

LICENSING COMMITTEE (NON-LICENSING ACT 2003 FUNCTIONS)

Agenda Item 16

Brighton & Hove City Council

Subject:	Licence fees 2015/2016		
Date of Meeting:	20 November 2014		
Report of:	Head of Regulatory Services		
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Ward(s) affected:	All		

FOR GENERAL RELEASE

1. SUMMARY AND POLICY CONTEXT:

- 1.1 This report sets out the proposed licence fees and charges for 2015/16 relating to Street Trading, Sex Establishments and Sex Entertainment Licences, Gambling premises, taxi licensing and other licensing functions.

2. RECOMMENDATIONS:

- 2.1 That the committee approves the following variation to licence fees:
- Hackney carriage driver fee +58.7%, hackney carriage vehicle fee +5.1%, private hire driver fee +25.6% and private hire vehicle fee -51.5%.
 - Sex entertainment venues and sex establishments are decreased by -38.5%.
 - Street trading fees - decreased by -5% (street artists & misc. short term - 6.3%).
 - All Gambling Act 2005 fees remain the same.

3. CONTEXT/ BACKGROUND INFORMATION

- 3.1 In order to ensure that council tax payers are not subsidising work concerning licensing administration, income is raised by licence fees which aim to cover the cost of administration of each regime within constraints of regulation. Licence fees should not be used to raise revenue. We have reviewed the way we have calculated the charges so that they are now based on a recent detailed analysis of officer time. The regulation of setting fees is detailed and changes as a result of legislation and cases; outlined below.

3.2 Licence Fee Setting – general principles

1. There must be a proper determination of the authorisation fee (see Hemming [2013] EWCA Civ 591).
2. A clear understanding of the policy and objects of the regime in question is required. It follows that the relevant considerations for vetting an applicant for a street trading licence will be different to those required for a sex establishment (see R v Manchester City Council ex parte King (1991) 89 LGR 696; also R (on

the application of *Davis & Atkin v Crawley Borough Council* [2001] EWHC 854 (Admin)). Particular attention needs to be had to those statutory provisions where a power is given to the local authority for the determination of an authorisation fee and other administrative fees.

3. Applicability of the European Services Directive (see *Hemming* [2013] EWHC 1260 (Admin) and [2013] EWCA Civ 591: The Directive applies to street trading and sex licensing; not gambling or taxis.

4. Different fee levels for different types of application. A licensing authority is entitled to set either the same or different fee levels for different types of applications: i.e. grant, renewal, variation, alteration or transfer. *R v Greater London Council, ex parte Rank Organisation* [1982] LS Gaz R 643.

5. Recovery of deficit. In *R v Westminster City Council, ex parte Hutton* (1985) 83 L.G.R. 461 it was held that where the fee income generated in one year fails to meet the costs of administering the licensing system, it is open to the local authority to make a proportionate increase in the licence fee for the following year so as to recoup the cost of the shortfall (*Hutton* at p 518). This longstanding principle was confirmed in *Hemming* [2012].

6. Accounting for surplus. In *Hemming* [2012] EWHC 1260 (Admin) and [2013] EWCA Civ 591 the court determined surpluses as well as deficits are to be carried forward. The licensing authority is not entitled to make a profit. (*R v Manchester ex parte King* 1991 89 LGR 696.

7. Rough and ready calculations. In *Hemming* [2012] EWHC 1260 (Admin) and [2013] EWCA Civ 591, the court did not require pin-point precision year on year. The council does not have to adjust the licence fee every year to reflect any previous deficit or surplus, so long as it 'all comes out in the wash' eventually. And the adjustment does not have to be precise: a rough and ready calculation which is broadly correct will do.

8. Anticipated costs. Cases demonstrate that the fee level may be fixed by reference to anticipated costs of administering the authorisation scheme.

9. Over-estimation. If the fee levied in the event exceeds the cost of operating the scheme, the original decision will remain valid provided it can be said that the district council reasonably considered such fees would be required to meet the total cost of operating the scheme. *R v M ex parte King*.

Hackney Carriage & Private Hire

- 3.3 The Council must be able to show that it calculates hackney carriage and private hire licensing fees in accordance with the specific requirements of the Local Government (Miscellaneous Provisions) Act 1976. This requires that such fees have to be reasonable to recover the cost of issue and administration of licences. They cannot be used to raise revenue or fund activities such as taxis marshalls. This has been confirmed in a recent court case *Cummings and Others v Cardiff City Council* which also confirmed that fees set must have regard to any surplus or deficit in previous years for each regime (hackney carriage or private hire) The Act allows the following costs to be recovered in the fees:

- The reasonable cost of carrying out vehicle inspection to decide if a licence should be granted
- The reasonable costs of providing hackney carriage stands
- Any reasonable administrative or other costs in connection with vehicle inspection and providing hackney carriage stands and
- Any reasonable administrative or other costs in the control and supervision of hackney carriage and private hire vehicles.

