

LICENSING COMMITTEE (NON-LICENSING ACT 2003 FUNCTIONS)

Agenda Item 17

Brighton & Hove City Council

Subject:	Licence fees 2022/2023		
Date of Meeting:	14 October 2021		
Report of:	Executive Director of Housing, Neighbourhoods & Communities		
Contact Officer:	Name:	Jim Whitelegg, Regulatory Services Manager	Tel: 29-2438
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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 2022/23 relating to Street Trading, Sex Establishments and Sex Entertainment Licences, Gambling premises, Taxi Licensing and Animal Activity Licences.

2. RECOMMENDATIONS:

- 2.1 That the committee approves the following licence fees will increase by an average of 2%:
- Taxi Licence fees - as set out in Appendix 1.
 - Sex Entertainment Venues and Sex Establishments fees – as set out in Appendix 2.
 - Street Trading fees – as set out in Appendix 2.
 - All Gambling Act 2005 fees – as set out in Appendix 2.
 - All Animal Activity Licences fees - as set out in Appendix 5.

A list of agreed fees for 2021-22 and proposed fees for 2022-23 is included in Appendices 1-2 & 5.

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 with the aim of covering the cost of administration of each regime within the constraints of regulation. Licence fees should not be used to raise surplus revenues. The regulation of setting fees is detailed and changes as a result of legislation and cases; outlined below. It is proposed to raise all fees by the corporate rate of inflation (2%) for 2022/23 and as a minimum each year thereafter. Given that our fees have been benchmarked and can demonstrate they are set fairly, it is felt that this approach helps provide more certainty for the trade and ensures that our costs are fully recovered each year (taking account of inflationary uplifts). If there were any

significant variations to the costs, then these would be communicated to the trade and clearly be taken into account when setting the relevant fee/s.

Licence Fee Setting – general principles

- 3.2 There must be a proper determination of the authorisation fee (see Hemming 2015, 2017] UKSC.
- 3.3 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.
- 3.4 Applicability of the European Services Directive (see Hemming [2015, 2017] UKSC: The Directive applies to street trading and sex licensing; not gambling or taxis. *The UK left the EU on 31 January 2020, and the transition period (during which EU rules continued to apply in the UK) ended on 31 December 2020. The Services Directive therefore no longer applies to the UK, or to EEA businesses or individuals providing services in the UK. However, the European Union (Withdrawal) Act 20183 preserved the Provision of Services Regulations 2009 (as amended in 2014) for UK nationals and businesses established in the UK and formed under UK law. Regulation 18(4) applies to fees in the same way as the former Directive.*
- 3.5 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.
- 3.6 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].
- 3.7 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.
- 3.8 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.
- 3.9 Anticipated costs. Cases demonstrate that the fee level may be fixed by reference to anticipated costs of administering the authorisation scheme.

- 3.10 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

- 3.11 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 marshals. 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 recent Court of Appeal case: R. (on the application of Rehman) v Wakefield City Council, December 2019, established that costs of administration under S53(2) of the above act could include the costs of enforcement against drivers of hackney carriages and private hire vehicles.

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.
- 3.12 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.

Taxi Licensing	
Financial Year	£'000 (- Surplus)/ Deficit
2020/21 Actual	1
2021/22 Forecast	1
2022/23 Budget	-1
Total	1

- 3.13 The fee structure has been reviewed and simplified to help improve the application process and allow payments to be made on-line. The current and proposed fees are set out in Appendix 1.

Detailed Trading Accounts are attached in Appendix 3.

Sex Establishments and Street Trading

- 3.14 Sex Establishments:-The administration of Sex Establishments and Sex

Entertainment venues (SEV)s 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.

- 3.15 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. The results are set out in the table below.

Sex Establishments and Sex Entertainment Venues	
Financial Year	£'000 (-Surplus)/ Deficit
2020/21 Actual	-2
2021/22 Forecast	1
2022/23 Budget	1
Total	0

The proposed fees are set to rise in line with the corporate rate of inflation at 2%. Detailed Trading Accounts are attached in Appendix 4.

- 3.16 Following the same principles as stated previously, a trading position has been established for Street Trading. During 2021/22, the majority of inspections carried out by officers were recoverable. The administration of street trading is wholly recoverable, broken down as follows:

Zone A:-

4 traders at 50 sq ft – all pay quarterly
1 traders at 42 sq ft - both vacant

Zone B:-

38 traders – 27 paid/11 unpaid)

Upper Gardner Street Saturday Market:-

Total 43 pitches (total 74 available) – 32 paid/5 unpaid

- 3.17 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
2020/21 Actual	0
2021/22 Forecast	0
2022/23 Budget	-1
Total	-1

The proposed fees are set to rise in line with the corporate rate of inflation at 2%. Detailed Trading Accounts are attached in Appendix 4.

Gambling Act 2005

- 3.18 The proposed fees are set to increase by an average of 2% in most cases, Where fees charged are already at the maximum level (set nationally) they are unchanged. Trading accounts can be found at Appendix 4.

Gambling Act	
Financial Year	£'000 (-Surplus)/ Deficit
2020/21 Actual	0
2021/22 Forecast	1
2022/23 Budget	1
Total	2

Animal Activity Licensing

- 3.19 It is proposed to raise all fees in line with the corporate rate of inflation (2%) as set out in Appendix 5.

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:

- 7.1 Financial Implications:

Licence 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.

Finance Officer Consulted: Michael Bentley

Date: 14th Sept 2021

7.2 Legal Implications:

Legal constraints on setting fees are as follows:

- 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. Fees must be proportionate. This principle is key and applies to other licensing regimes such as sex establishments.

- This principle has been reinforced by the introduction of the European Services Directive which took effect from the end of 2009. The European Union (Withdrawal) Act 2018 preserved the Provision of Services Regulations 2009 (as amended in 2014) for UK nationals and businesses established in the UK and formed under UK law. Regulation 18(4) applies to fees in the same way as the former Directive.
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- The processes must be non-discriminatory, justified, proportionate, clear, objective, made in advance, transparent and accessible. 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. The applicability of the Directive has been discussed in the recent case of *Hemming (and others) v Westminster City Council* (2015) (2017) UKSC. It is permissible for enforcement costs to be included in a licence fee but this element of the fee must be levied once the application has been granted. 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: 30/09/21

7.3 Equalities Implications:

There are no direct equalities implications.

7.4 Sustainability Implications:

here are no direct sustainability implications. Any Other

Significant Implications:

SUPPORTING DOCUMENTATION

Appendices:

- 1-2 List of fees and charges.
- 3-4. List of Trading accounts.
5. Current and Proposed Fees for Animal Activity Licensing

Documents in Members' Rooms

1. None.
2. None.

Background Documents

None

