FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00FY/HML/2024/0001**
Property	**:**	**Unit 2, 85 Arnold Road, Nottingham, NG6 0EE**
Applicant	**:**	**Nottingham's Homeless Housing Limited**
Respondent	**:**	**Nottingham City Council**
Type of Application	**:**	**Appeal in respect of conditions imposed on the grant of a House in Multiple Occupation Licence under paragraph 31 of Schedule 5 to the Housing Act 2004**
Tribunal Members	**:**	**Judge M K Gandham** **Mr A McMurdo MCIEH**
Date of Hearing	**:**	**5 September 2024**
Date of Decision	**:**	**9 October 2024**

DECISION

Decision

1. The Tribunal varies, as detailed in the Schedule hereto, conditions 5 and 25 of the Licence of House in Multiple Occupation for the Property known as Unit 2, 85 Arnold Road, Nottingham, NG6 0EE. The other conditions and term of the licence are not varied.

Reasons for Decision

Introduction

2. By an application received on 19 April 2024, Mr Alex Pridmore, the Chief Executive of Nottingham's Homeless Housing Limited ('the Applicant'), applied to the First-tier Tribunal, under paragraph 31(1) of Schedule 5 to the Housing Act 2004 ('the Act'), to appeal against conditions contained in a Licence of House in Multiple Occupation dated 13 March 2024 ('the Licence').

3. The Licence was issued by Nottingham City Council ('the Respondent') in respect of the property known as Unit 2, 85 Arnold Road, Nottingham, NG6 0EE ('the Property'). The Property was described in the application form as having twelve studio rooms, a large communal kitchen and a small support office.

4. Mr Pridmore had made an application for an HMO licence in respect of the Property on 5 October 2022 and the Respondent had carried out an inspection of the Property on 1 February 2023.

5. Following correspondence between the parties, the Respondent had been satisfied that the test in section 64(3) of the Act had been met and served notice of its proposal to grant a licence on 7 July 2023.

6. After considering representations from the Applicant regarding conditions proposed on the licence, the Respondent served notices proposing to grant modified licences on 5 October 2023 and 19 December 2023. Further representations were made by the Applicant on 2 January 2024. On 13 March 2024, the Respondent confirmed that it did not accept these further representations and the Licence was granted with certain conditions.

7. The appeal related to conditions 5, 13, 25, 26 and 31 of the Licence together with the term of the Licence, which had been limited to 12 months by the Respondent.

8. The Tribunal issued substantive directions on 8 May 2024 and received a bundle from each of the parties, together with an Additional Response from the Applicant. The Tribunal did not carry out an inspection of the Property and a hearing was held remotely, via CVP, on 5 September 2024.

The Law

9. The statutory framework for the imposition of conditions on an HMO licence are

set out in sections 64 and 67 of the Act. Section 64(3)(a) of the Act confirms that an authority may grant a licence if they are satisfied:

> *"that 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"*

And Section 67(1) of the Act provides as follows:

> *"A licence may include such conditions as the local housing authority consider appropriate for regulating all or any of the following—*
> *(a) the management, use and occupation of the house concerned, and*
> *(b) its condition and contents."*

10. Schedule 5 to the Act deals with procedural requirements and appeals. Paragraph 31 of Schedule 5 deals with the right to appeal and states as follows:

> *"(1) The applicant or any relevant person may appeal to the appropriate tribunal against a decision by the local housing authority on an application for a licence—*
> *(a) to refuse to grant the licence, or*
> *(b) to grant the licence.*
>
> *(2) An appeal under sub-paragraph (1)(b) may, in particular, relate to any of the terms of the licence."*

And paragraph 34 sets out the tribunal's powers:

> *"(1) This paragraph applies to appeals to the appropriate tribunal under paragraph 31 or 32.*
>
> *(2) An appeal—*
> *(a) is to be by way of a re-hearing, but*
> *(b) may be determined having regard to matters of which the authority were unaware.*
>
> *(3) The tribunal may confirm, reverse or vary the decision of the local housing authority.*
>
> *(4) On an appeal under paragraph 31 the tribunal may direct the authority to grant a licence to the applicant for the licence on such terms as the tribunal may direct."*

Hearing

11. Mr Pridmore attended the hearing on behalf of the Applicant and the Applicant was represented by Mr Sajjad Jaffer. The Respondent was represented by Miss Sabina Bashir, a solicitor employed by the Respondent, and Mr Matthew Gilmour, the Principal Licensing and Compliance Officer for the Respondent.

