BIRMINGHAM CITY COUNCIL

REPORT OF THE INTERIM ASSISTANT DIRECTOR OF REGULATION AND ENFORCEMENT TO THE LICENSING AND PUBLIC PROTECTION COMMITTEE

9 MARCH 2022
ALL WARDS

REVIEW OF MANDATORY HMO FEES AND CHARGES 2022/2023

1. Summary

1.1 The Corporate Charging Policy and Financial Regulations require that fees and charges levied by the Licensing and Public Protection Committee be reviewed on an annual basis to ensure the continued full recovery of costs.

1.2 It should be noted that some of the fees relating to areas which come within your Committee's remit are set nationally through statute, and these cannot be varied by your Committee.

2. Recommendations

2.1 That the changes to the mandatory Houses in Multiple Occupation (HMOs) fees and charges as detailed in Appendix 1 be approved to take effect from 31st March 2022 for applications where a new licence would be issued in the financial year 2022/23 or where a late application was received on 31st March 2022 or later for a licence that expired at any time before.

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3. Background

3.1 The City Council's Corporate Charging Policy and Financial Regulations require that Chief Officers, at least annually, report to and seek approval from Committee on a review of all fees and charges levied for services provided. This report also takes account of the legal framework within which certain licence fees must be set.

3.2 The mandatory HMO licensing scheme is a ring-fenced account and therefore must meet any and all expenditure from within its own income. The level of income is entirely dependent upon the number of licences applied for, issued or renewed in a particular year.

3.3 In order to ensure the fees accurately reflect the true cost of administering and processing licences the fee calculations are based data relating to the current budget, the number of licences issued per year (new or renewals) in the last 4 years. It is also acknowledged that since 2019/20, 2020/21 and 2021/22 there has been a backlog of licence applications due to insufficient staffing caused by budget constraints related to the fee level The proposed fees are further influenced by the introduction of a new process for determining licences from 2022/23 that will include a pre licence inspection.

3.4 Members will note a blanket percentage change has not been applied, but that each fee has been reviewed to take into account the use of carry forward balances (where applicable), changes in overhead costs and processing times.

3.5 The fees proposed in this report are calculated to recover the full cost of carrying out the service. This includes all administrative costs (including premises and service costs), any recharge of officers' time in appropriate cases when carrying out inspections of premises and other compliance duties (where applicable).

3.6 The fees proposed fulfil the main requirement of assuring that full costs are recovered from the income generated wherever possible.

3.7 The legal requirement for a Licensing Service to recover only "reasonable costs" takes precedence over the City Council's Corporate Charging Policy and the requirement to maximise income. License fees prescribed by statute also take precedence over the Corporate Charging Policy.

3.8 In setting the fees we have also taken account of the various precedents set by case law in the various areas of licensing. A summary of these cases is provided at Appendix 2

4. Mandatory HMOs

4.1 Not all HMOs require a licence. However, under the provisions of the national mandatory licensing scheme, a building, or part of a building, requires a mandatory HMO licence if it is a HMO with five or more people in occupation, who form two or more households, and the property fulfils the standard, self-contained flat or the converted building tests as detailed in Section 254 Housing Act 2004.

4.2 A separate licence is needed for each HMO property.

4.3 Failure to apply for a licence is a criminal offence and can result in a civil penalty or an unlimited fine.

4.4 To grant a licence, we must be satisfied that:

- the proposed licence holder is the most appropriate person to hold the licence
- the proposed licence holder, and any manager of the property, is a "fit and proper person"
- proper management standards are in place at the property
- the HMO is reasonably suitable, or can be made suitable, for occupation by the number of persons allowed under the licence, and achieves the minimum prescribed standards of fire precautions, amenities and facilities, including the number, type and quality of shared bathrooms, toilets and cooking facilities.
- Please see the following link for further information: https://www.birmingham.gov.uk/downloads/file/1630/houses_in_multiple_occupation_hmo_property_and_management_standards

5. Who must hold the licence?

5.1 The landlord, or someone they nominate, such as a manager or agent, can hold the licence, provided that person is in agreement, as the licence must be held by the most appropriate 'fit and proper' person.

5.2 In determining whether a licence-holder is 'fit and proper, we will consider:

- any previous convictions relating to violence, sexual offences, drugs and fraud
- whether the proposed licence holder has broken any laws relating to housing or landlord and tenant issues
- whether the person has been found guilty of unlawful discrimination
- whether the person has previously managed HMOs that have broken any approved code of practice.

