractive option to potential and existing landlords than increased regulation and cost. Buy to let mortgages and other breaks to landlords could create an area of high demand for landlords creating 'decent' homes for all target groups.
28.	143. Selective Licensing will support this strategic priority by ensuring that the private rented sector makes a positive contribution to a sustainable mixed tenure neighbourhood that offer a range of housing options for current and future residents of the Borough.	This point looks to be supportive of the PRS while the rest of the document (specifically point 122.; point 22 in the table) look to 'reduce the impact of the PRS'.
29.	144. The Council have long held the view that a positive relationship with the private rented sector is of mutual benefit to both parties and residents of the borough. Through programmes to tackle empty homes, prevent homelessness, address issues of low demand and improve housing standards the Council have worked with the private rented sector to strengthen this partnership and deliver effective solutions.	The RLA fosters these sorts of relationships and encourages them wherever possible (see the RLA Local Authority Network for proof of this), and commends Burnley Council for their hard work.
30.	145. To achieve this aim the Council supports the Private Rented Sector Forum that meet periodically to discuss issues of particular relevance to the sector and the Council also organise bi-annual Landlord evenings to engage with the wider sector, update	It is safe to assume that the landlords that attend these meetings are invested and engaged and can be considered to be providing a

		subjected to high fees and enforcement proposals are suffering for the actions of criminal minority.
35.	168. Whilst the number of accredited landlords continues to grow in Burnley, our experience shows that accreditation attracts a limited number of only those landlords that already provide appropriate management standards and are motivated to improve the standards and reputation of the private rented sector.	Using this stream of logic, surely one could expect these (good!) landlords to adhere to selective licensing while other landlords flout the law and continue to provide poor quality housing.
36.	169. Whilst we see GLAS and the Private Rented Sector Forum as important schemes to work with landlords and improve standards it does not have an intensive impact in any one area of the Borough, nor does it tackle the worst privately rented properties, as due to the voluntary nature the worst landlords will not engage with the Council or join the scheme. Experience shows that it is resource intensive to encourage the poorer landlord to join accreditation and when asked to make improvements due to its voluntary nature many landlords fail to comply showing that accreditation cannot tackle the worst standards of property condition and management practices within Burnley.	Creating more incentives to join the program could see numbers rise positively. Rather selective licensing is a 'catch-all' that arguably will not 'catch' the actual criminal landlords that do not engage.
37.	172. Through Selective Licensing designation landlords will attend development days which cover all aspects of property management including property condition. Through training, advice and support landlords will recognise what improvements need to be made to their properties reducing the need for action under the HHSRS (Housing Health and Safety Rating Scheme)	This sounds an awful lot like training that could be supported through more beneficial and pointed accreditation? Will the sessions be mandatory? Are there penalties for not attending? There needs to be more clarity on this.
38.	180. There is no guarantee that landlords, especially the worst, will join the scheme and the council cannot compel them to do so. As with Management Orders the scheme does not address poor management practices as the landlord does not gain experience, advice or training during the lease meaning that once handed back management standards will once again be unsatisfactory.	Non-compliant landlords can be dealt with using existing powers without having to compel compliant landlords to join a licensing scheme.
39.	182. The alternative options do not compel a landlord to address tenant behaviour or ensure landlords seek references when allocating properties. The current selective licensing scheme has proved successful in tackling anti-social behaviour and ensuring problem tenants do not move within the designation area. Landlords will be able to continue to access advice and support from the Council to deal with problematic tenant behaviour.	Though the Council will offer advice they should look to implement a tenant referencing system. Otherwise it can be assumed that the Council is not considering all options to help landlords as fully as possible. Furthermore, the second sentence is suggestive of discrimination as tenants with anti-social behaviour tendencies should be

10. *Freedom of Information* request

In view of the lack of information on Burnley's proposed budget for the proposed HMO additional licensing scheme, and the concerns outlined in paragraph 1, I would be very grateful if you could provide me with a full breakdown of the proposed budget for the scheme under the auspices of *Freedom of Information* protocol.

11. Conclusion

The RLA is opposed to the proposed HMO additional licensing scheme for the reasons outlined in this response. However, the Association is keen to work with Burnley Borough 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,

[REDACTED]
Policy Director
Residential Landlords' Association

Email: [REDACTED]