The Council aims to be transparent in recording or presenting its method for calculating licence fees. This report aims to do that.

- 3.4 A trading position has been established, taking into account all expenditure that the Council has incurred in administering the service, including both direct and indirect costs. (Indirect costs for example would include an element of management time to oversee the activity, a legitimate expense in administering the licensing function). The results are set out in the table below.

Financial Year	Balance on Taxi License Fees £000*
2013/14 Actual	46 deficit
2014/15 Forecast	37 deficit
2015/16 Budget	0
Total	83 deficit

- 3.5 The proposed fee changes reduce the annual deficit with an aim to bring the trading account to a breakeven position. *Cummings & Others v Cardiff City Council 2014* confirmed that licensing authorities must take into account previous deficits and surpluses when setting fees. The Council budget setting does not normally facilitate carrying forward deficits, and so, in line with corporate charging policy officers recommend aiming for full cost recovery within the annual financial period to avoid creating deficits. Corporate fees and charges policy aims to increase the proportion of income contributed by users of services where appropriate, rather than the cost being met from the general council tax payer. Charges should not be levied on services where there is no legal basis to charge for a service but charges for services provided should be set to recover costs including central overheads. Detailed Trading Accounts are attached in Appendix 1-3.

Sex establishments and Street trading

- 3.6 *R v. Manchester ex parte King* - fees should be set at a level reasonably expected to cover costs. Surplus should be reinvested in service.

The Provision of Services Regulations 2009 is likely to have the effect that fees may need to accommodate “charges provided for by a competent authority which applicants may incur under an authorisation scheme must be reasonable and proportionate to the cost of the procedures and formalities under the scheme and must not exceed the cost of those procedures and formalities.” Recent case law, *Hemming (and others) v Westminster City Council (2012)*, has held that this cannot include the cost of investigating and prosecuting persons, firms or companies who operate sex establishments within the Council’s area without a licence.

3.7 Sex establishments: A breakdown of inspections carried out during 2012/13 by officers shows that an insignificant amount of inspections related to unlicensed premises. The administration of sex establishments and SEVs is broken down as follows:

There are 5 Sex Establishments in total, for which renewal applications are processed annually, including officers carrying out annual inspections to ensure compliance with their licence. It is unlikely that a further sex establishment licence would be granted as this would be contra policy.

SEVS: There are 3 SEVs in total. SEV fees are based on licence renewals. It is unlikely that a further SEV licence would be granted as this would be contra policy. Annual inspections are carried out to ensure compliance with their licence.

3.8 A trading position has been established, taking into account all expenditure that the Council has incurred in administering the service, including both direct and indirect costs. (Indirect costs for example would include an element of management time to oversee the activity, a legitimate expense in administering the licensing function). The results are set out in the table below.

Financial Year	Sex establishments and sex entertainment venues £000*
2013/14 Actual	22 surplus
2014/15 Forecast	18 surplus
2015/16 Forecast	0
Total	40 surplus
Assumption: Reduce licence fees by 38.5% to bring trading account to a net nil position.	

The proposed fee changes reduce the annual surplus with an aim to bring the trading account to a breakeven position. Detailed Trading Accounts are attached in Appendix 1-3.

3.9 Following the same principles as stated previously, a trading position has been established for Street Trading. During 2013/14, the majority of inspections carried out by officers are recoverable. The administration of street trading is wholly recoverable, broken down as follows:

Zone A:-

3 traders at 50 sq ft – all pay quarterly
2 traders at 42 sq ft - Ditto

Zone B:-

17 traders – 2 have paid in full, 15 pay by quarterly instalments

Upper Gardner Street Saturday Market:-

Total 51 traders – 3 pay in full with the remainder of the traders paying by quarterly instalments.

- 3.10 Taking into account all the council expenditure incurred in administering the service including an element of management time to oversee the activity, the results are set out in the table below.

Street Trading		
Financial Year	£'000	(Surplus)/ Deficit
2013/14 Actual		17 surplus
2014/15 Forecast		13 surplus
2015/16 Budget		9 surplus
Total		-39surplus
Assumption: Reduce licence fess by 5% as agreed last financial year to reduce surplus position.		

Fees should be set each year to recover the expected cost of administering the service. Initial forecasts suggest that charging for street trading at the current charge rate would result in a surplus in 2014/15 of approximately £13,000. The proposed fee changes (-5%) reduce the annual surplus with an aim to bring the trading account to a breakeven position. Detailed Trading Accounts are attached in Appendix 1-3.

Gambling Act 2005

- 3.11 There will be no increase in gambling fees and it is assumed we will maintain fees at 2014/15 levels to reduce surplus position. Trading accounts can be found at appendix 2.

