

Report of Head of Licensing and Registration

Report to Licensing Committee

Date: 12th November 2013

Subject: Interim 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. The fees are reviewed regularly, usually on an annual basis.
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. The fee for sex establishments have included the cost of a hearing. Sex shop renewals in the past have not attracted objections which would lead to a hearing. Therefore officers recommend that the fee for a sex shop renewals be reduced to take into account this fact.

Recommendations

4. That Licensing Committee consider the contents of this report and approve a reduced fee for sex shop renewals.

1 Purpose of this report

- 1.1 To request that Licensing Committee considers a reduction in fees for sex shop/cinema renewals.

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 1st October 2011.
- 2.2 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. At this time there was increased interest in sex establishments and it was likely that all applications for sex establishments would attract objections and therefore require a hearing. The fee was set accordingly, with an element of that fee to cover the cost of a hearing.

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. This 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.

Leeds City Council Fees

- 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 receives 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.

3.11 The fee set at £2,880 included the following costs:

Application Process

Check, acknowledge, receipt and bank fee, enter record on database, notify agencies and ward members, update website	1 hour @ £43	£43
Enquiries from members of the public, enter and acknowledge objections	10 hours @ £43	£430
Notice checks	4 hours @ £62	£248
Site visits	2 hours @ £62	£124
Issue of licence, licence prep, endorse and despatch	1 hour @ £62	£62
	Total	£907

Hearing Process

Chair's brief, including reports preparation, agenda print, room hire, legal, clerk, Members allowances		£612
Hearing, including notice of hearing, print and postage, room hire, legal, Members allowances		£1086
Decision notice including minutes, legal, print and postage, formal notice of decision to applicant		£190
Total		£1,888

- 3.12 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. At that time the council was undergoing a review process on the sex establishment policy. It was anticipated that this would similarly attract attention to all types of sex establishment and that the council would receive objections to sex shop renewals and so maintained the same fee for all sex establishment licences.
- 3.13 The renewal processes for licences for sex shops occur at the same time each year, in January. In 2012 and 2013 the council did not receive any objections to the renewals and the licences were granted for a further 12 months without the need to convene a hearing.
- 3.14 The council has now received correspondence from sex shop operators challenging the current fee and requesting a further detailed breakdown of the costs.
- 3.15 Talking into consideration the EU Services Directive, the confirmation of the law in the Hemmings case, and the request from sex shops operators for further information with regards to the fees set in Leeds, it is timely to consider if the fees as set truly reflect the cost of the licensing process.
- 3.16 As part of the scrap metal fee setting process, officers requested a recalculated hourly rate for Entertainment Licensing staff. Due to savings made the staff hourly rates have reduced.
- 3.17 The application process for processing a sex shop renewal has been examined and the time allocated to each task has been reviewed.

3.18 Officers recommend that the following fee accurately reflects the cost of processing a sex shop and cinema renewal, variation and transfer application and recommends that a fee of £1,250 be applied.

Admin process of application, incl.	7 hours @ £43	£301
<ul style="list-style-type: none"> • check, receipt & acknowledge • bank fee • enter record on database • carry out relevant checks (enforcement records, companies check etc), • notify agencies and ward members • update and maintain website 		
Public/elected member/agency enquiries and associated administrative work	2 hours @ £43	£86
Site notice checks	8 hours @ £48	£384
Prep licence, check by principal officer, endorse, print and post	1 hour @ £43 1 hour @ £52	£43 £52
Site visits to check compliance, including associated correspondence and recording	8 hours @ £48	£384
Total		£1,250

3.19 The fee for a new application for a sex shop will remain the same at £2,884 until the fees are reviewed in March 2014 as these applications must be heard by Licensing Committee.

3.20 The proposed fee structure for sex shops and sex cinemas is

New	£2,884
Renewal	£1,250
Transfer	£1,250
Variation	£1,250

3.21 Should sex shop renewals start to attract objections, the fee can be reviewed and amended to reflect these costs. The council does not currently licence any sex cinemas.

4 Corporate Considerations

4.1 Consultation and Engagement

4.1.1 The initial fee setting process formed part of the wider consultation on the Sex Establishment Statement of Licensing Policy. No comments were received regarding the proposed fee. The subsequent review suggested an increase in line with inflation and therefore was not consulted upon. In general the setting of licensing fees is a matter reserved for Licensing Committee.

4.2 Equality and Diversity / Cohesion and Integration

4.2.1 There are no implications for equality and diversity/cohesion and integration.

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 enforcement or investigation of unlicensed activity. As such the policy review is a cost to the council, which is not recovered by the licence fee.

4.5 Legal Implications, Access to Information and Call In

4.5.1 The Hemmings 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 shop and cinema 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 for the renewal, transfer and variation of sex shops and sex cinemas licences is reviewed and reduced to reflect the fact that the council has not taken such an application to hearing in the last two years.

6 Recommendations

6.1 That Licensing Committee consider the contents of this report and approve a reduced fee for sex shop renewals, transfers and variations.

7 Background documents¹

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

¹ 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.