

LICENSING COMMITTEE

Date: Tuesday 20 November 2018
Time: 5.30 pm
Venue: Rennes Room - Civic Centre

Members are invited to attend the above meeting to consider the items of business.

If you have an enquiry regarding any items on this agenda, please contact Mark Devin, Democratic Services Officer (Committees) on 01392 265477 or email mark.devin@exeter.gov.uk

Entry to the Civic Centre can be gained through the Customer Services Centre, Paris Street.

Membership -

Councillors Owen (Chair), Sheldon (Deputy Chair), Begley, Branston, Foale, Hannan, D Henson, Holland, Mitchell, Newby, Pattison, Sills, Warwick and Wright

Agenda

Part I: Items suggested for discussion with the press and public present

1 **Apologies**

To receive apologies from Committee members.

2 **Minutes**

To approve and sign the minutes of the meeting held on 18 September 2018.

3 **Declarations of Interest**

Councillors are reminded of the need to declare any disclosable pecuniary interests that relate to business on the agenda and which have not already been included in the register of interests, before any discussion takes place on the item. Unless the interest is sensitive, you must also disclose the nature of the interest. In accordance with the Council's Code of Conduct, you must then leave the room and must not participate in any further discussion of the item. Councillors requiring clarification should seek the advice of the Monitoring Officer prior to the day of the meeting.

4 **Local Government (Access to Information) Act 1985 - Exclusion of Press and Public**

To pass the following resolution:

RESOLVED that, under Section 100A (4) of the Local Government Act 1972, the press and public be excluded from the meeting for item 5 on the grounds that it involve the likely disclosure of exempt information as defined in paragraphs 1 and 2 of Part I of Schedule 12A of the Act.

Part II: Items suggested for discussion with the press and public excluded

LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT 1982

5 Application for Consent to Street Trade

To consider the report of the Environmental Health and Licensing Manager.

(Pages 3 -
12)

Part I: Items suggested for discussion with the press and public present

LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT 1976

6 Change to Sex Establishment Licensing Fees

To consider the report of the Environmental Health and Licensing Manager.

(Pages 13
- 16)

Individual reports on this agenda can be produced in large print on request to Democratic Services (Committees) on 01392 265107.

Agenda Item 5

By virtue of paragraph(s) 1, 2, 3 of Part 1 of Schedule 12A
of the Local Government Act 1972.

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REPORT TO LICENSING COMMITTEE

Date of Meeting: 20 November 2018

Report of: Environmental Health and Licensing Manager

Title: Change to Sex Establishment Licensing Fees

Is this a Key Decision?

No

* One that affects finances over £1m or significantly affects two or more wards. If this is a key decision then the item must be on the appropriate forward plan of key decisions.

Is this an Executive or Council Function?

Licensing is a Council function delegated to the Licensing Committee

1. What is the report about?

1.1 The purpose of this report is to amend the current fee structure for sex establishments in accordance with the power to charge fees under Schedule 3 Paragraph 19 of the Local Government (Miscellaneous Provisions) Act 1982. This report does not seek to revise the fees charged for sex establishment licences.

2. Recommendations:

2.1 To amend the current fee for 2018/19 with immediate effect in accordance with the provisions of the Local government (Miscellaneous Provisions) Act 1982 and the Provision of Services Regulations 2009 and in order to meet current legal requirements. The Sex Establishment Fee will remain at £3850 in total but will be split as follows:-

- Part A - £3130
- Part B - £720

3. Reasons for the recommendation:

3.1 The statutory principle in relation to the setting of fees is that they should be reasonable and should relate to the costs of performing the function, including staffing, administration, testing, inspections, hearings, regulation and appeals.

3.2 The recommendation is in order to comply with the provisions of the European Services Directive (2006/123/EC) which was incorporated into UK law by the Provision of Services Regulations 2009. The legal requirements were considered by the Supreme Court in the case of *R (on the application of Hemming and others) v Westminster City Council* [2015] UKSC 25 and [2017] UKSC 50.

4. What are the resource implications including non financial resources.

4.1 There are no resource implications as a result of this report.

5. Section 151 Officer comments:

The overall fee remains in-line with approved fees and charges for 2018/19 and therefore raises no concerns. However, the licence fee for future financial years will be review annually in order to ensure it continues to achieve full cost recovery.

6. What are the legal aspects?

6.1 The Licensing Committee's responsibilities are set out in the Council's Constitution and include setting and reviewing licensing fees other than those set by statute.

6.2 The power to charge a fee is contained in Schedule 3 Paragraph 19 of the Local Government (Miscellaneous Provisions) Act 1982 which provides local authorities with a wide discretion to set a 'reasonable fee'. Paragraph 19 provides that:

'An applicant for the grant, variation, renewal or transfer of a licence under this Schedule shall pay a reasonable fee determined by the appropriate authority.'

In accordance with this provision, it was established over 30 years ago by the Court of Appeal in the case of *R v Westminster, ex parte Hutton (1985)* that a fee could be charged under paragraph 19 in order to reflect the costs, not only of processing applications, but also of '...inspecting premises after the grant of licences and for what might be called vigilant policing... in order to detect and prosecute those who operated sex establishments without licences'. The Supreme Court has subsequently held in the Hemming case (cited below) that it is open to a licensing authority to require an applicant for the grant or renewal of a licence to pay a fee to cover the running and enforcement costs of a licensing scheme.

