

Birmingham City Council

Sex Establishments Policy 2017 - Draft

Introduction

- 1 The Birmingham City Council Sex Establishments Policy (“the Policy”) identifies the City Council’s approach to the regulation of Sex Establishments and the processes to be followed relating to applications for licences of this kind.
- 2 A Sex Establishment is a:
 - Sex Shop
 - Sex Cinema
 - Sexual Entertainment Venue (SEV)
- 3 The Policy seeks to provide guidance for prospective applicants, existing licence holders, those who may wish to object to an application and members of the Licensing and Public Protection Committee when making a determination on an application. This policy will be reviewed regularly and revised where necessary.
- 4 Birmingham City Council (“the Council”) does not take a moral stance in adopting this policy. The Council recognises that Parliament has made it lawful to operate sex establishments and that such businesses are a legitimate part of the retail and leisure industries. It is the Council’s role as a Licensing Authority to regulate such premises in accordance with the law.
- 5 The previous Policy related only to Sexual Entertainment Venues, despite the similarity of requirements and conditions relating to the three types of Sex Establishment. As part of the most recent review it was decided a single Sex Establishment Policy should be introduced to encompass the three areas.

Legal Background

- 6 Birmingham City Council is able to regulate sex establishments through Schedule 3 of the **Local Government (Miscellaneous Provisions) Act 1982** (“the 1982 Act”) as amended.
- 7 Provisions relating to Sex Shops and Sex Cinemas were adopted in 1983, with the Sexual Entertainment provisions being adopted in 2010, following amendment by the **Policing and Crime Act 2009**.
- 8 The adoption of Schedule 3 allows the Council to prescribe standard conditions and fees for the grant, variation, renewal and transfer of Sex Establishment licences and the appropriate number of premises to be licensed in a relevant locality, which may be nil.
- 9 Consideration will be given to the provisions of the **Human Rights Act 1998**, the **Provision of Services Regulations 2009** and the Home Office guidance issued in March 2010 entitled “Sexual Entertainment Venues – Guidance for England and Wales” when considering applications for SEVs.

- 10 With regards to online application tacit authorisation does not apply to-applications for Sex Establishment Licences. This means the applicant must wait for the Licensing Authority to determine the application before they can operate a Sex Establishment.
- 11 The **Crime and Disorder Act 1988** places a duty on the Local Authority to do all that it reasonable can in order to prevent crime and disorder in the area.
- 12 **Each application will be dealt with on its own merits.**

Consultation

- 13 The Council has consulted with stakeholders throughout the process of devising its policy documents. Those consulted include:

- Existing Licence Holders (received hard copy documents)
- Licensing Committee (LPPC)
- Other elected Members
- Licensing Officers
- Police (Licensing and PPU/Sex crimes)
- Trading Standards
- Environmental Health
- Children's services
- Fire Service
- WMAS
- Public Health
- Planning
- Revenues (Business Rates)
- Business Improvement Districts (11)
- Trade Associations
- Charity /Interest Groups – e.g. Umbrella , SAFE, HGL
- Institute of Licensing

The consultation for this latest review began via email on 22 June 2017 and closed on 26 July 2017(midnight). Fifteen Responses were received.

This is the first draft of the new Sex Establishments Policy.

Definitions:

‘Sex Shop’ means any premises, vehicle, vessel or stall used for a business which consists to a significant degree of selling, hiring, exchanging, lending, displaying or demonstrating—

- (a) sex articles; or
- (b) other things intended for use in connection with, or for the purpose of stimulating or encouraging—
 - (i) sexual activity; or
 - (ii) acts of force or restraint which are associated with sexual activity.

‘Sex Articles’ means anything made for use in connection with, or for the purpose of stimulating or encouraging sexual activity; or acts of force or restraint which are associated with sexual activity;

any article containing or embodying matter to be read or looked at or anything intended to be used, either alone or as one of a set, for the reproduction or manufacture of any such article; and to any recording of vision or sound which is concerned primarily with the portrayal of, or primarily deals with or relates to, or is intended to stimulate or encourage, sexual activity or acts of force or restraint which are associated with sexual activity; or is concerned primarily with the portrayal of, or primarily deals with or relates to, genital organs, or urinary or excretory functions.