The Submissions

Conditions on the Licence

12. The Tribunal noted, prior to the hearing, that although the Applicant had appealed five of the conditions on the Licence (conditions 5, 13, 25, 26 and 31), the grounds of appeal appeared to relate to lack of clarity around those conditions which the Respondent, in its bundle, appeared to have explained. The Applicant's Additional Response, only referred to the term of the Licence.

Condition 5

13. The Applicant queried whether a portable appliance test (PAT) would satisfy the visual and physical test requirement detailed in this condition. The Respondent, in their bundle and at the hearing, confirmed that a PAT would inherently include a visual inspection of the appliance and so a PAT would meet the requirements of this condition.

14. Both parties agreed, at the hearing, that the inclusion of wording to confirm that a PAT would satisfy condition 5 was acceptable to them.

Condition 13

15. Although the Applicant, in its bundle, had queried the inclusion of the term "*as soon as is reasonably practicable*" in this condition, the Respondent confirmed that the condition did not require, nor refer to, all repairs that were requested as being treated as urgent; that it was for the licence holder to distinguish between urgent and low risk requests and allocate a reasonable timeframe for the works to be carried out.

16. At the hearing, Mr Jaffer confirmed that the wording was no longer disputed.

Condition 25

17. The Applicant's grounds of appeal submitted that the wording set out in condition 25 would mean providing tenants with exhaustive amounts of paper documentation at the outset of their tenancy. The Applicant suggested that it should, instead, be able to provide relevant policies and procedures via an electronic link.

18. In their written submissions, the Respondent confirmed that the provision of information was of benefit to the tenants and noted that condition 25 did not require the Applicant to provide printed copies of the documents. They confirmed that providing electronic links to documents was an alternative acceptable.

19. At the hearing, both parties confirmed that a variation to the wording to include that it included access via a link to digital documents would be acceptable. Mr Pridmore also confirmed that the Applicant could make a hard copy of the documents, or a means of access to digital versions of the documents, available for any occupants who would be unable to access the link personally.

Condition 26

20. The Applicant's objection to condition 26 related to its objection to condition 25. As such, Mr Jafffer confirmed at the hearing that, subject to the variation of condition 25 to include access to digital documents, the Applicant accepted the current wording of condition 26.

Condition 31

21. The Applicant objected to the wording in condition 31. It stated that the requirement to provide the authority with notice of unsubstantial changes would be overly burdensome and challenging to comply with. The Applicant suggested that only significant changes, such as changes in ownership or management arrangements, should be reported to the authority rather than small changes, such as contact details or change of personnel.

22. Although the Respondent did not refer to this condition in their written submissions, at the hearing, Mr Gilmour clarified that the references to "*manager*" in condition 31, and in the Licence generally, referred to a *manager of the house* for HMO licence purposes as referred to in the Act, not someone with general management duties.

23. Based on this, Mr Jaffer confirmed that the condition in it's current form was acceptable to the Applicant.

Term of the Licence

24. Mr Jaffer, on behalf of the Applicant, submitted that the Respondent's planning and licensing departments were two distinct machines which should not be conflated. He stated that the purpose of the licensing regime was to consider the suitability of properties as HMOs, taking into account the safeguarding of occupiers and maintenance of housing, and that any planning considerations were completely separate to this aim.

25. Mr Jaffer referred the Tribunal to the FTT's decision in *Lakatos v (1) Nottingham City Council and (2) Clarence Hotel Limited* Ref: BIR/00FY/HML/2018/0008, in which he stated that the planning class of the subject property was not considered at all.

26. Although the Respondent had referenced three decisions in its bundle which took planning into account – the decision of the Upper Tribunal in *London Borough of Waltham Forest v Khan* [2017] UKUT 0153 (LC) ('*Khan'*), and the First-tier Tribunal (FTT) decisions in *Oxford City Council v Parvizi* Ref: CAM/38UC/HML/2020/003) (*'Parvizi'*) and *London Borough of Waltham Forest v Malik* Ref: AB/LON/00BH/HML/ 2020/0005 ('*Malik*') – Mr Jaffer submitted that the present case was clearly distinguishable from all of these on the facts.

27. In relation to the *Khan* decision, Mr Jaffer stated that, unlike the subject property in that case, the Property had already received planning permission for a change

of use from commercial to residential. In addition, he stated that, as permission had already been granted for twelve residential flats, there could be no argument regarding over-intensive use of the land and, as the Respondent had been aware of the Property's use as an HMO for some time – as evidenced by a Council Tax Enquiry form dated 17 January 2019 contained within the Applicant's bundle – there were no public interest issues as there was in *Khan*.

