

BIRMINGHAM CITY COUNCIL

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

10 NOVEMBER 2021
ALL WARDS

REVIEW OF STREET TRADING CONSENT 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 Street Trading Service fees and charges as detailed in Appendix 1 be approved to take effect from 1st December 2021 for all applications for the year 2022/23.
- 2.2 That the new renewal application fee detailed in Paragraph 4.6 and Appendix 1 be approved to take effect from 1st December 2021 for all applications for the year 2022/23.

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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 Street Trading service receives no corporate budget allocation and as such must meet any and all expenditure from within its own income. The level of income is entirely dependent upon the number of consents 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 consents the fee calculations are based on the finalised accounts from 2020/21. This is more reliable than trusting in projections and estimates and is accepted as best practice in fee calculations of this kind.
- 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.
- 3.7 The fees proposed in this report are calculated to recover the full cost of carrying out the service. This includes all administrative costs, any recharge of officers' time in appropriate cases when carrying out inspections of premises and other compliance duties (where applicable).
- 3.8 The fees proposed fulfil the main requirement of assuring that full costs are recovered from the income generated wherever possible.
- 3.9 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. Licence fees prescribed by statute also take precedence over the Corporate Charging Policy.
- 3.10 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. The Proposed Fees:

- 4.1 In order to ensure the fees reflect the cost of administering the consent scheme and processing the consents, as well as compliance with those consents (and a proportion for enforcement against illegal street traders), the fee calculations are based on the finalised accounts for the street trading service for 2020/21.
- 4.2 Members will note that the fees are split into a non-refundable application fee and a consent 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.

- 4.3 The time taken to process and administer (including compliance) each consent type has been calculated using actual costs. Costs for peripheral items such as the installation of electrical supplies for trading units, legal costs and mileage costs are added in after the time is calculated, as has any restitution of carry forward balances.
- 4.4 The reason for the higher cost for annual consents in the city centre is that street traders in this area will be visited weekly to ensure compliance and to resolve any logistical or other issues. Outer city traders and occasional traders over 12 days will be visited at least monthly.
- 4.5 The reason for the higher cost of an Occasional Sports Stadia Consent is because compliance visits at these venues will need to be done in pairs to ensure health and safety both due to the crowded environment and also the time of day (some evening work)
- 4.6 The proposed renewal fee has been calculated based on the time it is expected to take to process a shortened renewal application process where a trader wants to remain in situ and there are no changes to the way they operate.
- 4.7 Should there be significant changes to the street trading unit or the way the trader operates, then a full application fee will be required.
- 4.8 It should be noted that, with the exception of two, there has been a reduction of the actual fees compared to last year. There are a number of reasons for this, including the removal of the appeals process; the fees are based on full year spend rather than an estimate of costs; updating the timings for the process based on actual times rather than predicted times.
- 4.9 The increase in fees for annual non-stadia consents has increased slightly, this is based on the extra enforcement activity attributed to these areas.

5. Consultation

- 5.1 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 street trading licence or a street trading consent. There is no requirement to consult.

6. Implications for Resources

- 6.1 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.

- 6.2 The fees and charges proposed within this report are calculated based on 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.
- 6.3 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.
- 6.4 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.
- 6.5 The proposed fees have been calculated having regard to finalised accounts 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.
- 6.6 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.

7. Implications for Policy Priorities

- 7.1 The recommendations are in accordance with Financial Regulations and budget requirements.
- 7.2 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.

8. Public Sector Equality Duty

- 8.1 The fees that are proposed in this report will relate to all consent holders and applicants for consents 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

The Proposed Fees

Transaction Type	Current Fee	Proposed fee 22-23	Difference	% Change
Application Fee for any type of Consent	£ 724.00	£ 528	-£ 196	-27
Renewal Application Fee for any type of Consent	£ -	£ 271	£ 271	
Annual City Centre Licence fee	£ 5,160	£ 5,501	£ 341	7
Annual out of city Licence fee	£ 2,218	£ 2,357	£ 139	6
Occasional 21-30 Licence fee	£ 1,589	£ 1,146	-£ 443	-28
Occasional 11-20 Licence fee	£ 708	£ 618	-£ 90	-13
Occasional up to 10 Licence fee	£ 425	£ 348	-£ 77	-18
STADIA Annual Licence fee	£ 3,728	£ 3,027	-£ 701	-19
STADIA Occasional 21-30 Licence fee	£ 3,225	£ 2,525	-£ 700	-22
STADIA Occasional 11-20 Licence fee	£ 1,416	£ 1,237	-£ 179	-13
STADIA Occasional up to 10 Licence fee	£ 849	£ 696	-£ 153	-18

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