6. The Proposed Fees:

6.1 Appendix 1 shows the current licence fees (unchanged since 1 April 2018) and the proposed licence fees for any application where a new licence would be issued in the financial year 2022/23 or where a late application was received on 31st March 2022 or later for a licence that expired at any time before.

6.2 In order to ensure the fees reflect the cost of administering the licensing scheme and processing the licences, as well as compliance with those licences (and a proportion for enforcement against landlords illegally operating without a licence, but not related to any prosecution costs), the fee calculations are based projections for salary, premises and other costs for 2022/23.

6.3 Members will note that the proposed fees are split into a non-refundable application fee and a licence fee. This split is required further to case law set by R (Hemming and Others) vs Westminster City Council. Each fee takes account of salary costs, overhead costs, and processing and activity times.

6.4 The introduction of additional fees for paper applications relates to the extra work entailed in sending out the paper application and checking the paperwork, scanning and uploading it onto the electronic system..

6.5 We have introduced a new service relating to an advice visit pre application where officers will visit the premises an assist in clarifying any issues for the applicant.

6.6 There will no longer be a reduction in the overall cost of licence (application fee and licence fee) for membership of the Midland Landlord Accreditation Scheme. This because being a member of this scheme does not reduce the time spent in determining applications and administering the scheme to its members. Therefore, any fee reduction would result in a shortfall the income required to deliver the licensing scheme.

6.7 There is no separate fee proposed for renewals as the time spent assessing renewal applications and administering the licence scheme for renewals is the same as that spent for any new licence application.

6.8 It is acknowledged that there is a considerable increase in the cost of an mandatory HMO licence, but this increase will enable the Council to ensure that it is meeting its obligations and duties in relation to processing licences within a reasonable timeframe and carrying out the appropriate inspections to ensure that the conditions of the licence are complied with and that the standard and safety of premises is at the required level. It also enables the scheme to identify premises that are operating illegally and bring them into the scheme using appropriate enforcement powers.

7. Duration of a Licence

7.1 Mandatory HMO licences may be issued for a duration up to five years. However, the duration is at the discretion of the local authority when considering each application on its merit. It is our intention to issue a licence for five years unless one of the matters below are raised in which case we will consider limiting the duration of the licence to one year

- the application follows an investigation made by the council
- the application follows a request made by the council
- where a property should have been licensed previously
- there is evidence of previous poor management of an HMO
- the planning status for use of the property as an HMO is unconfirmed

7.2 In relation to the last bullet point consideration has been given to Waltham Forest v Khan [2017] UKUT 153 (LC) refer to appendix 3.

In this case the Upper Tribunal (UT) recognised that the grant of a shorter licence was found to be a sensible solution to problems that can arise from the overlapping and sometimes irreconcilable planning and licensing regimes. Landlords seeking to regularise the planning status of a property are often required to obtain possession. However, under the Housing Act 2004 a landlord is not able to serve a section 21 notice to regain possession of an unlicensed property. Therefore, if the local authority refused to grant a licence, the landlord would not be able to gain possession in order to regularise the planning status. However, if the local authority granted a licence it would be sanctioning the letting of a property in breach of planning control. The grant of a one-year licence, which allowed the landlord time to regularise the planning issues whilst lawfully letting the property was found by the UT to be a sensible and practical solution to this problem.

7.3 It is acknowledged that the UT was referring to a licence in a selective licensing scheme rather than a mandatory HMO licensing scheme, however, it is considered that the same principles apply.

7.4 The duration of the licence will not impact on the amount of work required to assess the application and to carry out at least one compliance visit. As such no separate licence fee applies in these circumstances.

8. Consultation

8.1 Under Schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982 (LGMPA 82), a district council may charge such fees as they consider reasonable for the grant or renewal of a licence. There is no requirement to consult.

8.2 On 17 December 2021 the Head of Licensing wrote (by email) to the Midland Landlord Accreditation Scheme (MLAS) and informed them that Birmingham City Council's was reviewing the fees related to mandatory HMOs. The correspondence detailed the issues that had previously been considered in relation to the current reduction in fees for MLAS members and clarified that the review could not establish how being a member of MLAS would result in a time saving in terms of administration of the licensing scheme for MLAS members. It would not therefore be appropriate to offer a fee reduction to MLAS member in respect of mandatory HMO licensing fees.