28. In relation to the FTT's decisions in *Parvizi* and *Malik*, Mr Jaffer stated that, unlike the properties in those decisions, the Property already had a well-established, existing use as an HMO. He referred the Tribunal to the Occupancy Table and copy licence agreements included within the Applicant's bundle, which he submitted detailed occupancy and use as an HMO since May 2019.

29. As such, Mr Jaffer contended that, even if planning was a relevant consideration, due to the established use of the Property as an HMO, the Respondent would be unable to take any enforcement action because of the four-year rule limiting such action under section 191(2) of the Town and Country Planning Act 1990.

30. Mr Jaffer pointed to the fact that there was no legal requirement for regularisation of planning and no obligation on the Applicant to have to obtain a Certificate of lawfulness of existing use ('Existing Use Certificate'), under section 191(1) of the Town and Country Planning Act 1990, for the Property. He stated that, by limiting the term of the licence, the Respondent was *requiring* the Applicant to apply for the same, and bear the associated costs, which was an abuse of its powers.

31. If the Licensing department did want to have regard to planning considerations, Mr Jaffer stated that it should have considered the evidence submitted and noted that planning enforcement was highly unlikely due to the established use of the Property.

32. Mr Jaffer also referred to the time constraints in being able to obtain an Existing Use Certificate and whether a year would be sufficient to obtain the same, as it was unlikely that this would provide adequate time for resolving planning issues and ensuring compliance.

33. Finally, Mr Jaffer referred to the financial burdens that would be placed upon the Applicant by, not only having to make an application for an Existing Use Certificate but also having to re-apply for a licence after one year or for having to make an application to vary the licence once the planning issues had been dealt with.

34. In addition to the above, the Applicant's written submissions referred to the widespread adoption of selective licensing and high licensing fees charged by the Respondent and the importance of having better communication between businesses and local authorities, encouraged by the adoption of local enforcement plans as well as by the D2N2 Local Economic Partnerships 'Better Business Regulation' partnership, with whom the Respondent was affiliated.

35. On questioning by the Tribunal, Mr Pridmore confirmed that, since having an interest in the Property, the Applicant had not carried out any works to the same; that there were twelve units of accommodation, each of which contained a bathroom and kitchenette; that the occupiers also had shared used of a kitchen (with greater facilities, such as ovens) in the communal area and that, although the licence agreements in bundle referred to occupiers not carrying out food preparation other than in the designated kitchen, these were standard licence agreements and occupiers were able to use the kitchenettes within their individual units as well.

36. Mr Jaffer confirmed that, although occupiers were given licence agreements rather than tenancy agreements, previous occupiers had claimed that they occupied under a tenancy rather than a licence, and that the Applicant had previously had to apply for possession orders through the County Court.

37. In their written submissions, the Respondent agreed that licensing and planning were governed by distinct areas of legislation but confirmed that the local authority had not sought to enforce any aspect of planning through its licensing decisions.

38. The Respondent confirmed that it consulted the Planning department prior to determining the licencing application, who advised that, although the Property had received planning permission for C3 use (residential use), the Property did not have the correct permission for C4 (HMO) use. The Respondent stated that it could not ignore that the Property did not have planning permission to operate as an HMO and so a licence was granted for a limited time, to enable the Applicant to engage with the Planning department to resolve issues regarding the planning status of the Property.

39. The Respondent submitted that there was clear legal precedent, from both the Upper Tribunal and FTT decisions, confirming that planning status was a relevant consideration when determining whether to grant an HMO licence. The Respondent referred to the decision in *Khan*, where at paragraphs 47-48, Martin Rodger KC, the Deputy Chamber President had stated:

> *"I am satisfied that it is legitimate for a local housing authority to have regard to the planning status of a house when deciding whether or not to grant a licence and when considering the terms of a licence. It would be permissible for an authority to refuse to determine an application until it was satisfied that planning permission had been granted or could no longer be required. It would be equally permissible, where an authority was satisfied that enforcement action was appropriate, for it to refuse to grant a Part 3 licence, but as Waltham Forest points out that would make it difficult for a landlord to recover possession of the house and would expose him to prosecution for an offence which he would be unable to avoid by his own actions. The solution adopted by Waltham Forest of granting a licence for a short period to allow the planning status of the house to be resolved was, in those circumstances, a rational and pragmatic course which I accept was well within its powers.*

Nor would it be satisfactory to place the onus on the local authority to establish a breach of planning control in costly and time consuming enforcement proceedings when the landlord's requirement of a part 3 licence provides an opportunity to require that he take the initiative of demonstrating that he does not need, or alternatively is entitled to, planning permission. 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 applicant requires but does not have planning permission, the grant of a shorter period is a legitimate means of procuring that an unlawful use (which itself may exacerbate anti-social behaviour) is discontinued or regularised".