‘Sex Cinema’ means any premises, vehicle, vessel or stall used to a significant degree for the exhibition of moving pictures, by whatever means produced, which:

- are concerned primarily with the portrayal of, or primarily deal with or relate to, or are intended to stimulate or encourage sexual activity; or acts of force or restraint which are associated with sexual activity;
- or are concerned primarily with the portrayal of, or primarily deal with or relate to, genital organs or urinary or excretory functions.

A sex cinema does not include a dwelling house to which the public is not admitted.

‘Sexual Entertainment Venue’ means any premises at which relevant entertainment is provided before a live audience, directly or indirectly for the financial gain of the organiser or the entertainer.

The ‘organiser’ means any person who is responsible for the organisation or management of the relevant entertainment or the premises at which the relevant entertainment is provided. The ‘organiser’ must be someone who is in a position of responsibility over the provision of the relevant entertainment and should not be interpreted to mean a member of staff who is merely employed to work during the provision of relevant entertainment.

‘Premises’ includes any vessel, vehicle or stall but does not include any private dwelling to which the public is not admitted.

‘Relevant Entertainment’ means any live performance or any live display of nudity which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means). An audience can consist of just one person.

This definition would apply to the following forms of entertainment [as they are commonly known]: lap dancing; pole dancing; table dancing; strip shows; peep shows and live sex shows. This list is not exhaustive and should only be treated as indicative. The decision to licence premises as sexual entertainment venues shall depend on the content of the relevant entertainment rather than the name given to it.

‘Burlesque’ This Policy may apply to some forms of burlesque performances. A decision on whether or not the entertainment provided is relevant entertainment for the purposes of the Act shall depend on the content of the entertainment and not the name it is given. Therefore, any decision as to whether entertainment is relevant entertainment will be made on a case by case basis.

‘Performer’ means a person performing the relevant entertainment and could also be referred to as a **‘dancer’**.

In this document **‘The Licensing Authority’**, **‘the Council’**, **‘The Licensing and Public Protection Committee’** and **‘The Licensing Committee’** have the same meaning.

WAIVERS

- 14 Schedule 3 of the 1982 Act makes provision for the Council to grant a waiver from the requirement to hold a sex establishment licence in any case where it considers that to require a licence would be unreasonable or inappropriate. A waiver may be for such a period as the Council thinks fit. Applications for waivers will be considered in exceptional circumstances.
- 15 The Council may at any time give a person who would require a licence but for a waiver, notice that the waiver is to terminate on a date not less than 28 days from the date the notice is given.

Making an Application

- 16 The 1982 Act provides a maximum licence period of one year. The authority may grant a shorter licence if it thinks fit. A shorter period may be granted for example where a licensee wants a licence for a limited period for a trade exhibition or a show.
- 17 An application for the grant, variation, renewal or transfer of a licence must be made in writing to the Licensing Authority together with the application fee in accordance with the requirements set out below.
- 18 There are three separate notice requirements:
 - The applicant must, within seven days after the date of the application, publish an advertisement in a local newspaper circulating in the local authority’s area. A suggested form of advertisement is attached to the Application Form
 - Where the application is in respect of premises the applicant must display a notice of the application on or near the premises where it can be conveniently read by the public. The notice must be displayed for 21 days starting with the date of application. Again a suggested form of notice is attached to the Application Form.
 - The applicant must send a copy of the application to the Chief Officer of Police no later than seven days after the date of the application. Where the application is made electronically it is for the Local Authority itself to send the copy within seven days of receipt of the application.