8.3 MLAS was asked to submit any comments they wished to make in response to this email 4 January 2022. No comments have been received.

9. Implications for Resources

9.1 The proposals are consistent with the proposed budget for 2022/23 for the Licensing and Public Protection Committee that will be reported to you in March, subject to prior approval by City Council. This will ensure that the services continue to be managed within the approved cash limits and in line with the financial regulations relating to these services.

9.2 The fees and charges proposed within this report are calculated both on forecasts and also historic income and expenditure for 2020/21 and include the direct costs of the delivery of services and a proportion of indirect central business support costs e.g. Human Resources, Legal, IT, Finance, Procurement and Democratic costs.

9.3 It should be noted that fees and charges are reviewed annually and that they may increase or decrease depending on the cost of delivering the service in the previous year and any carry forward balances.

9.4 There are three possible ways in which the fees could be challenged:

- Judicial review of the Council decision based on the decision being Ultra Vires or considered to be unreasonable or irrational (known as Wednesbury Principles).
- Through the District Auditor – if a Birmingham resident objects to the Local Authority accounts on the grounds that an item is contrary to law or
- If the Council proposes to set an unlawful fee. This must be reported to and considered by the Monitoring Officer.

9.5 The proposed fees have been calculated having regard to projected costs and in accordance with best practice advice and also with regard to significant case law. There is no statutory method in which to calculate the fees.

9.6 Any decision to set fees otherwise than in accordance with the proposals within this report without appropriate justification is likely to increase the risk of challenge.

10. Implications for Policy Priorities

10.1 The recommendations are in accordance with Financial Regulations and budget requirements.

10.2 The legal requirement for a Licensing Service to recover only "reasonable costs" takes precedence over the City Council's Corporate Charging Policy and the requirement to maximise income.

11. Public Sector Equality Duty

11.1 The fees that are proposed in this report will relate to all licence holders and applicants for licences regardless of their protected characteristics. The fees are calculated on the cost of delivering the service and consequently an Equalities Assessment has not been undertaken.

Background Papers:
Birmingham City Council – Corporate Charging Policy

APPENDIX 1

MANDATORY HMO LICENCE BASIC FEES FOR ALL APPLICATIONS RECEIVED AFTER 1st April 2018	
Licence fee for an HMO	**£950**
For the renewal of an existing licence made before the current licence expires where no change of circumstances	**£650**
DISCOUNTS	
For applicants who are members of Midlands Landlords Accreditation Scheme (based on a deduction for non-inspection of properties at the average cost of inspection of HMOs)	**£250**

The Proposed Fees 2022/23

	Number of Occupants of HMO		
	5 Persons	**6 to 11 Persons**	**11+ Persons**
Part A (application fee)	£420	£470	£515
Part B (licence fee)	£705	£745	£785
Total	**£1125**	**£1215**	**£1300**

Paper application to send	£20
Paper application to process	£65
Advice visit	£200

APPENDIX 2

Summary of Relevant Case Law

R (on the application of Carl Cummings and others) v The County Council of the City of Cardiff [2014] EWHC 2544 (Admin)

The Claimants challenged successfully the lawfulness of the taxi and private hire fees set by Cardiff City Council, resulting in the refund of some £1.2 million to the taxi trade in respect of overpaid fees. This case was a Judicial Review of a Cardiff City Council decision. The court found that the Council had not been properly accounting and keeping record of any surplus or deficit dating back to 01 May 2009, and that the fees that had been set over the subsequent years had therefore been set without taking into account any such surplus or deficit. These surpluses and deficits can only be accounted for and taken into account within the specific regime that they cover (either hackney carriage or private hire), and surpluses from one regime cannot be used to offset deficits in the other regime. In other words, Councils are required to keep separate accounts for both the hackney carriage regime and the private hire regime, and must ensure that one is not supporting the other financially. Councils ought to separate out the five streams of taxi licensing (comprising vehicles, drivers and operators) when collecting their licence fees, to ensure no cross-subsidy within these streams. Moreover, Councils must not use the licensing fees as an income generating scheme.

