

**BIRMINGHAM CITY COUNCIL**

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

**15 MARCH 2023**  
**All wards**

**SMALLER HOUSES IN MULTIPLE OCCUPATION - ADDITIONAL LICENSING  
FEES AND CHARGES 2023/2024**

1.0 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.

2.0 Recommendations

- 2.1 That the additional licensing fees and charges as detailed in Appendix 1 be approved to take effect from 1 April 2023 for any licence commencing on or after 5 June 2023, which is the date of commencement of the scheme.

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### 3.0 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 additional licensing designation 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 on the predicted number of licences that will be issued over the course of the licensing designation (5 years). Predictions have been based on the experience of other Local Authorities administering similar schemes.
- 3.4 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).
- 3.5 The fees proposed fulfil the main requirement of assuring that full costs are recovered from the income generated wherever possible.
- 3.6 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.
- 3.7 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

### 4.0 Additional Licensing

- 4.1 From the 5 June 2023, all of the city's wards will become subject to the Council's additional licensing designation. Any landlord of a smaller House in Multiple Occupation (HMO) with 3 or 4 occupants not already covered by the mandatory licensing scheme (covering larger HMOs with 5 or more occupants), will require a property licence (subject to specific exemptions detailed in the regulations).
- 4.2 A separate licence is needed for each 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
- valid gas, electrical, and energy performance certificates are in place for the property

5.0 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

6.0 The Proposed Fees:

6.1 Appendix 1 shows the proposed licence fees

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 on projections for salary, premises and other costs for the duration of the designation.

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.

6.5 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.

6.6 The fee 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.

## 7.0 Duration of a Licence

7.1 Licences issued under the designation 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 property management
- the planning status for use of the property is unconfirmed

7.2 In relation to the last bullet point consideration has been given to [Waltham Forest v Khan \[2017\] UKUT 153 \(LC\)](#) referred to in 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 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.

## 8.0 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 Over a ten-week period between 4 July 2022 and 13 September 2022, the Council consulted on a proposal to designate all of the city's wards as subject to additional licensing, with the views of respondents on the proposed fee structure sought. There was no legal requirement to consult on the fee.

8.3 Around a quarter (23%) of the 545 respondents to the online survey felt that the proposed fee was about right, compared to over half (55%) who felt the fee was too low, and 16% too high.

8.4 However, there was a disparity between the views of landlords and lettings agents, and that of other respondents, with 60% of landlords and agents believing the proposed fee to be too high. 16% of landlord and agents consider the fee is too low, with 18% believing the fee is about right.

## 9. Implications for Resources

9.1 The fees and charges proposed within this report are calculated on forecasts 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.

9.2 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.

9.3 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.

9.4 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.

9.5 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.

**DIRECTOR OF REGULATION AND ENFORCEMENT**

Background Papers:

Birmingham City Council – Corporate Charging Policy

## APPENDIX 1

<b>Additional Licence Individual Property Licence Fee(s)</b>	<b>Standard Fee</b>
Total Licence Fee	£755
Part A – Application Fee	£325
Part B - Fee on approval	£430

### Other fees

Change of licence holder	Standard fee (Part A & B)
Variation of licence – <ul style="list-style-type: none"> <li>• Change of property owner, freeholder, mortgagee, or leaseholder</li> <li>• Change of property manager</li> <li>• Change of address details</li> <li>• Agreed change in number of occupiers</li> <li>• Increase in number of rooms or changes in room size and/or amenities</li> </ul>	No fee
Licence variation instigated by the Council	No fee
Licence application following revocation	Standard fee (Part A & B)
Licence application refused	Part A fee
Property ceases to be licensable during application process	Part A fee
Application withdrawn by applicant	Part A fee
Application made in error	No fee

## **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**

### **Background**

Part 2 of the Housing Act 2004 enables local authorities to implement additional licensing schemes to cover all HMOs not already required to be licensed under the mandatory scheme within a particular area. Additional licensing is designed to assist local authorities improve housing conditions in shared accommodation. Schemes are often introduced to deal with anti-social behaviour and waste incidents.

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).

Selective licensing legislation has many parallels with that covering additional licensing and the following case is applicable to both types of schemes.

[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.

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