- 19 The application form can be used for grant, variation, transfer and renewal applications. Applicants must provide their name, address, age (where the applicant is an individual), the premises address and the proposed licensed name of the premises.
- 20 Applicants must, at the time of submission of a new grant or variation application, provide a scheme showing the exterior design for consideration by the Licensing Authority before the premises are opened for business in order to ensure that exterior design of the premises complies with the Standard Conditions of Licence.
- 21 In addition applicants must, at the time of submission of a new grant or variation application, provide a plan showing the interior layout of the premises and where relevant entertainment will take place for consideration by the Licensing Authority.
- 22 There is no facility within the Act for a 'minor variation'. Any changes to the Licence or premises must be dealt with by variation/transfer etc.
- 23 Applicants for SEX ESTABLISHMENTS must submit a copy of their Operating Manual at the time of application for a Grant/Renewal. This is a working document. Its aim is to ensure relevant information is readily accessible in a single location.
- 24 The Operating Manual is to include (as a minimum):
- Copy of Sex Establishment Licence (once granted)
 - Customer Code of Conduct
 - Performer Code Of Conduct
 - Performer Welfare Policy
 - Disciplinary Policy
 - Plans of interior layout
 - An Incident Log (or details of where the Log can be found)
- 25 Such documents will form part of the conditions of licence (if granted) and may be subject to amendment by the Licensing Authority prior to approval. It would be useful to include a copy of any Premises Licence /other Authorisation where applicable – such as TENs /GA05.
- 26 Officers of the Licensing Service may, as part of the application process, visit the relevant locality of the premises to establish and report on whether there are any characteristics of the locality which may require consideration by the Licensing and Public Protection Committee.
- 27 Officers of the Licensing Service may also consult with colleagues from other parts of the Council or other agencies (such as Planning, Immigration etc).
- 28 With regards to online application tacit authorisation does not apply to applications for Sex Establishment Licences. This means the applicant must wait for the Licensing Authority to determine the application before they can operate a Sex Establishment.

Fees

- 29 The 1982 Act permits the authority to set a reasonable fee. Fees for Sex Establishments are reviewed annually by the Licensing and Public Protection Committee and set at a level

appropriate to recover the costs of carrying out the licensing function under that Act namely: administration (including any hearings or appeals), inspection and compliance.

- 30 Fees are split into two amounts; An Application Fee and a Licence Fee. The Application fee covers the cost of the administration and processing of the application itself, whereas the licence fee covers the cost of ongoing administration of the licence.
- 31 Application fees must be paid in full at the time of submission of the application.
- 32 Licence Fees become due once the application to Grant/Renew the Licence has been determined.
- 33 A Licence will not be issued without payment of the Licence fee.

Making Objections to Applications

- 34 The 1982 Act permits a wide range of persons to raise objections about the **grant, renewal, variation or transfer** of a Sex Establishment Licence. Objectors can include residents, resident associations, trade associations, businesses, Councillors (providing they do not sit on the Licensing and Public Protection Committee), regulatory agencies such as Planning and Environmental Health, or MPs. The Police are a statutory consultee for all applications.
- 35 Objections must be made in writing (email is acceptable) no later than 28 days after the date of the application to the Licensing Authority and should include the following:
- the name and address of the person or organisation making the objection;
 - the premises to which the objection relates;
 - the proximity of the premises to the person making the objection, a sketch map or plan may be helpful to show this.
- 36 Objectors should limit their objection to matters which are relevant to the statutory grounds for refusal as set out in the 1982 Act. The relevant grounds for objection are:
- That the applicant is unsuitable to hold a Sex Establishment Licence;
 - That the Sex Establishment, if granted would be carried on for the benefit of person/s who would be refused a Sex Establishment licence if they had applied themselves;
 - That the layout, character or condition of the premises are inappropriate for the proposed Sex Establishment;
 - That the use of the premises as a Sex Establishment would be inappropriate due to the use of premises in the vicinity;
 - That the use of the premises as a Sex Establishment would be inappropriate due to the character of the relevant locality; and/or
 - That the number of sex establishments or sex establishments of a particular type is inappropriate in the relevant locality.
- 37 Any objections received by the Licensing Authority which do not relate to the grounds set out in the 1982 Act will be rejected by the Licensing Service.
- 38 The courts have consistently stated that moral objections are inadmissible in such applications. Objections of this kind will therefore be rejected.