6.3 Since December 2009, this power has been subject to the provisions of the European Services Directive (2006/123/EC) which was incorporated into UK law by the Provision of Services Regulations 2009. The Regulations state that charges incurred by applicants 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" (effectively the costs to administer the process). In the case of *R (on the application of Hemming and others) v Westminster City Council [2015] UKSC 25*, the Supreme Court held that it remains the case that local authorities can include not only administrative costs, but additionally the costs of regulatory and enforcement costs in the fees charged to licensed operators provided that such costs are reasonable and proportionate.

6.4 It was originally the case that application fees have been payable in full and at the time of making an application for a licence as one composite fee. However, following the Supreme Court's judgment in the Hemming case in 2015, it made a referral to the Court of Justice of the European Union (CJEU) as to the interpretation of the European Services Directive. The Supreme Court identified two types of licensing schemes:

Type A: Application for licenses are made on terms that the applicant must pay:

- (i) On making the application, the costs of the authorisation procedures and formalities, and
- (ii) On the application being successful, a further fee to cover the costs of the running and enforcement of the licensing scheme.

Type B: Applications for licences are made on terms that the applicant must pay:

- (i) On making the application, the costs of the authorisation procedures and formalities
- (ii) At the same time, a further fee to cover the costs of the running and enforcement of the licensing scheme.

The CJEU interpreted the legislation as allowing only 'Type A' schemes.

The CJEU's interpretation was subsequently applied by the Supreme Court in the second Hemming case in July 2017. Until now, Exeter City Council has been running a 'Type B' scheme. Therefore the licensing authority is required to operate a 'Type A' scheme. This will require the licensing authority split the licence fee into two separate sums, one for administration of the licence application, to be paid upon the application being made, and the second fee which is to be paid following the grant of the application. This second sum will cover the enforcement and management of the licence.

Accordingly the proposals in this report will change the basis upon which licensing fees are charged by the licensing authority to sex establishments by removing the 'Type B' scheme and implementing the 'Type A' scheme in its place.

On this basis the licence fee will consist of two parts, A and B as follows:

Part A is to cover the costs of processing the application, namely the costs of the authorisation procedures and formalities.

The Part A fee is payable in full on submission of the application and is non-refundable.

Part B is to cover the costs associated with running and enforcing the licensing scheme.

The Part B fee would only become payable if a licence is granted, and would need to be paid by the operator before the licence becomes operational.

7. Monitoring Officer's comments:

In order to comply with the provisions of the European Services Directive (2006/123/EC) which was incorporated into UK law by the Provision of Services Regulations 2009, the licensing authority is required to adopt a 'Type A' scheme as set out above under 'legal comments'.

8. Report details:

- 8.1 Exeter City Council has statutory responsibility for the administration and enforcement of a wide range of licences, registrations and permits. Many of these schemes allow the Council to charge a fee, payable by an applicant for a licence, in order to cover the costs (or a proportion thereof) of the administration of those licence types. In some cases, costs are also permitted to cover other aspects of providing the regulatory scheme.
- 8.2 The basis in setting such fees is generally to ensure full cost recovery, or as close to it as possible. Licensing fees may not be used to generate a profit for councils, and fees should be reviewed annually to ensure that neither a significant surplus nor deficit is created. Surpluses or deficits may be carried forward to future years to be redistributed or recouped, as applicable.
- 8.3 Many licensing schemes fall within the definition of 'services', under the EU Services Directive, as incorporated by the Provision of Services Regulations 2009. For such schemes, fees and charges 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*". This principle was affirmed by the courts in *R (on the application of Hemming (t/a Simply Pleasure Ltd)) v Westminster City Council*. Fees

must reflect administrative, policy and compliance costs, but cannot include the costs of enforcement action against unlicensed operators.

8.4 This report seeks to maintain the current fee level, but to move from a 'Type B' to a 'Type A' scheme and to split the fee into Part A and Part B to comply with statutory requirements.

9. How does the decision contribute to the Council's Corporate Plan?

9.1 The appropriate setting of Licensing Fees will contribute to a healthy and safe city, and lend support to a robust, business friendly economy.

10. What risks are there and how can they be reduced?

10.1 The proposed fees have been calculated on a cost recovery basis, and projections show that if the current fees are maintained (split between Part A and Part B) the costs of administering licensing schemes should be recovered.

11. What is the impact of the decision on equality and diversity; health and wellbeing; safeguarding children, young people and vulnerable adults, community safety and the environment?

11.1 Formulating a licensing fee structure that supports a strong licensing regime and recognises the key aims of the council will lead to a positive impact in creating a vibrant city to live, work and visit.

11.2 There are no identified equality concerns arising from this report.

12. Are there any other options?

12.1 The proposed amendments are required in order to comply with the provision of Services Regulations 2009. There are no other options.

Environmental Health and Licensing Manager

Local Government (Access to Information) Act 1972 (as amended)

Background papers used in compiling this report:-

Local Government (Miscellaneous Provisions) Act 1982

Contact for enquires:
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