



## Report of Head of Licensing and Registration

### Report to Licensing Committee

**Date:** 8<sup>th</sup> April 2014

### **Subject: Review of Sex Establishment Fees**

Are specific electoral Wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, name(s) of Ward(s):		
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, Access to Information Procedure Rule number:		
Appendix number:		

### Summary of main issues

1. Licensing Committee set the fees for sex establishments (sexual entertainment venues, sex shops and sex cinemas) in April 2013. An interim review was undertaken in September and Licensing Committee amended the fee for the sex shop renewal fee at that time.
2. Under the EU Services Directive and the Provision of Services Regulation 2009, the council may set a reasonable fee that only includes the costs related to the application process.
3. This report presents the annual fee review and a proposed scheme of charges.

### Recommendations

4. That Licensing Committee considers the contents of this report and approves a new fee scheme for sex establishment applications to take immediate effect and to remain in place until the scheme is reviewed again.

## **1 Purpose of this report**

- 1.1 To request that Licensing Committee set a fee scheme that reflects the cost of processing and determining applications for sex establishment licences for 2014.

## **2 Background information**

- 2.1 In 2010 the Government introduced a new category of sex establishment called a “sexual entertainment venue”. This reclassified lap dancing clubs as sexual entertainment venues and gave local authorities the power to regulate such venues. The intention was to give local people greater say over the number and location of lapdancing clubs in their area.
- 2.2 In January 2011 the Council made a resolution to adopt the provisions of Sch 3 of the Local Government (Miscellaneous Provisions) Act as amended by the Policing and Crime Act 2009, effective from 1<sup>st</sup> October 2011.
- 2.3 As part of this process the Licensing Committee set a new fee for all applications for sex establishments. This included sexual entertainment venues, sex shops and sex cinemas.

## **3 Main issues**

- 3.1 The Local Government (Miscellaneous Provisions) Act 1982 states that the licensing authority may set a reasonable fee.

### EU Services Directive

- 3.2 The European Services Directive ensures that the fee is limited to cost recovery. It provides:

*“Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures.”*

- 3.3 Regulation 18 of the Provision of Services Regulations effectively replicates the provisions of the Directive. Guidance on the provisions was given in the Department for Business Innovation and Skills’ Guidance for Local Authorities on the Provision of Services Regulations. These states:

*“Local Authorities must set fees that are proportionate to the effective cost of the procedure dealt with. As costs vary from region to region, central advice on the level of fees will not be appropriate. Local Authorities will need to bear in mind the threat of legal challenge should a service provider feel that the levels of fee are being used as an economic deterrent or to raise funds for Local Authorities. Enforcement costs should not be assimilated with the application fee. This is to forestall the possibility of an unsuccessful applicant seeking legal remedy due to part of his fees having been used to subsidise his successful competitors.”*

- 3.4 The Department's corresponding Guidance for Businesses on the Provision of Service Regulations states:

*"Under regulation 18, fees charged in relation to authorisations must be proportionate to the effective cost of the process e.g. to cover the actual cost of the application process. Fees should not be used as an economic deterrent to certain activities or to raise funds. As now, if you believe the fee to be disproportionate you can contest it with the authority concerned."*

### Hemmings Case

- 3.5 In 2012 the operators of a number of sex shops in Westminster were successful in their High Court action against Westminster City Council, in challenging the level of fees set by them. The basis of the case was that the authority had not taken into account a European Directive and to that effect, the fees were in excess of what they should have been. It was argued that prosecuting persons, businesses and companies who operate sex establishments illegally could not be included in the fee structure of the council.
- 3.6 Westminster Council appealed the decision of the High Court to the Court of Appeal, which dismissed the appeal, supporting the High Court. In summary, the Court of Appeal decided that the fees charged by Westminster Council were incorrectly calculated after the European Directive became effective in the beginning of 2010.
- 3.7 In the High Court decision, Keith J held that the council had not validly determined a licence fee for any years after the year ending 31 January 2006 and ordered it to do so and to make restitution of the difference between the payments that it had received and the lawful fee set. He also ordered the council to pay indemnity costs and the enhanced rate of interest, because it had rejected an offer by the respondents that was more advantageous to it.
- 3.8 In a very detailed and analytical judgement, the Court of Appeal had determined that Westminster was wrong in determining their fee structure and that the fees needed to be recalculated with reference to the correct process.
- 3.9 It is clear that the Court of Appeal have determined that where there is an administrative licensing process, there is a need to be particularly careful with how the fee structure is established. This of course is critical if the fees are not set centrally as standard fees.

