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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : BIR/ 37UD/RTB/2013/0013

Property : 11 A Ewe Lamb Close, Bramcote,
Nottingham, NG9 3JU

Applicants : 1. Mr. James William Marshall
2. Mrs. Doreen Marshall

Representative : In person

Respondent : Broxtowe Borough Council

Representative : Kimberley Dawson

Type of Application : Housing Act 1985, Para 11, Schedule
5: suitability for occupation by the
elderly.

Tribunal Members : Andrew McNamara
John Ravenhill FRICS

Date of Hearing : 7 November and 23 December 2013

Date of Decision : 14 January 2014

DECISION

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Introduction

1. By an Application dated 4 September 2013 Mr. James William Marshall and Mrs. Doreen Marshall (the Applicants) asked the Tribunal to decide the issue of whether their home is a property which is suitable for occupation by elderly persons for the purposes of paragraph 11, Schedule 5 Housing Act 1985. They contend that it is not.
2. The context to this application is that, pursuant to the provisions of Part V Housing Act 1985, the Applicants made a right to buy (RTB) application to the Respondent which, on 27 August 2013, was refused.
3. Paragraph 11 Schedule 5 Housing Act 1985 provides:

(1) The right to buy does not arise if the dwelling-house
(a) is particularly suitable, having regard to its location, size, design, heating system and other features, for occupation by elderly persons, and
(b) was let to the tenant or a predecessor in title of his for occupation by a person who was aged 60 or more (whether the tenant or predecessor or another person).
(2) In determining whether a dwelling is particularly suitable, no regard shall be had to the presence of any feature provided by the tenant or a predecessor in title of his...

4. Broxtowe Borough Council (the Respondent), the freeholders of the property, resisted the application on the following basis arising from paragraph 10, Schedule 5 Housing Act 1985 and insist that this Tribunal has no jurisdiction:

Certain dwelling-houses for persons of pensionable age
(1) The right to buy does not arise if the dwelling-house is one of a group of dwelling-houses
(a) which are particularly suitable, having regard to their location, size, design, heating systems and other features, for occupation by [elderly persons] and
(b) which it is the practice of the landlord to let for occupation by [persons aged 60 or more], or for occupation by such persons and physically disabled persons, and special facilities such as are mentioned in sub-paragraph (2) are provided wholly or mainly for the purposes of assisting those persons.
(2) The facilities referred to above are facilities which consist of or include—
(a) the services of a resident warden, or
(b) the services of a non-resident warden, a system for calling him and the use of a common room in close proximity to the group of dwelling-houses.

The inspection and the property

5. The Tribunal met and, with the permission of the Applicants, viewed the property on 7 November 2013.
6. There was some confusion regarding the time of the inspection and so the Tribunal reconvened on 23 December 2013 at which time the Respondent Local Authority also attended, represented by its officers and lawyer.
7. The property is a first floor maisonette within a semi-detached unit consisting of four units in total. It has two double bedrooms, a bathroom, kitchen and sitting room. It is fitted with double glazing and gas fired central heating.
8. From the street one approaches through a shared gate and along a relatively level path with lawn to the right. Access to the property is gained through a door to the left hand elevation where there is a small airlock and an inbuilt, ground floor cupboard. The first floor is reached by climbing a flight of relatively narrow, steep stairs.
9. The only material alterations which have been carried out, by the Applicants, are to the bathroom in the form of a corner shower unit and a grab rail which has been attached to the bathroom wall alongside the toilet. Historically, that is prior to the commencement of the Applicants' tenancy, the Respondent installed an emergency call out system which can be operated by means of a pendant or a wall mounted unit. The Tribunal understands that the system connects to a third party service provider.
10. In addition, there is a garden to the rear of the premises: it is split horizontally so that the Applicants use the portion furthest from the property at the rear.
11. Following the inspection the Tribunal members met to consider the case.

The documentation

12. The Tribunal received a letter from the Applicants dated 5 November. Given the late presentation of that letter, following the inspection the Tribunal gave the Respondent seven days to consider it and make any further representations it considered necessary. Given the early confusion regarding the timing of the inspection, the Respondent was also given a further opportunity, until 6 January 2014, to make any further representations arising from the inspection. It has chosen not to do so.
13. Therefore, the Applicants' case consisted of the application and the letters of 29 October 2008 and 5 November 2013. The Applicants also indicated, in a form dated 26 September 2013, that they were content for the matter to be resolved without a hearing.
14. By way of resistance, the Respondent relied upon a letter dated 3 October 2013; an undated Statement of Case; and a witness statement dated 31

October 2013 supported by four exhibits from Kim Dawson, a performance and housing officer employed by the Respondent.

The Applicants' case

15. Quoting verbatim from the application, it is the Applicants' view that the property is not suited for occupation by the elderly because:

*There is no lift access (none installed)
& the staircase is very steep and I've been informed it (sic)
unsuitable for stairlift due to H & S.
I wish to inform you that 14A Ewe Lamb Close (similar to my flat)
is owner occupied.*

16. The letter dated 29 October 2008 received from the Applicants refers to the location of the water stop taps as inaccessible and that the water meter cannot be seen.

