



# City of Westminster Licensing Committee Report

**Meeting:** *Licensing Committee*

**Date:** *Wednesday 26<sup>th</sup> June 2013*

**Classification:** *For General release*

**Title:** *Sex Establishment (Sex Shops) Fees for 2010/11 to 2013/14 and restitution amounts follow Court Order*

**Wards Affected:** *All*

**Financial Summary:** *The proposed retrospective fees will enable the Council to meet the requirements of the Court order. The overall reimbursement in relation to this order will be £1,280,761. This represents the surplus accumulated between the period 2006/07 to 2009/10 and from each of the years 2010/11 to 2012/13 plus the interest prescribed within the order.*

**Report of:** *The Operational Director for Premises Management*

## 1. Executive Summary

- 1.1 Following a legal challenge, by way of a Judicial Review of the Council's fees for sex establishment licences the Court of Appeal has ordered that the Council shall determine a reasonable fee for the licensing years 2010/11, 2011/12 and 2012/13 and that it shall repay any surpluses to the licensees during these periods along with the required level of interest by no later than the 1<sup>st</sup> August 2013.
- 1.2 This report sets out the fee for each of the years so as to recover the Council's costs for processing/administration and compliance. In setting the fee the officers have had regard to the surpluses and deficits from previous years going back to 2006/07 financial year. The Committee is being requested to approve the fees set out in this report, and repayment of the resulting surplus and interest restitution by the required deadline. The overall surplus amount identified along with the Court orders prescribed interest rates is £1,280,762.

## **2. Recommendations**

- 2.1 To approve the fee levels for the licensing years 2010/11 to 2013/14 as set out in Appendix 1 of the report.
- 2.2 To note the requirement to meet the Court of Appeal order deadline in relation to reimbursing the excess amounts as detailed within the report, and authorise officer to make the necessary payments to comply with the Order.

## **3. Reasons for Decision**

- 3.1 The Court of Appeal has issued an order requiring the Council to set a reasonable fee for the licensing years 2010/11, 2011/12 and 2012/13 and to reimburse any surplus with interest as detailed within the Order. The report sets out these fees, the accumulated surplus amounts and interest. It is recommended that the Committee approve the re-evaluated fees as detailed within this report in order to meet the requirements of the Court of Appeal.

## **4. Background**

- 4.1 Sex Establishments are licensed under the provisions of Part 1, Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982. Sex Establishments are defined as a Sex Shop, Sex Cinema, Sexual Entertainment Venues and within the City of Westminster, Hostess Bars. For the purposes of this report any reference to Sex Establishments is in relation to sex shops only. A further report relating to the fee levels for the other types of Sex Establishments may be required which will be brought before the Committee at a later date.
- 4.2 The fee for Sex Establishments has been considerably more than other licence fees. The reason for this large fee is the amount of work undertaken on illegal unlicensed sex shops mainly located in and around Soho. The Council has been working to eradicate the unlicensed Sex Establishments within Westminster for many years. This process is costly and takes a considerable amount of time. Reducing the level of illegal operators in and around Soho has its benefits for those who are licensed to operate as a sex establishment to remove competitors who don't have the overheads that legitimate operators have. In addition to enforcement action on illegal operators the Council's Licensing Inspectors visit licensed premises and ensure compliance with the regulatory requirements of the licensing regime. The major cost and majority of the licence fees covered the cost of the enforcement of unlicensed operators.
- 4.3 The Council has been subject to a Judicial Review, brought by 7 of the licensed sex shop operators within Westminster. The Committee will receive a separate report from the Head of Legal Services on the full details and outcomes of this Judicial Review, however, as a matter of completeness a brief outline of this outcome of this Judicial Review is set out in paragraphs 4.4 to 4.7 below.