### 2011 Fee Review

- 3.10 In 2011 the council set the same fee of £2,880 for the grant, renewal and transfer of any type of sex establishment licence. At that time it was anticipated that the interest in sexual entertainment venues would extend to all types of sex establishment and that the council would receive objections to sex shop renewals in the same way as it expected to receive objections to sexual entertainment venues. This would have necessitated a hearing for all applications of sex establishments and so this cost was included when calculating the fee.

## 2013 Fee Review

- 3.11 In 2013 the fee was reviewed and increased by 3% in line with inflation to £2,884 for a new, transfer and renewal application and £927 for a variation.
- 3.12 In September 2013 officers recommended that Licensing Committee reviewed the costs of processing a sex shop renewal fee and set a fee commensurate with cost recovery. Licensing Committee set a fee of £1,250 in consideration that sex shop renewal applications tend not to come before the Licensing Sub Committee.

## 2014 Fee Review

- 3.13 In January 2014, officers calculated the cost of the processes undertaken in 2013, which were:
- 6 sex establishment (SEV) renewals that went to hearing
  - 2 transfers (SEV) that went to hearing
  - 1 new application (SEV) that went to hearing
  - 5 sex establishment (sex shops) renewals that received no objections
- 3.14 As part of this review, officers requested a breakdown of costs from Democratic Services and Legal Services and isolated the amounts that related directly to the applications received in 2013. When calculating these costs, officers only included the costs of the application processes, not the cost of the recent Judicial Reviews, the review of the policy or any enforcement action relating to unlicensed activity. This is in accordance with the EU Services Directive.
- 3.15 Officers reviewed the administrative process undertaken within the section to ensure that it is as streamlined as possible. There have been significant changes made in the past five years to streamline services, improve IT provision, utilise email and other digital processes, scanning of files and digital archiving. These changes have led to a reduction in the overhead costs of the service and the time that each process takes.
- 3.16 The proposed fee structure recognises that all applications for sexual entertainment venues are heard at a licensing subcommittee and attract the subsequent costs associated with this process. The fee structure also recognises that applications for the renewal of sex shops have not attracted objections in the past few years.
- 3.17 **Grant of a new licence (SEV, sex shop, sex cinema) and renewal of SEV  
£4,314**

New applications tend to attract objections and all applications are determined by a licensing subcommittee.

Receipt and administration of application	Officer time	3 hours	£107.31
Enquiries, processing of objections	Officer time	8 hours	£286.16
Notice checks	Officer time	4 hours	£163.36
Production of notice of hearing	Officer time	2 hours	£71.54
Production of notice of hearing	Print & post	30 copies	£21.00
Production of agenda	Officer time	4 hours	£143.08
Production of agenda	Print	Actual cost	£158.00

Production of agenda	Post	14 copies	£9.66
Room hire	per hour	3 hours	£90.00
Refreshments	per person	15	£37.50
Members allowance			£302.00
Officer attendance x 2	Officer time	3 hours x 2	£214.76
Notice of decision/minutes	Officer time	4 hours	£143.08
Notice of decision/minutes	Print & post	30 copies	£21.00
Visits and associated paperwork		8 hours	£326.72
Issue of licence	Officer time	4 hours	£143.08
Advice, attendance at hearing			£2,076.00
<b>Total</b>			<b>£4,314.25</b>

### 3.18 Variation (SEV, sex shop, sex cinema) £3,400

For this process there is no advertising requirement but the application will be determined by a licensing subcommittee.