- 39 Objections will be considered by the Licensing and Public Protection Committee determining the application.
- 40 The applicant will be informed of any objections received in respect of their application and the objection(s) will become public documents. (However, objector's personal details such as name, address and telephone number will be removed.)
- 41 A copy of the hearing procedure will be sent to the applicant and any objectors prior to the hearing.

Determination of an Application

- 42 All applications for the grant of a Sex Establishment Licence will be determined by the Licensing and Public Protection Committee.
- 43 Valid objections to any application will be considered by the Licensing Committee or delegated to a Licensing Sub Committee at the hearing to consider the application.
- 44 Applicants and objectors will be given an equal opportunity to state their case in accordance with the Licensing and Public Protection Committee's procedure for hearings.
- 45 The 1982 Act provides five mandatory grounds and four discretionary grounds for refusal of a SEV licence. Each application for a SEV will be decided upon its own merits and the Licensing Authority will give clear reasons for its decisions. Any decision to refuse a licence **MUST** be relevant to one or more of the following grounds:

Mandatory grounds for refusal

- 46 Specific mandatory grounds for refusal of a licence are set out in paragraph 12(1) (a to e) of Schedule 3 in the 1982 Act.
A licence cannot be granted:
- (a) to any person under the age of 18 years;
 - (b) to any person who is for the time being disqualified due to the person having had a previous licence revoked in the area of the appropriate authority within the last 12 months;
 - (c) to any person, other than a body corporate, who is not resident in an EEA State or was not so resident throughout the period of six months immediately preceding the date when the application was made; or
 - (d) to a body corporate which is not incorporated in an EEA State; or
 - (e) to any person who has, within a period of 12 months immediately preceding that date when the application was made, been refused that grant or renewal of a licence for the premises, vehicle, vessel or stall in respect of which the application is made, unless the refusal has been reversed on appeal.

Discretionary grounds for refusal

- 47 The only discretionary grounds upon which the Council may refuse an application for the grant or renewal of a licence on one or more of the grounds specified in Schedule 3 paragraph 12(3) are that:
- (a) the applicant is unsuitable to hold the licence by reason of having been convicted of an offence or for any other reasons;
 - (b) if the licence were to be granted, renewed or transferred the business to which it relates would be managed by or carried on for the benefit of a person, other than

- the applicant, who would be refused the grant, renewal or transfer of such a licence if he/she made the application himself/herself;
- (c) the number of sex establishments, or of sex establishments of a particular kind, in the relevant locality at the time the application is made is equal to or exceeds the number which the authority consider is appropriate for the locality;
 - (d) the grant or renewal of the licence would be inappropriate, having regard:
 - (i) to the character of the relevant locality; or
 - (ii) to the use to which any premises in the vicinity are put; or
 - (iii) to the layout, character or condition of the premises, vehicle, vessel or stall in respect of which the application is made.

Suitability of an Applicant

48 In respect of 47(a) and (b) above with regard to the suitability of an applicant to hold a licence, the criteria for Members to consider include, but are not limited to:

- that the operator is honest
- that the operator is qualified by experience to run the type of sex establishment in question
- that the operator understands the general conditions
- that the operator is proposing a management structure which delivers compliance with the operating conditions e.g. through managerial competence, presence, a credible management structure, enforcement of rules internally, a viable business plan and policies for welfare of performers
- that the operator can be relied upon to act in the best interests of performers e.g. in how they are remunerated, the facilities they enjoy, how they are protected and how and by whom their physical and psychological welfare is monitored (SEV)
- that the operator can be relied upon to protect the public e.g. transparent charging, freedom from solicitation
- that the operator can show a track record of management of compliant premises, or that he/she will employ individuals who have such a track record.
- Compliance with other regulatory and taxation schemes.
- That the operator is not insolvent,
- In relation to limited companies, that the operator is not a dormant/non-trading company.