- 4.4 The Judicial Review challenged that the Council had not set its fees correctly since 2005/06 and 2011/12 and as a result challenged whether the fee had been reviewed and set correctly year on year, taking into account any surplus or deficit. In December 2009 the EU Service Directive became law in the UK via the Provision of Services Regulations 2009. The regulations require the competent authority (Local Authorities) that are responsible for an authorisation scheme (certain licensing regimes that fall within the scope of the Directive) must be reasonable and proportionate to the cost of the application process. As a result of this change in law the Judicial Review also challenged whether the Council could incorporate the cost of enforcement of unlicensed Sex Establishments into the licence fee.
- 4.5 The High Court Judge ordered in favour of the sex establishment operators in his judgement dated 16<sup>th</sup> May 2012. The High Court issued an order on the 17<sup>th</sup> July 2012 requiring the Council to review its fees for the period 2005/06 to 2012/13 taking into account any surplus or deficit accrued year on year and that the surplus amount including interest must be reimbursed to those party to the Judicial Review.
- 4.6 The Council appealed this decision to the Court of Appeal. A hearing was conducted at the Court of Appeal on the 14<sup>th</sup> January 2013 to consider the case. On the 24<sup>th</sup> May 2013 the Court of Appeal issued its judgement in relation to the Council's appeal. The judgement dismissed the Council's appeal in relation to the original judgement, that the Council could not charge licensed operators within the fee for the cost of action against illegal operators and that the Civil Procedure Rules in relation to the cost consequences following judgements would apply. However, the Court of Appeal judgement did accept the Council appeal in relation to the judge having erred in his order to require the Council to set a fee for each of the licensing years from 2007 for each year until 2013. The Court of Appeal judgement enables the Council to calculate any surplus/deficit amount and carry it forward on a rolling basis until the licensing year 2010/11.
- 4.7 The Court of Appeal issued an order requiring the Council to determine a reasonable fee for the licensing years starting 1<sup>st</sup> February to 31<sup>st</sup> January for 2010/11, 2011/12 and 2012/13. In determining the fee for the Licensing year 2010/11 the Council must have regard to any surplus or deficit from the previous years from 2006/07. In addition the Council is to apply interest to any surplus amount that is to be repaid as prescribed within the judgement. The requirements of the order must be determined before the 1<sup>st</sup> July 2013 and any reimbursements made to those parties to the Judicial Review by the 1<sup>st</sup> August 2013. A copy of the order itself is appended to the report of the Head of Legal and Democratic Services elsewhere on the agenda.
- 4.8 This report sets out the re-evaluated fee levels, any surpluses and adjustments as well as the interest amounts for each of the licensing year periods. The

Committee is being requested to determine the fee levels for the periods specified so that the required restitution can be made.

## **5. Methodology and Terminology**

- 5.1 It is important to set out the methodology and terminology that officers have used in interpreting and presenting the Courts requirements to establish the reasonable fees for new and renewal applications for the licence periods 2010/11 to 2012/13.
- 5.2 Within this report and in the Court orders there is a reference to licensing years in relation to the period in which a licence is in force. The licensing year starts from 1<sup>st</sup> February to the 31<sup>st</sup> January each year. This is a historical reference to when the licences for Sex Establishments had fixed periods and renewal dates. Prior to changing in 2009/10 the licences were only granted to the expiry date of the 31<sup>st</sup> January for that year. This was the case even if the application was determined within the licensing year in question. The vast majority of licences that are issued by the Council still expire in January each year. However, there have been some new applications that have been received that were granted with an expiry date 12 months from the determination date.
- 5.3 When considering the income levels for the licensing years it should be noted that the fees received came in during the previous licensing period but are carried over to the next period. For example the fees received between 1<sup>st</sup> February 2010 and 31<sup>st</sup> January 2011 relate to the costs for the Licensing year 1<sup>st</sup> February 2011 to the 31<sup>st</sup> January 2012.
- 5.4 Within this report we refer to re-evaluated licence fee or retrospective fee. This relates to the new fee set as part of this process so as to meet the requirements of the Court of Appeal order.
- 5.5 The Court of Appeal order requires that the Council, when setting the fee level for the licensing year 2010/11, takes into account any surplus or deficit from previous years going back to 2006/07. In doing so officers have used the costs and income for each of the financial years from the Council's audited accounts as they represent the best available information to establish any surplus or deficit. . As the 2009/10 financial year will run into the first two months of the 2010/11 licensing year it is necessary to make an adjustment to only show 10 months of the income and costs for that financial year so as to avoid double counting. It is important to note that the Council include its costs for enforcing against illegal operators prior to the 28<sup>th</sup> December 2009.
- 5.6 The fee setting processing combines all of the officer's average timings for carrying out their functions for the particular application process and management of that licence with a chargeable hourly rate. The timings have been established for the average application or licence, that being one that fits

the norm rather than a complex or simple application. Although there will be applications and licences that are more or less complex than the norm, these tend to balance each other out. The hourly rates have been calculated for each of the different bands of officers involved in the process which takes into account not only the officer's salary costs but also the direct costs associated with that licensing regime, e.g. central service recharges such as HR, IT building maintenance to direct charges for legal, Committee Services, etc.

