Please note that almost everyone of the 86 people who have put their names to this resides, like those who are members of SoLAR (South L'ton Area Residents group), within with one of the L'ton wards covered by the Article 4 Direction and therefore has a direct interest in the outcome of this consultation.

RESPONSE TO THE COUNCIL'S LICENSE AND PLANNING CONSULTATION

The Warwick District residents named below welcome the Council's decision to end what it describes as the current 'perverse situation' whereby 'contrary to the Council's own Article 4 planning policy' Private Sector Housing (PSH) to date has deemed it necessary to license HMOs in the absence of prior planning consent. We share the view that this change should be achieved by refusing to accept/process HMO license applications where the applicant has not already obtained such consent as in option 1. PSH should reject the alternative option of issuing a one year only license, with a period of grace during which applicants will be expected to apply for and obtain the necessary planning permission (or be refused). This is for the following reasons:

- why keep the door open for landlords to operate without planning consent by issuing a one year license when officers can firmly shut the door on this unlawful behaviour by simply refusing to accept a license application in the absence of planning consent?
- allowing any landlord to operate a licensed HMOs without planning consent, albeit for a reduced period, is contrary to WDC's policy embedded in the Article 4 Direction/Policy H6 - which is exactly what this proposed change is supposed to prevent - and offering any period of grace in which to subsequently apply for consent does not overcome this problem;
- Policy H6's HMO concentrations are calculated with reference to the number of HMOs within 100m of the site of a new/retrospective planning application, and the presence of licensed HMOs awaiting planning consent is likely to complicate/undermine the implementation of this policy, especially where the ratio of HMOs to dwellings borders 10%;
- without the grant of prior planning consent, the amenity of occupants and neighbours will not have been assessed as acceptable;
- why waste time processing applications for a license as per option 2 when some of these HMOs may well be refused planning consent?
- option 2 will require a monitoring system to be put in place to ensure landlords submit timely applications, with sanctions specified for failure to do so - eg intervention by Planning Enforcement, generating extra work for them;
- if consent is refused, appeals can follow and take months to be heard, and all the while landlords with initial one year licenses will be able to draw income from these HMOs, despite the Council's enforcement policy stating at para 6.2(b) that it aims 'to eliminate any financial gain or benefit from non-compliance';
- option 1 will align the Council's practice with the 2019 Govt Guidance which states 'We actively encourage local authorities to ensure planning permission has been given before issuing a licence.' (para 2.6).

In summary, PSH intends to ensure that when issuing HMO licenses it is acting in compliance with the Article 4 Direction/Policy H6. Option 2 will not achieve this because it will allow HMOs without prior planning consent to continue in operation, albeit for a reduced period of time, to the benefit of landlords and at the expense of tenants and neighbours. Simply refusing to accept a licensing application without prior planning consent,

as per option 1, is an easy solution to the identified problem, with none of the downsides of option 2, and it should be immediately implemented.

Unaddressed Problems and Issues

The consultation avoids addressing matters that will inevitably arise.

1. Neither the consultation introduction or the survey form mentions applications for licence *renewals*, and it seems likely they are not included in the proposals. *However,* as the courts have established that "due regard" should be taken of planning status in considering a licence application, there is no reason why that should not also include applications for renewals (though clearly not in an identical fashion). The arguments and language of Martin Rodger QC in his opinion in Waltham Forest v Khan [2017] UKUT 153 (LC), at para. 46 would certainly support that conclusion, and from the perspective of a resident concerned with planning control, the issues raised by new licences and renewals are little different.

(i) As case law currently stands, the existence of HMOs without planning permission substantially undermines application of several parts of Local Plan Policy H6. Calculations for the 10% rule, and prohibition of specific configurations of HMOs, may only count HMO properties with planning approval. *The ability to use Policy H6 to the full is an essential requirement for bringing HMO licencing and planning control into harmony for the benefit of existing residents. There is no recognition of this in any part of the consultation material.*

(iii) There is also an obligation to act consistently, and offer no encouragement to owners of HMOs who hope to evade the costs and responsibilities of securing planning approval.