Gambling Act		
Financial Year	£'000	(Surplus)/ Deficit
2013/14 Actual		8 deficit
2014/15 Forecast		3 surplus
2015/16 Budget		3 surplus
Total		2 deficit
Assumption: Maintain fees at 2014-15 levels to reduce deficit position.		

- 3.12 A table showing the fee increases can be seen at appendix 4.
- 3.13 Licensing (Income and Banking) was audited between August and October 2012.

The internal auditors reported that Substantial Assurance is provided on the effectiveness of the internal controls over the Licensing Income and Banking system. This opinion means that the effective controls are in place to manage the key risks to the system.

4. ANALYSIS & CONSIDERATION OF ANY ALTERNATIVE OPTIONS

Fees must be set.

5. COMMUNITY ENGAGEMENT AND CONSULTATION

5.1 Council's finance officer and legal services.

6. CONCLUSION

Fees must be set.

7. FINANCIAL & OTHER IMPLICATIONS:

Financial Implications:

7.1 License fees are set annually at a level that it is reasonably believed will cover the costs of providing the service, and in accordance with the legal principles involved. This is necessary in order to ensure that council tax payers are not subsidising work concerning licensing administration. Detailed trading accounts are attached in Appendix 1-3.

Finance Officer Consulted: Steven Bedford

Date 20/10/14

Legal Implications:

7.2 Legal constraints on setting fees

Fees must be charged in accordance with the requirements of the legislation under which they are charged. Thus for instance the Licensing Act 2003 gives the Council no discretion as they are set centrally by the relevant government department. Other legislation such as the Local Government (Miscellaneous Provisions) Act 1982 which covers a whole raft of activities and includes street trading and sex establishments simply states that we may charge such fees as we consider reasonable.

The term 'Reasonable' however does not imply wide discretion but incorporates important legal principles and constraints. These were highlighted in the case of *R v Manchester City Council ex parte King* concerning street trading. This case held that the fees charged must be related to the costs incurred in providing the street trading service. They must not be used to raise revenue generally. This principle is key and applies to other licensing regimes such as sex establishments. This means the fees must be set at a level reasonably expected to cover the cost of providing the service.

This principle has been reinforced by the introduction of the European Services Directive which took effect from the end of 2009. It aims to ensure that licence applications and procedures are transparent and burdens on business kept to a minimum. The processes must be non-discriminatory, justified, proportionate,

clear, objective, made in advance, transparent and accessible. The domestic legislation will require “any charges provided for by a competent authority which the applicant may incur under an authorisation scheme must be reasonable and proportionate to the cost of the authorisation procedures and formalities under the scheme and must not exceed those procedures and formalities”. Any fee charged for establishing a service can only be based on cost recovery and cannot be set at an artificial high level to deter service sectors from an area. It was held in the recent case of Hemming (and others) v Westminster City Council (2012) EWHC 1260 (Admin) and (2013) EWCA Civ 591 that when determining what is a reasonable fee for the grant or renewal of a licence to operate a sex establishment, the Council is not, as a consequence of the European Services Directive, entitled to take into account the cost of investigating and prosecuting persons firms or companies who operate sex establishments within the Council’s area without a licence. The same principle would also apply to the cost of unlicensed street traders. The Council should schedule regular fee reviews.

Therefore the trading accounts must be carefully looked at in accordance with these principles. There is a risk of challenge by way of Judicial Review in cases where fees are set at an unreasonable or unlawful level.

Lawyer Consulted: Rebecca Sidell

Date: 20/10/14

Equalities Implications:

- 7.3 There are no direct equalities implications.

Sustainability Implications:

- 7.4 There are no direct sustainability implications.

Any Other Significant Implications:

- 7.5 The council has to adapt if we are to meet the funding gap over the next four years that we are expecting. This follows savings already made over the past four years. This gap is caused by reductions in the way we are funded centrally from Government at the same time as general costs of providing services are increasing with demand for services also rising growth in the local population. People are living longer and the population is becoming more diverse. So the way people live and their needs are changing, and demand for services has gone up as a result. People’s basic expectations about how and when they contact services provided by the council have changed. It is in Council interests for more services to take advantage of new technology, so that we can tailor provision to their needs, but it also requires significant investment at a time of reducing resources. None of these things alter the nature of the council’s purpose or our responsibilities. But they do mean that the way in which the council as an organisation is run and managed, and the way in which the authority responds to demand for services has to change radically at a pace with society and financial necessity. Corporate fees and charges policy aims to increase the proportion of income contributed by users of services where appropriate, rather than the cost being met from the general Council taxpayer. All decisions for service change are taken openly, through democratic process, but we can expect that the council will

become a smaller organisation. Environmental sustainability, city regeneration, transport, culture, leisure & tourism are priorities.

SUPPORTING DOCUMENTATION

Appendices:

- 1-2 Trading Accounts.
- 3-4. List of fees and charges.

Documents in Members' Rooms

- 1. None.
- 2. None.

Background Documents

- 1. None.