49 Concerns of this nature regarding suitability of applicants may be identified through a number of means. This may be through the application itself, through visiting the premises, by an objector to the grant/renewal of the licence, or may arise during the course of the licence period.

Suitability of Premises

50 The Council would expect that when an application for a Sex Establishment Licence at permanent commercial property is made, that the applicant will be able to demonstrate that the layout, character and/or condition of the premises is appropriate to the relevant entertainment proposed at the premises.

51 The Council would expect that when an application for a Sex Establishment Licence at permanent commercial property is made, that property should have the appropriate planning consent.

Use of Premises in the Vicinity

- 52 In considering whether the grant, renewal or variation of the licence would be inappropriate to the use of any premises in the vicinity, the Licensing Authority shall consider, among other considerations:
- (a) the fact that the premises are sited in a residential area;
 - (b) the premises are sited near shops used by or directed to families or children, or no frontages frequently passed by the same;
 - (c) the premises are sited near properties which are sensitive for religious purposes e.g. synagogues, churches, mosques, temples;
 - (d) the premises are sited near premises or areas which are sensitive because they are frequented by children, young persons or families, including but not limited to educational establishments, leisure facilities such as parks, libraries or swimming pools, markets and covered markets;
 - (e) the premises are sited near places and or buildings of historical/cultural interest, tourist attractions.
 - (f) the premises are sited near civic buildings

Character of the Relevant Locality

- 53 With reference to paragraph 52 'relevant locality' for the purposes of paragraph 12 of Schedule 3 of the Act means:
- (i) in relation to the premises, the locality where they are situated, and
 - (ii) in relation to a vehicle, vessel or stall, any locality where it is desired to use it as a Sex Establishment.
- 54 In considering if the grant, renewal or variation of the licence would be inappropriate, having regard to the character of the relevant locality or to the use of which any premises in the vicinity are put, the Licensing Authority shall consider, among other considerations, whether the grant of the application would be inappropriate, having regard to:
- (a) the fact that the premises are sited in a residential area;
 - (b) the premises are sited near shops used by or directed to families or children, or no frontages frequently passed by the same;
 - (c) the premises are sited near properties which are sensitive for religious purposes e.g. synagogues, churches, mosques, temples;
 - (d) the premises are sited near premises or areas which are sensitive because they are frequented by children, young persons or families, including but not limited to educational establishments, leisure facilities such as parks, libraries or swimming pools, markets and covered markets;
 - (e) the premises are sited near places and or buildings of historical/cultural interest, tourist attractions.
 - (f) the premises are sited near civic buildings
- 55 The Council will consider relevant locality on a case by case basis taking into account the particular circumstances of each case. However, the Council will not seek to define locality as the whole of the Council's administrative area or an entire town.

Appropriate Number of Sex Establishments

- 56 As set out within paragraph 47(c) above, paragraph 12 of Schedule 3 provides that a Local Authority may refuse an application if it is satisfied that the number of sex establishments or sex establishments of a particular kind in the relevant locality at the time the application is

made is equal to or exceeds the number which the authority consider is appropriate for that locality. The Council is able to determine that the appropriate number for a locality is nil.

- 57 The Council may choose to set an upper limit guide on the number of establishments which it considers appropriate in any area within the Council's administrative control. Each application MUST in any event be considered on its merits at the time the application is determined by the local authority.