2. Although the possibility that a planning application required by either of the two options will be rejected is implicitly acknowledged, there is no explanation of how this would affect decisions on licence applications, whether a licence would be refused, or how enforcement might be handled. *From the perspective of residents, if WDC Housing does not intend to refuse or withdraw HMO licences from properties that are in irremediable breach of planning control (however the Planning Department might proceed) there is little point in making planning applications an integral part of the licencing process.*

(a) The consultation focus is on inducing planning applications, and regularising planning status. It does not consider that the range of possible grounds on which planning consent could be ***refused*** *(*many of which would be irremediable, in practice or through appeal), and which would be known in advance by the Planning Department. It is moreover not the policy of the Planning Department to encourage a futile planning application to be made, not least because of the cost involved.

(i) In these circumstances it is not clear if, for an unoccupied HMO, the requirements of Option 1 would still mean a planning application had to be made, and whether the inevitable rejection would lead to refusal of a licence.

(ii) It would be totally unacceptable to consider the grant of a 1-2 year HMO licence to an unoccupied property in the knowledge that it could not be granted planning permission. The landlord could be put to considerable expense to meet other licencing requirements;* nearby residents could be subjected to disturbance and nuisance; and the difficulties for the Planning Department of enforcing its decision could be considerable, all of which would be unnecessary and capable of being avoided. ***** *Please see D3(b)(i) and (iv) below.*

(iii) In the case of an occupied HMO that would not be able to be granted planning permission, the circumstances approach those in Waltham Forest v Khan, although the

principal concern of that case was to support a "*rational and pragmatic course*" which provides time for "*the planning status of the house to be resolved"* (such resolution being possible). However, addressing the larger issue where planning status led to rejection of a licence application, the ruling states: *"It would be... permissible, where an authority was satisfied that enforcement action was appropriate, for it to refuse to grant a Part 3 licence, but**... 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.**"* (Waltham Forest v Khan [2017] UKUT 153 (LC), at para. 46, emphasis added). This is a serious problem to which the ruling offers no solution, or hint of how it might find were this to be the substantive issue before it. What would WDC do?

(iv) Several residents' groups are now organised to report HMOs that breach planning control and/or licence conditions. While they are anxious to see the planning and licencing regimes used to ameliorate and safeguard the conditions of HMO residents, their principal focus is on preventing the approval of any more HMOs in South and Central Leamington Spa, and on "rolling back" licenced HMOs that operate without planning permission. Whatever licencing policies are adopted and implemented after the consultation will need to be take into account that public scrutiny and organised protest are likely to be triggered if discretionary approaches avoid rigorous enforcement action.

3. The options presented for consultation simply follow MHCLG, "Guidance: Houses in multiple occupation and residential property licensing reform: guidance for local housing authorities", October 9, 2019 update, para 2.6 [Option 1]; and the outcome of Waltham Forest v Khan [2017] UKUT 153 (LC) [Option 2]. This is problematic, in that neither provides suggestions of or authority for specific administrative arrangements.

(i) The Guidance from MHCLG does not have statutory authority. It *"actively **encourage[s]** local authorities to ensure planning permission has been given before issuing a licence. Wherever possible we recommend processing consents in parallel, to resolve any issues as early as possible."* The attempt to comply with the second half of this guidance explains the uncertain thrust of Option 1. The legal strength of this guidance has not been tested in the courts, and does not hint at the issues touched on in [2] above. It assumes planning approval will be granted (if necessary by the early resolution of "issues") and does not comprehend the challenges of refusing planning permission and/or licence.

One of the leading online commentators on property law, with a long-standing specialisation in HMO litigation, considers there is a *"question of whether it is appropriate to use guidance to procure an effect which should really be dealt with in the legislation... and for the MHCLG to bring this in by the back door."* He suggests that the advice "*totally ignores the situation on the ground"* in failing to recognise the dissimilarity of and divergence of timescales for determination of planning and licencing applications. Overall he views the guidance as a *"half-hearted intervention".* (David Smith, "The Link between Planning and HMO Licencing" Local Government Lawyer, October 29, 2019; also see the same author's "Planning status of house can be relevant to selective licensing: Upper Tribunal," Local Government Lawyer, April 18, 2017).