R (on the application of Abdul Rehman on behalf of the Wakefield District Hackney Carriage and Private Hire Association) v Wakefield District Council and the Local Government Association (intervener) [2019] EWCA Civ 2166

This case, known as Rehman v Wakefield Council, was a Court of Appeal matter which clarified the law on taxi and private hire enforcement costs. Wakefield Council had imposed the cost of enforcement activity in relation to drivers onto the vehicle licence fees. Wakefield's Taxi and Private Hire Association challenged this, on the basis that Wakefield's calculations were unlawful because it was a form of cross-subsidising fees. The case clarified the correct procedure that councils must apply when setting taxi and private hire fees – namely that costs associated with monitoring and enforcing driver conduct must be factored into to driver licensing fees under s53 LG(MP)A 1976, and not vehicle licence fees under s70 (as had been the practice in Wakefield). The case therefore reaffirmed the principle that cross-subsidisation of taxi and private hire fees is not permitted in law.

R v Manchester City Council ex parte King (89 LGR 696 [1991]; The Times, 3 April 1991)

This was a street trading case that established that local authorities may only charge reasonable fees for licences and cover the Council's costs in the administration of those application types and issue costs - but not use them to raise revenue. The Council had set licence fees at a commercial rate, considering that the calculation of a ‘reasonable fee’ was a matter for their own discretion. But the court held that the fees must be related to the street trading scheme, and the costs of operating that scheme. The Council could therefore charge such fees as it reasonably considered would cover the total cost of operating the street trading scheme (or such lesser part of the cost of operating the street trading scheme as they considered reasonable). NB – this does not mean that any surplus revenue makes the fee structure invalid. The original position will remain valid provided that it can be said that the Council reasonably considered such fees would be required to meet the total cost of operating the scheme, even if the fees levied turn out to exceed the cost of operating the scheme.

R v Westminster City Council ex parte Hutton (1985) 83 LGR 516

This case was tried and reported with R v Birmingham City Council, Ex p Quietlynn Ltd (1985) 83 LGR 461, 517 and confirmed the principle that licensing fees may lawfully include amounts calculated to cover the cost to the licensing authority of regulation and enforcement. Hutton challenged the fee set for applying for a licence to operate a sex shop, on the basis that the administrative costs on which the fee was based included a sum representing the supposed shortfall in fee income against administrative costs in the previous year. The court held that the fee could reflect not only the processing of applications, but also ‘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 Council was free to fix fees reflecting those necessary elements on a rolling basis, without adjusting surpluses and deficits in each year. This was on the basis that the statutory accounts of local authorities are structured such that shortfalls in one year must be carried into the next year’s accounts. The court accepted Westminster’s contention that when a charge is based on an annual budget, which must be concerned with situations which themselves will not be verifiable until after the end of the year in question, the only sensible way to fix the level of the charge is to take one year with another.

R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) v Westminster City Council [2015] - 29th April 2015; [2015] UKSC 25, [2015] BLGR 753, [2015] PTSR 643, [2015] WLR(D) 193, [2015] AC 1600, [2015] 3 CMLR 9, [2015] LLR 564, [2015] 2 WLR 1271, UKSC 2013/0146

The Hemming case was a Supreme Court decision which overturned a Court of Appeal decision which had in turn upheld the decision of the lower court. Many commentators feel that the Supreme Court decision “restored common sense to the question of what licensing and other regulatory fees can lawfully include”. The Supreme Court affirmed the principle in ex p. Hutton – namely that licensing fees may lawfully include amounts calculated to cover the cost to the licensing authority of regulation and enforcement.

Hemming’s argument was that the approach approved 30 years before in ex p. Hutton was no longer lawful due to the effect of an EU Directive which had been implemented into domestic law under Regulations. Hemmings asserted that the Directive and Regulations precluded Westminster from including costs of enforcement activities against unlicensed operators in determining the licence fees payable by licensed operators; he felt that these costs should be covered by revenue from Council Tax and business rates. The huge importance of the case, not only to all other Council licensing departments but also to other (entirely unrelated) regulatory bodies, was such that when the case came before the Supreme Court there were nine Interveners before the Court - including the Architects Regulation Board, the Solicitors Regulation Authority, the Bar Standards Board, the Local Government Association and HM Treasury.

The decision was that the Directive and Regulations were solely concerned with ensuring that the costs charged for authorisation procedures (ie the clerical and administrative aspects of authorisation) were reasonable and proportionate to the actual costs of those procedures; they in no sense precluded licensing authorities from also including the costs of regulatory and enforcement activities in the total licence fees payable by licensed operators. The court saw no reason why the fee should not be set at a level enabling the authority to recover from licensed operators “the full cost of running and enforcing the licensing scheme, including the costs of enforcement and proceedings against those operating sex establishments without licences." Likewise, with regard to other areas of licensable activity (where licensing authorities are empowered by domestic legislation to recover the costs of enforcement activity through licence fees) and regulated activity (e.g. practising as an architect, barrister or solicitor) - the decision of the Supreme Court has made clear that the Directive and Regulations do not preclude licensing authorities, or other regulatory bodies, from continuing to recoup their enforcement costs through fees charged to licensed operators or certified practitioners.