Conditions

- 58 When issuing a Sex Establishment Licence the Licensing Authority is permitted to issue it on such terms and conditions and subject to restrictions as specified at the time the licence is issued either in the form of conditions specific to the individual or standard conditions applicable to all Sex Establishments.
- 59 The Council has decided to produce regulations prescribing standard conditions and these shall apply to every licence granted, varied, renewed or transferred by the authority unless they have been expressly excluded or varied. These regulations are attached to this policy at Appendix A.
- 60 It is an offence to operate a Sex Establishment without a licence or contravene a condition of the licence. The maximum penalty upon conviction is an unlimited fine

Renewal Applications

- 61 Provided an application for renewal has been accepted by the Licensing Service prior to the date of expiry, the licence shall be deemed to remain in force until such time as the renewal is determined by the Council, or the application is withdrawn.
- 62 The statutory requirements for advertising and giving notice are the same as those applying to initial grants, which are dealt with at paragraphs 18-23. Renewal applications will be dealt with by way of delegated authority to officers, unless there are any objections or other matters of concern, in which case, the application will be heard by the Committee.

Revocation of a Sex Establishment Licence

- 63 A licence can be revoked by the Council at any time on any one of the grounds set out in paragraph 46(a - e) or any one of the grounds set out in paragraph 47(a and b) of the policy.
- 64 The Council will not revoke a licence without the licence holder being given an opportunity to appear before the Licensing and Public Protection Committee and be heard.
- 65 The licence holder will be notified, in writing of the hearing and provided with a copy of the report.
- 66 Where a licence is revoked, the Council shall give the licensee a statement in writing of reasons for its decision within seven days of the decision being made. Where a licence is revoked its holder will be disqualified from holding or obtaining a licence in the area of the Local Authority for a period of 12 months from the date of revocation.
- 67 When the authority revokes a licence, the decision does not take effect until the time for bringing an appeal has expired and if an appeal is brought until the determination or abandonment of that appeal.

- 68 Where an appeal is abandoned, the Licensing Authority may seek to recover reasonable costs incurred in preparing to defend such an appeal.

Cancellation of a Sex Establishment Licence

- 69 The Licensing Authority may at the written request of the licence holder cancel the licence.
- 70 If a licence holder dies then the licence will be deemed to have been granted to the licence holder's personal representatives and will remain in force for three months from the date of the licence holder's death and will then expire.
- 71 The Licensing Authority can, however, on the application of the licence holder's personal representatives extend the three month period if the Licensing Authority is satisfied that an extension is necessary for the purpose of winding up the late licence holder's estate. The Authority will only do so where there are no circumstances that make such an extension undesirable.

Variation of a Sex Establishment Licence

- 72 A licence holder may at any time apply to vary a term, condition or restriction of a licence or apply to change the location of a licensed vessel. The statutory requirements for advertising, giving notice, consideration by the Licensing Authority, hearings and the giving of the reasons are the same as those applying to initial grants, which are dealt with at paragraphs 18-23. On receiving such an application, the Licensing Authority can either:
- (a) make the variation as requested;
 - (b) make such variations as it thinks fit;
 - (c) refuse the application.
- 73 The applicant will be given an opportunity to attend a Licensing and Public Protection Committee before a decision is made to make a variation other than that being applied for or to refuse the application.
- 74 Where the Council imposes some other term, condition or restriction other than one sought in the variation application, the decision does not take effect until the time for bringing an appeal has expired and if an appeal is brought until the determination or abandonment of that appeal.
- 75 Where an appeal is abandoned, the Licensing Authority may seek to recover reasonable costs incurred in preparing to defend such an appeal.

Right to Appeal a Decision

- 76 The decisions against which a right of appeal lies are refusals for the grants, renewals, variations or transfers, the imposition of conditions and also revocation.
- 77 Appeals must be made to the Magistrates Court within 21 days, starting from the date the applicant is notified of the Licensing Authority's decision.
- 78 It is important to note that appeals only lie against the mandatory refusals on the basis that the mandatory ground does not apply to the applicant/licence holder. Further, no appeal lies against the Licensing Authority's decision made on the discretionary grounds set out at paragraphs 47(c and d), namely:

- that it is inappropriate to grant or renew a licence on the grounds of the character of the locality or the number of premises in it; or
- the use of premises in the vicinity or the layout, character or condition of the premises.

79 The only discretionary grounds against which an appeal lies are those in paragraph 47(a and b) relating to the suitability of the applicant, the manager and/or the beneficiary of the operation.