FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BC/HMK/2018/0001**
Property	:	**240 New North Road, Ilford, Essex IG6 3BS**
Applicant	:	**Abrar Khan**
Representative	:	**Patrick McMorrow (Barrister)**
Respondent	:	**London Borough of Redbridge**
Representative	:	**Nick Ham (Barrister)**
Type of application	:	**Appeal against the terms of an HMO licence – Section 64 and Part 3 of Schedule 5 to the Housing Act 2004**
Tribunal member(s)	:	**Ruth Wayte (Tribunal Judge)** **Sue Coughlin MCIEH**
Date and venue of hearing	:	**20 April 2018 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**27 April 2018**

DECISION

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Decision of the tribunal

(1) The Respondent is directed to vary the terms of the licence to reduce the number of persons permitted to occupy the house to 7 and extend the period to 29 November 2022 (5 years from the original date of issue).

The application

1. This is an appeal against the decision by the Respondent to limit the period of the licence to 1 year to enable the Applicant to obtain the relevant planning permission. In particular, since the house had been considered reasonably suitable for occupation by 7 households and 10 persons, planning permission would be required as that number of residents would require a *sui generis* class of use. By way of contrast, a maximum of 6 residents would fall within the current permitted development provisions set down by the borough as a C4 or small HMO class of use.

2. The application was made on 14 January 2018. The grounds of appeal challenged the need for planning permission as there was no evidence of a material change of use from C4 or breach of planning permission. The appellant also raised an issue in relation to the cost of the licence on this basis, which would require 5 payments of £1,000 over five years, rather than a single payment of the same amount to cover the full 5 year period.

The Law

3. Part 2 of the Housing Act 2004 introduced a new scheme for the licensing of HMOs by local housing authorities. A licence authorises occupation of the HMO by not more than the maximum number of households or persons specified in it (section 61). That number is determined by reference to prescribed standards which usually refer to the number, type and quality of kitchens, bathrooms and laundry facilities (section 65). There is also provision for the licence to include such conditions as the local housing authority consider appropriate for regulating the management, use and occupation of the house concerned (section 67).

4. Where an application in respect of an HMO is made to the local authority it must either grant or refuse the licence (section 64). The duration is for a maximum of 5 years (section 68).

5. Any appeal against licence decisions is covered by the provisions in Schedule 5, Part 3. In particular, paragraph 34 states that the appeal is to be by way of a re-hearing, may be determined having regard to

matters of which the authority was unaware and the tribunal may confirm, reverse or vary the authority's decision.

The hearing

6. At the hearing, the applicant was represented by barrister Patrick McMorrow, who produced a skeleton argument shortly before the hearing started. The respondent was represented by Nick Ham, a barrister, with witnesses Gary Wallace and Wayne Jackson in attendance. No objection was made to the applicant's skeleton argument, although the respondent clarified at the outset that their case was that even where current use is not in breach of planning permission, the authority should be entitled to consider likely breaches as its discretion as to the duration of the licence was unfettered.

7. No request was made for an inspection of the property and the tribunal did not consider it was necessary to determine the application.

The applicant's case

8. The appellant bought the property in a derelict condition and carried out refurbishment works under permitted development rights. The works included a single storey extension, chimney removal and loft conversion and conversion of the property from C3 residential use by a single household to a C4 small HMO. The property now has 7 bedrooms but is currently occupied by 6 tenants within the C4 classification.

9. Mr McMorrow's central point was that the respondent had erred in restricting the licence to 1 year on the grounds that the property was in breach of planning legislation. He submitted that planning permission was only required where there had been a material change of use as set out in the planning guidance to the Town and County Planning (Uses Classes) Order 1987. That was not the case here and the appellant had no intention of breaching planning permission. The respondent had simply applied a blanket policy assuming that the property would require permission without carrying out any assessment or consideration of the individual merits of the appellant's case, including whether there would be a material change of use due to the number of people in occupation.

10. The case of *Waltham Forest v Khan* [2017] UKUT 153 which was relied on by the respondent to support a grant for one year did not apply here. That case involved clear and continuing breaches of planning which had not been resolved at the time the applicant applied for an HMO licence. The respondent's policy appeared to reflect this decision, stating at paragraph 4.4.4 that the "*Council will issue one year licences where the property is operating in contravention of planning legislation.*" That policy could not apply where there was no breach

and it was wrong in principle to base a decision on the possibility of a potential breach in the future.

11. Finally, the appellant pointed out there was no consistency by the respondent on this point. He had identified at least three other HMO properties in the borough which had been granted 5 year licences without planning permission. These were all at or around the same time as the licence granted in this case. In all the circumstances the respondent had acted unreasonably in restricting this licence to one year.

12. The appellant confirmed that the property was currently occupied by 6 tenants. Some had overnight guests from time to time and he was keen to ensure that his licence and fire certificate covered the same number of people that might be staying at the property at any one time. There was general agreement that this use did not require planning permission. He also objected on principle at being asked to pay £5,000 over 5 years based on the council's approach of granting a one year licence, when the fee should actually have been £1,000 for 5 years.

<u>The respondent's case</u>

13. The respondent filed three witness statements in accordance with the directions issued on 25 January 2018: Gary Wallace, Housing Standards Team Manager who had met with the appellant as required by the directions in an attempt to reach agreement; Wayne Jackson, Senior Housing Standards Officer who had inspected the property and advised on the terms of the licence and Hannah Parker, Team Leader Enforcement and Appeals. Ms Parker had made a very short statement exhibiting a small section of the planning legislation but had not dealt with the appellant's arguments as to material change of use. Ms Parker was released by her counsel before the start of the hearing and was therefore unable to expand on her evidence or be asked any questions by either the appellant or the tribunal. Later attempts to contact her to ask if she could return were unsuccessful. That meant that her evidence was of limited use.