17. The Applicants' letter from 5 November 2013 averred that there are a number of occupants of nearby properties of the same design as the Applicants' who are not elderly; and that there are three owner occupiers in Ewe Lamb Close and another in Trenton Close.

18. In the same letter the Applicants also suggested that their request for modifications to the bathroom to assist the Second Applicant were declined, hence the Applicants' decision to undertake the work at their own expense.

19. The letter also identifies the lack of a lift; the lifeline provision is 'outdated'; and '*We FULLY [emphasis added] support the concept of senior citizens in these flats, when a simple clause could be written in to the buying contract to protect this concept*'.

The Respondent's case

20. In the statement from Ms. Dawson, the Respondent, effectively, submitted that the Applicants' property is ineligible and that this Tribunal has no jurisdiction to hear this application.

21. In support of the factual basis to both submissions the Respondent points to the exhibits: the tenancy agreement, which is in relation to '*supported housing*' includes a '*weekly support service charge*' of £11.11; the Applicants' housing application, dated 20 September 2006, referred to the Applicants' desire to live in an environment which was safe and secure with community involvement and in the vicinity of like people and friends; a document entitled 'THE RETIREMENT LIVING SERVICE'; and a list said to be of retirement living properties. The Respondent

insists that the property at 14A Ewe Lamb Close, although owner occupied, was 'sold in error'.

The Law

22. The relevant parts of Schedule 5 Housing Act 1985 are set out above. In broad terms if a tenant who occupies local authority housing submits an RTB application the local authority is obliged to transfer the property to the tenant. That entitlement is subject to certain qualifications and exceptions. This application is concerned with an exception.
23. Paragraph 10(1)(a) of Schedule 5 sets out a list of relevant criteria in order that properties fall within the exception: location; size; design; heating systems; and 'other features'. That has to be read in conjunction with 10(1)(b) which refers to the practice of the Landlord to let such properties for occupation by [persons over 60]. In turn, both of those provisions are to be read in conjunction with 10(2)(a) and (b) which deal with the provision of warden services.

The Tribunal's decision

24. The Respondent contends that this Tribunal has no jurisdiction to hear this application since the Respondent relies not upon paragraph 11 of Schedule 5 but paragraph 10. Paragraph 10 does not include any provision as to appeal, unlike paragraph 11(4).
25. Evidentially, it is the Tribunal's view that the mere assertion of such an exception cannot be said to be a rebuttable presumption and so the burden of demonstrating the exception falls upon the Respondent .
26. This Tribunal has the advantage of expertise and the insight gained from an inspection of the property. Therefore, in forming a view as to whether the property conforms to the Respondent's submission that it is exempt from the RTB provisions, the Tribunal is entitled to compare its own assessment of the property and the Respondent's submission.
27. It is the Tribunal's finding that there is nothing about the location, size, design or heating systems of the property which render it uniquely suited to the elderly or persons of pensionable age. In particular, the fact that the property is located on the first floor and has had no modification to reflect age or reduced mobility militates against any such submission.
28. Further, although the tenancy agreement is said to be for supported housing, the evidence in relation to the provision of services to justify the additional charges in the tenancy agreement is scant: the tenancy agreement itself is entirely silent as to the nature of the support given; and the additional document at Exhibit KD3 of Kim Dawson's statement is unsupported by records or attendances from the Retirement Living Officer (RLO). The Tribunal notes that the tenant has to opt into a daily

- visit by the RLO and there is no evidence to say whether they have or have not done so. It is entirely unclear whether the Applicants benefit from the communal facilities provided for in Exhibit KD3.
29. The poorly photocopied historical record at Exhibit KD4 makes little or no sense on a stand-alone basis. The explanation given in paragraph 5 of Kim Dawson's statement sheds a little light on the situation but there is no reference to a rational process that gave rise to the decision to designate the properties in question as limited to occupation by the elderly.
 30. The Tribunal concludes that the suggestion in Kim Dawson's statement that the property has '*many of the features that make it a property for older persons*' is not supported: the only actual '*feature*' is the call system and that alone is not enough to bring this property into the exception provided for in paragraph 10 of Schedule 5. Accordingly the Tribunal concludes that the property does not conform to the requirements of paragraph 10, Schedule 5 Housing Act 1985 and so this Tribunal does have jurisdiction to hear the Application.
 31. It is noted that the Respondent, in error, appears already to have conveyed at least one property in accordance with the RTB provisions. The Tribunal is unable to make a finding in relation to the evidence from the Applicants regarding the status and/or age of others identified as owner occupiers or below the age of 60/pensionable age living in similar properties.
 32. Given the Tribunal's reasoning above in relation to the issue of jurisdiction, in particular the question as to the location, size, design heating system and other features, the Tribunal concludes that the property is **not** exempt from the right to buy and the Application is allowed.
 33. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). First, within 28 days of the date of this decision, an application must be made in writing to this Tribunal setting out the grounds upon which the Appellant relies.

Andrew McNamara

Judge of the First Tier Tribunal (Property Chamber)
14 January 2014.