(ii) Waltham Forest v Khan [2017] UKUT 153 (LC) has given rise to the suggestion to grant a one-year HMO licence while planning issues are "resolved". Apart from the points on rejection of planning applications *above*, the ruling is extremely specific, and directly comparable cases are unlikely to occur for WDC. It also grounds much of its argument in controlling antisocial behaviour. The ruling is essentially permissive, and it remains for a

local authority to justify its approach in particular circumstances, and to interpret the phrase "due regard". At the same time the ruling reiterates the separation of planning and licencing enforcement procedures in respect to planning breach. It is therefore relevant to consider the comments of another leading online property law expert, who emphasised that the complexities of this and another related case demonstrated ***"the need for local authorities to adopt flexible, nuanced polices that are capable of justification."*** (Susan Summers, "Khan and Reid: the Upper Tribunal considers the length of landlords' property licences," London Property Licencing, Dec. 5, 2017) I would suggest that the discussion above shows the policies proposed in the consultation to the anything but flexible, nuanced or capable of justification; and further discussion with legal experts is appropriate.

D. Comments

1. Depending on specific circumstances, it might be appropriate to use either option suggested in the consultation; and these two options do not exhaust the possible ways in which licencing and planning permission could be considered in relation to one another. To make sure either option is effective, and to try to arrive at better solution than either, it is essential that Housing and Planning departments cooperate more closely, and according to established protocols.

2. Both options contain periods in which it is implied that licence applicants may consider and effectively delay applying for planning permission. While it is within the power of Housing to treat the *licence* application in any way they wish, it will be misleading if they suggest to applicants, still less guarantee, that they will not, during any suggested period in which a planning application is made, be subject to the procedures of planning control and enforcement. The vigilance of residents' groups is making it more and more likely that planning enforcement could occur before the licence applicant had time to submit a planning application. Examination of the specific circumstances addressed in Khan shows just how much Housing procedures and Planning enforcement can diverge problematically even during the attempt by Housing to reconcile them!

3. (a) I am sure you are aware that the WDC Planning Department provides professional pre-planning application advice.* For small scale non-householder proposals, and changes of use, including house to HMO, the cost is £300 for each meeting, or £600 for both. It would make most sense to try to persuade anyone considering applying for an HMO licence to use this service first, and thereby have a good idea what the chances are of planning approval, and possible terms of grant.

*see: https://www.warwickdc.gov.uk/info/20374/planning_applications/1061/pre-application_advice

Dear Private Sector Housing

I have responded to the online consultation on HMOs on behalf of the District Labour Group. I thought it would be helpful to set out in a separate email the points that we have made in in support of option 1 and also to make some other points on this matter.

We welcome the Council's decision to end what it describes as the current 'perverse situation' whereby 'contrary to the Council's own Article 4 planning policy' Private Sector Housing (PSH) to date has deemed it necessary to license HMOs in the absence of prior planning consent. We share the view that this change should be achieved by refusing to accept/process HMO license applications where the applicant has not already obtained such consent as in option 1. PSH should reject the alternative option of issuing a one year only license, with a period of grace during which applicants will be expected to apply for and obtain the necessary planning permission (or be refused). This is for the following reasons:

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- option 2 will require a monitoring system to be put in place to ensure landlords submit timely applications, with sanctions specified for failure to do so - eg intervention by Planning Enforcement, generating extra work for them;
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In summary, PSH intends to ensure that when issuing HMO licenses it is acting in compliance with the Council's Article 4 Direction/Policy H6. Option 2 will not achieve this because it will allow HMOs without prior planning consent to continue in operation, albeit for a reduced period of time, to the benefit of landlords and at the expense of tenants and neighbours. Simply refusing to accept a licensing application without prior planning consent, as per option 1, is an easy solution to the identified problem, with none of the downsides of option 2, and it should be immediately implemented.

You will receive similarly worded responses from other residents and from the SOLAR group but these issues are not confined to south Leamington and can be encountered in Leamington more widely and in other towns in the District, albeit to a lesser degree. We propose these changes in the interests of students and other residents in HMOs as well.

I hope this is a helpful contribution to this important consultation.