14. Mr Jackson dealt with the respondent's approach to the application. Redbridge's application form does not contain any questions as to the number of households applied for or queries in relation to planning permission. Their approach is to visit the property, undertake an inspection and provide the owner with advice and a schedule of works to ensure that the property would be compliant with the regime for HMOs. He assessed the property was suitable for occupancy by 7 households and a maximum of 10 people. However, he advised the applicant that any HMO property with 7 or more occupants would require planning permission as a large HMO. In the circumstances he gave the applicant two options: limit the number of occupants to 6 and obtain a 5 year licence or issue a one year licence for the maximum occupancy entitlement. In either case if the applicant obtained planning permission for a large HMO, the licence could be varied as to

the number of people or the duration at no extra cost (provided permission was obtained within the year for the second option).

15. Under cross-examination he explained that Redbridge had changed its policy in 2017 to limit licences with planning issues to one year in order to have better join up with its planning department. He considered that a year would be sufficient to determine a planning application but when pressed confirmed he wasn't aware of any large HMOs being given permission by Redbridge.

16. Mr Wallace dealt mainly with the other properties which had been given 5 year licences around the same time as the appellant's application despite planning issues. In one case a property which had been refused permission for a *sui generis* change of use was nevertheless granted a 5 year licence for 7 households and 10 people. He was clear that this and any others were mistakes.

17. The tribunal asked what would happen at the end of the first year if the applicant had not applied for planning permission. The answer was that he would need to make a fresh application and provided nothing had changed, it would be likely that he would receive a new licence for another year. Unless an inspection found a breach and enforcement action was taken, he conceded that this could happen in perpetuity. The council would receive an annual fee but take the risk that the property could be occupied by up to 10 people, albeit in breach of planning permission.

18. Mr Ham reiterated in closing that the local authority had a broad discretion as to the duration of any licence, up to maximum of 5 years. The authority's guidance did not limit that broad discretion, it just gave examples of when a licence would be limited to one year. That meant that even if the council could not show a breach of planning permission at the outset, it could take planning into account when deciding how long the licence should last as the most prudent curse of action where there could be a breach in the future. Although he conceded *Khan* had different facts, it was an authority in terms of planning being a relevant consideration and that to limit the duration of a licence in the face of planning concerns was a reasonable and rational decision in all the circumstances.

19. Although neither witness was a planning expert, they both accepted that there was a grey area between 7 and 8 persons in terms of whether there had been a material change of use from 6 occupiers which was clearly covered by C4 and classification as a large HMO. In response to this concession, the appellant offered an agreement to a licence limited to 7 people, reflecting the number of rooms. The respondent was unable to agree to such a variation at the hearing in the absence of anyone from the planning department.

The tribunal’s decision

20. As stated above, the tribunal’s powers on an appeal against a decision of a local housing authority to refuse a licence are to confirm, reverse or vary the decision. The tribunal may direct the authority to grant a licence to the applicant on such terms as it directs. It is entitled to take account of matters of which the local authority were unaware but should not disregard entirely the local authority’s decision (*Dhugal Clark v Manchester City Council* [2015] UKUT 0129.

21. The difficulty in this case is the apparent disconnect between the provisions for HMO licensing set out in the 2004 Act and planning law. As stated by the respondents, they must grant a licence if it meets the standards set out in the Act and there are no other objections in respect of the landlord, none of which applies here. On the face of it any requirement for planning can only be considered by reference to the duration of the licence, as conditions under section 67 would appear to relate to the manner of occupation as opposed to the number in occupation. In reaching this determination the tribunal wondered whether section 65(2) may assist. That provides that an authority may decide that a property “*is not reasonably suitable for occupation by a particular maximum number of households or persons even if it does meet prescribed standards for occupations by that number of households or persons*.” However, this point was not put to the parties at the hearing and is not relied upon in this determination.

22. Although *Khan* was a case involving selective licensing under Part 3 of the 2004 Act and a clear breach of planning permission, the tribunal accepts that it is relevant to this case in so far as it provides support for a local authority to have regard to planning when considering the issue of licenses under the Housing Act 2004. In particular, the tribunal accepts that as stated at paragraph 48: “*The authority has a discretion over the duration of each licence it grants and there is no automatic entitlement to a period of five years. Where there are grounds to believe that the application requires but does not have planning permission the grant of a shorter period is a legitimate means of procuring that an unlawful use…is discontinued or regularised*”.

23. That said, the appellant’s argument is that he does not need planning permission at all, either because the number of occupiers is within C4 use or any small increase of that number would not amount to a material change of use. Given the agreement by the appellant to a limit of 7 people, reflecting the number of bedrooms in the property, the tribunal determines that would be a pragmatic and just solution to the apparent conundrum of a licence being issued which may lead to a planning problem.

24. The tribunal is aware that 7 occupiers would appear to put the property outside class C4 based on the evidence provided by Hannah Parker. However, both parties agree that any change of use has to be material and that there is a grey area between 6 and 8 people. In the

circumstances the tribunal considers that the risk of breach of planning law is low and in these circumstances the licence should also be varied to allow a 5 year duration, concerns as to planning being the only issue raised by the respondents in support of their original decision to limit the term.

Name:	Ruth Wayte	**Date:**	27 April 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).