40. The Respondent also referred to the decisions of the FTT in *Parvizi,* which they submitted reiterated the relevance of a local authority's general HMO policies on licensing conditions, and *Malik*, where the FTT considered that the principle established by the decision in *Khan* "*must also apply to a part 2 licence*".

41. The Respondent, thus, submitted that there was clear legal precedent supporting the consideration of a property's status under planning law when determining an HMO licence application under Part 2 of the Act, and that the Respondent's approach was the same approach as that taken in *Khan*.

42. The Respondent stated that it had not made any decision in relation to whether the Property had established use as an HMO when issuing the Licence, as that would be a decision for the Planning department. As such, the Respondent stated that the evidence enclosed within the bundle relating to licence agreements and council tax documentation would be something that might be relevant to the Planning department but not to the Licensing department.

43. In relation to consultation and rights of appeal, the Respondent confirmed that it had responded to three different sets of representations made by the Applicant and had accepted several points, serving two modified licences, prior to serving the Licence. In addition, the Respondent stated that it had also made the Applicant aware of how they could appeal to the tribunal and the Applicant had done so.

44. With regard to any financial motivation, the Respondent stated that HMO licensing was intended to address poor management problems caused for occupants and members of the public, as well as addressing safety concerns regarding properties; that licensing schemes under the Act were required to be cost neutral and that the Respondent had already indicated that no fee would be applied for any variation of the licence if the planning position was to be regularised.

45. At the hearing, Miss Bashir confirmed that there was nothing in the Act which stated that a licence had to be granted for five years, rather this was the maximum term, and reiterated that the Respondent had already stated that it would be willing to vary the length of the term of the Licence, at no cost, once the Applicant regularised the planning status of the Property. She also confirmed that the Respondent would not charge the Applicant for a variation if it appeared that

extra time was required to deal with any planning queries once an application to regularise the planning status had been made.

46. Mr Gilmour confirmed that each licensing application was dealt with on a case-by-case basis and that, if there was question regarding planning, the Respondent's approach was to grant a licence for one year, following the approach taken in *Khan*.

47. In relation to Mr Jaffer's submission – that the Property had been operating as an HMO for the required time and the Planning department would be unable to take enforcement action – Miss Bashir submitted that, if this was the case, there should be no reason why the Applicant could not forward the evidence for this to the Planning department to have the planning use regularised.

48. On questioning by the Tribunal, Mr Gilmour confirmed that an Article 4 direction had been made in relation to the whole city in 2012 and that, as the Property encompassed twelve units of accommodation, the correct planning class should have been Sui Generis, rather than C4 (which was limited to houses with no more than six residents).

The Tribunal's Deliberations

49. In reaching its determination the Tribunal considered the relevant law, in addition to all of the evidence submitted, which is briefly summarised above.

Conditions on the Licence

50. The Tribunal noted that, at the hearing, the Applicant confirmed that conditions 13, 26 and 31 were no longer disputed based on the clarification of the same by the Respondent as set out above and, in respect of condition 26, the variation of condition 25 as set out below.

Condition 5

51. The Tribunal noted that both parties agreed at the hearing that the inclusion of wording to confirm that a PAT would satisfy condition 5 was acceptable to them. Accordingly, the Tribunal determines that the wording of condition 5 should be varied to that detailed in the Schedule hereto.

Condition 25

52. Again, the Tribunal noted that both parties confirmed that a variation to the wording to make clear that it included access via a link to digital documents would be acceptable. The Applicant also confirmed that it could make a hard copy of the documents, or a means of access to digital versions of the documents, available for any occupants who would be unable to access the link personally, which the Tribunal considered important when taking into account that the Property caters for the homeless who might not have the means to be able to access digital documents.

53. Accordingly, the Tribunal determines that the wording of condition 25 should be varied to that detailed in the Schedule hereto.

Term of the Licence

54. The Tribunal noted that the parties both agreed that planning and licensing were two distinct departments, dealing with different legislative provisions and procedures. The Tribunal agrees with the Respondent, however, that the decision by the Upper Tribunal in *Khan* clearly established that, in relation to Part 3 licensing at least, the planning status of a property when deciding whether or not to grant a licence, and the terms of such a licence, are legitimate considerations for a local housing authority.