Receipt and administration of application	Officer time	3 hours	£107.31
Enquiries	Officer time	1 hour	£35.77
Production of notice of hearing	Officer time	2 hours	£71.54
Production of notice of hearing	Print & post	10 copies	£7.00
Production of agenda	Officer time	4 hours	£143.08
Production of agenda	Print	Actual cost	£158.00
Production of agenda	Post	14 copies	£6.90
Room hire	per hour	3 hours	£90.00
Refreshments	per person	15	£37.50
Members allowance			£302.00
Officer attendance x 2	Officer time	3 hours	£214.76
Notice of decision/minutes	Officer time	4 hours	£143.08
Notice of decision/minutes	Print & post	10 copies	£7.00
Advice, attendance at hearing			£2,076.00
<b>Total</b>			<b>£3,399.94</b>

### 3.19 Transfer (SEV, sex shop/cinema) & renewal (sex shop/cinema only) £776

Transfers for all types of licence and the renewal of sex shop licences have an advertising requirement, but there is no history of objections, therefore rarely incur hearing costs

Receipt and administration of application	Officer time	3 hours	£107.31
Enquiries	Officer time	1 hour	£35.77
Notice checks	Officer time	4 hours	£163.36
Visits and associated paperwork		8 hours	£326.72
Issue of licence	Officer time	4 hours	£143.08
<b>Total</b>			<b>£ 776.24</b>

3.20 It is important to note that the hourly rate used in the calculation include wages, superannuation and overheads to reflect the cost to the service. Overheads include the following:

- Supplies and Services
- Finance
- ICT
- HR
- Customer Services
- Accommodation
- Resources Support Services

3.21 Members should note that the legal costs associated with the SEV applications heard last year were significantly higher than projected at the fee review in 2011. This has led to a significant increase in the fees for new licences and variation applications.

3.22 As part of the review process, the directors and managers of sex establishments in Leeds have been given the opportunity to comment on the proposed fees. The responses to this consultation are appended at appendix 1.

## **4 Corporate Considerations**

### **4.1 Consultation and Engagement**

4.1.1 The proposed fee structure was sent to all directors and managers of sex establishments currently operating Leeds. The responses are attached at appendix 1.

### **4.2 Equality and Diversity / Cohesion and Integration**

4.2.1 There are no implications for equality and diversity/cohesion and integration in setting a fee structure.

### **4.3 Council policies and City Priorities**

4.3.1 The licensing regime contributes to the following Best Council Plan 2013-17 outcomes:

- Improve the quality of life for our residents, particularly for those who are vulnerable or in poverty;
- Make it easier for people to do business with us.

4.3.2 The licensing regime contributes to our best council objective:

- Ensuring high quality public services – improving quality, efficiency and involving people in shaping their city.

#### **4.4 Resources and value for money**

- 4.4.1 The licensing of sex establishments attracts a fee which can only be used to pay for the costs associated with the licence application and cannot be used to cover the cost of the investigation of unlicensed activity. In addition the cost of the policy review and any legal challenge arising from the licence decisions cannot be recovered as part of the application fee.

#### **4.5 Legal Implications, Access to Information and Call In**

- 4.5.1 The recent case has highlighted the needs for councils to ensure that fees only include the costs of processing applications.

#### **4.6 Risk Management**

- 4.6.1 Following the result of the Hemmings case there is a risk of the licensed sex establishment trade challenging the fees set by the authority, if they consider that the fee is not reasonable or that the council is making a charge for matters that are not relevant to the applications process.

### **5 Conclusions**

- 5.1 Taking into consideration the European Services Directive, the Provisions of Services Regulations and the Hemmings case, officers recommend that the fee structure is adjusted to reflect full cost recovery of the application process. However the costs should be kept under review and regularly updated to ensure that the fee is only based on cost recovery.

### **6 Recommendations**

- 6.1 That Licensing Committee consider the contents of this report and approve a new fee scheme for sex establishment applications to remain in place until the scheme is reviewed again.

### **7 Background documents<sup>1</sup>**

- 7.1 There are no unpublished background documents that relate to this matter.

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<sup>1</sup> The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.