There is a related point - the Supreme Court said that one aspect should be referred to the European Court of Justice, namely Westminster's chosen method of exercising its right to recover the costs of enforcement. Westminster charged all applicants for sex establishment licences a fee that included both a sum to cover the cost of administering the application and a sum representing a contribution towards Westminster's costs of enforcement. The latter sum was refunded to unsuccessful applicants, whilst the former sum was not.

The Supreme Court asked the ECJ to determine whether that particular method of charging, which effectively deprives unsuccessful applicants of the use of the latter sum whilst their application is being considered, fell foul of the Directive (as opposed to an alternative method of charging only the successful applicants with the contribution towards the costs of enforcement).

In its judgment the ECJ concluded that the Directive must be interpreted as precluding a requirement for the payment of a fee, at the time of submitting an application for the grant or renewal of authorisation, part of which corresponds to the costs relating to the management and enforcement of the authorisation scheme concerned, even if that part is refundable if that application is refused. The citation of this ECJ decision is: Hemming (Judgment) [2016] EUECJ C-316/15 (16 November 2016): [2017] 3 WLR 317, [2017] LLR 189, [2016] WLR(D) 608, [2017] PTSR 325, ECLI:EU:C:2016:879, [2018] AC 650, [2017] CEC 920, EU:C:2016:879, [2016] EUECJ C-316/15

APPENDIX 3

Reference: https://www.londonpropertylicensing.co.uk/khan-and-reid-upper-tribunal-considers-length-landlords%E2%80%99-property-licences

Background

Part 3 of the Housing Act 2004 enables local authorities to implement selective licensing schemes to cover all privately rented accommodation within a particular area. Selective licensing is designed to assist local authorities improve housing conditions in the private rented sector. Schemes are often introduced to deal with low housing demand or anti-social behaviour.

Waltham Forest introduced a borough-wide selective licensing scheme in 2015. The effect of the scheme is that all landlords in the borough, even those who let to one family or one individual, have to apply to Waltham Forest for a property licence.

Licences are usually granted for the maximum length of five years. Local authorities, however, have the discretion to grant shorter licences and they usually have policies setting out factors that housing officers should consider when determining the length of a licence.

If a landlord is not satisfied with the local authority's decision it is able to appeal to the First-Tier Tribunal (Property Chamber) (FTT). Appeals of FTT decisions lie to the Upper Tribunal (UT).

Waltham Forest v Khan [2017] UKUT 153 (LC)

Waltham Forest v Khan

In Khan, the Upper Tribunal agreed with the local authority's decision to grant the landlord a shorter licence on the basis that the planning status of the property needed to be regularised.

Mr Khan, the landlord, had converted several flats without obtaining planning permission from the local authority. When Waltham Forest's selective licensing scheme came into force he applied for licences for the flats. Waltham Forest granted licences but limited their duration to one year so that Mr Khan could regularise the planning status of the flats in that period. Mr Khan appealed the local authority's decision to the FTT.

The FTT overturned the local authority's decision increasing each licence to the maximum period of five years. The FTT was of the view that compliance with planning law was not relevant to the issue of licensing. As planning considerations did not fall within the statutory criteria that local authorities are required to take into account when determining licensing applications, it was commonly thought that breaches of planning were not relevant to the local authority's decision to grant or refuse a licence or the terms of the licence.

The local authority successfully appealed to the UT. The UT stated that in light of the objective behind Waltham Forest's selective licensing scheme, to reduce the area's significant and persistent problem with ASB which landlords were failing to combat, it was not possible to state that a breach of planning control was irrelevant to the local authority's licensing decisions. Martin Rodger QC, the Deputy Chamber President commented that it was unnecessary and unrealistic 'to regard planning control and Part 3 licensing as unconnected policy spheres in which local authorities should exercise their powers in blinkers.' Local authorities were perfectly entitled to consider the planning status of a property when determining whether to grant or refuse a licence or the terms of any licence granted. Waltham Forest's policy of granting landlords in breach of planning law shorter licences to allow them time to resolve outstanding planning issues was deemed to be a rational and pragmatic course.