55. Although previous decisions of the FTT are not binding on this Tribunal, the Tribunal also accepts that planning considerations are equally valid when dealing with licensing under Part 2, especially when an Article 4 direction is in place requiring planning permission to be able to convert a property to an HMO.

56. In this matter, as the Property had twelve units of accommodation, the correct class would have been Sui Generis rather than C4, as confirmed by the Respondent at the hearing.

57. The Tribunal does not accept the Applicant's submission that the decision in *Khan* was not relevant to this matter as the Property already had planning permission for residential use for over twelve people. The considerations when granting planning permission for HMOs are quite distinct to those for granting permission for residential dwellinghouses. As referred to in *Khan*, a local authority may consider matters such as antisocial behaviour when deciding whether to grant planning permission for an HMO, so the number of occupiers and queries relating to over-intensive use of land are not the only considerations.

58. In relation to the Applicant's argument regarding established use as an HMO, the Tribunal accepts that there is no legal requirement for regularisation of planning and no obligation on the Applicant to have to obtain a Certificate of lawfulness of existing use under section 191(1) of the Town and Country Planning Act 1990. The Tribunal considered that there may even be, in some cases, a valid argument against the imposition of a shorter term if a local authority imposed the same for regularisation purposes where it was very clear from the evidence that no enforcement action could be taken.

59. That stated, the Tribunal finds that in this matter, even if such an argument was potentially valid, the occupancy evidence supplied by the Applicant to the Tribunal was insufficient to conclude that enforcement action could not be taken due to an established existing use for the requisite time period required for Sui Generis classification. In addition, neither party had provided a copy of the planning permission for residential use; it was unclear whether that planning permission had ever been complied with and it was unclear when the shared communal kitchen had been added to the Property and the use as an HMO first started.

60. In relation to the Applicant's arguments regarding time constraints and fees for variations of the licence, the Tribunal noted that the Respondent had confirmed that it would be willing to make such variations without charge. As such, the only additional costs would likely be an application fee for an Existing Use Certificate and any costs associated with collating evidence for the same. As the Applicant submitted that they were already in possession of clear evidence of this, those costs (if any) should not be particularly burdensome.

61. The Tribunal did not consider that any widespread adoption by the Respondent of selective licensing was relevant to this matter and considered that the Respondent had, in this case, cooperated with the Applicant and taken into account many of the representations the Applicant had made during the HMO application process.

62. The Tribunal noted that the Respondent granted the licence until 10 April 2025, to allow time for the Applicant to engage with the Planning department to resolve issues regarding the planning status of the Property. Although the Tribunal notes that the residents of the Property are granted licences rather than tenancies, the Tribunal accepts that the Applicant has, on occasion, had queries relating to status of the agreements and finds that the procedure adopted by the Respondent – of granting the Licence but limiting the term following the approach taken by Waltham Forest in the *Khan* decision — a pragmatic solution.

63. For the above reasons, the Tribunal considers that the licence expiry date should not be varied.

Appeal Provisions

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M K GANDHAM

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Judge M K Gandham

Schedule

Condition 5

The Licence Holder shall ensure that a record of visual inspections and testing (such as a portable appliance test) is maintained for all electrical appliances and furniture made available by them in the Property. The Licence Holder shall within seven (7) days of any demand by the Council provide the most recent records of visual inspections and testing carried out within the previous 12 months and provide a declaration as to the safety of electrical appliances made available by them at the Property. *

Condition 25

The Licence Holder shall provide to Tenants(s) an information pack at the commencement of a tenancy (or make available for inspection by the Tenant(s) a hard copy of the information pack or access to an electronic link to a digital version of the information pack) which contains as a minimum the following information:

a) A copy of the Property Licence and conditions.
b) Where appropriate, copies of the current gas certificate, electrical safety report and energy performance certificates.
c) Details of the procedures to be followed in the reporting of anti-social behaviour (ASB).
d) Details of the Tenant(s) duties and responsibilities to enable the Licence Holder or manager in complying with the Licence conditions.
e) Details of how to make a complaint, report maintenance issues and make other general enquiries.
f) Details of the arrangements in place including expected timescales, to deal with emergency and other enquires or repairs.
g) Details of telephone numbers which enable contact between 9am – 5pm Monday to Friday including an out of hours contact number for use in emergencies, which could include a number with a regularly accessed voicemail facility. Any change in contact and/or telephone number details should be provided to Tenants within 24 hours of the changes being made.
h) A copy of the waste management plan.