- 5.7 To calculate the fee the officer's hours are put together and the costs for those timings established. The total amount is then deemed to be the reasonable fee for that application process and to ensure compliance for that particular licence. A reasonable fee using this process has been established for each of the relevant years which would represent the Council recovering its costs for that particular process. It should be noted that we have used this new process to establish the retrospective fees as well as this year's fee levels. Over the past three years the processing, assessing and compliance monitoring hasn't altered greatly and this process represents the most transparent process for establish the fee level for each licensing regime.
- 5.8 As the Council cannot take into account the cost for enforcing against illegal operators as part of the licence fees the fees that have been set for the licensing years 2010/11 to 13/14 are only made up of the processing/administration and compliance costs. Processing/administration costs relate to the Licensing Service and Environmental Health. Compliance costs only relate to the Licensing inspectors carrying out that function.
- 5.9 When setting the retrospective fees for the licensing years 2010/11, 2011/12 and 2012/13 officers have used the total number of applications that resulted in the licence being granted for the full period of that licensing year and the amount paid for the application as recorded within the Licensing Service databases. Any applications that were refused, withdrawn or the licence was surrendered during the licence period are not included within the calculations for surplus amounts for 2010/11, 2011/12 and 2012/13. These applicants and licensees have already received a refund of the licence fee minus the Council's costs. However, due to the amended fee levels these applicants and previous licensee may be entitled to some level of reimbursement depending on what costs were charged and the amount of refund given.

## **6. 2010/11 Fees (Excess A)**

- 6.1 The Court of Appeal order sets out the requirements for the Council to set a reasonable fee for the licensing year between 1<sup>st</sup> February 2010 and 31<sup>st</sup> January 2012. The order also requires the Council to take into account and surplus or deficit from 2006/07 to 2009/10. Following this determination the Council must reimburse any surplus and pay interest as directed within the order. For the purposes of the order the Judge has referred to this as Excess A.

- 6.2 Officers have established a fee for new and renewal applications received for the licensing year 2010/11 are set out in the table below.

	New	Renewal
Processing/Administration	£1,516	£849
Compliance	£1,202	£1,202
Fee	£2,718	£2,051
Licences issued for full term	15 Renewals	
Total Recoverable Fee 2010/11	<b>£30,768</b>	

- 6.3 The following table shows the income and costs per financial year between 2006/07 to 2008/09 financial years and 10 months of 2009/10.

Financial Years	Applications		Total Actual Cost	Adjustment (£1,250 per licence)	Actual Income Received	Surplus / Deficit
	New	Renewals				
06/07	1	18	£451,137	-£23,750	£525,624	£98,237
07/08	0	16	£500,758	-£20,000	£524,454	£43,696
08/09	1	16	£522,804	-£21,250	£489,054	-£12,500
09/10	0	15	£415,358	-£18,750	£363,808	-£32,800
				Total Surplus		<b>£96,633</b>

- 6.4 An adjustment has been made in favour of licensees prior to 2011/12 in the sum of £1,250 per licence. That adjustment reflects the fact that it was accepted by the Council in the course of the High Court proceedings that the number of visits undertaken to each licensed sex shop per annum was between 1 and 3 as opposed to the 4 visits that had previously been understood to have been undertaken per premises per annum.
- 6.5 The following table shows the deduction of the re-evaluated fee income as set out in paragraph 6.2, the adjustment referred to above, total income actually received by the Council from these 15 applications and the overall surplus amount that is to be repaid to the licensees with interest.

Re-evaluated fee income (15 x £2,051)	£30,768
Adjustment (£1,250 x 15)	-£18,750
Total re-evaluated fee income minus adjustment for 2010/11	<b>£12,018</b>
Surplus amount from 2006/07 – 2009/10	£96,633
Re-evaluated fee income	-£12,018
Total 2006/07 – 2009/10 surplus minus adjusted re-evaluated fee income	<b>£84,615</b>
Actual income for licence year 2010/11	£436,530
Total 2006/07 – 2009/19 surplus following deductions for costs	£84,615

Total amount of surplus to be reimbursed which is made up of the income received and surplus following deductions for costs from previous years (Excess A)	<b>£521,145</b>
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6.6 The following table sets out the interest to be charged against Excess A as prescribed within the court order.

Period	Rate	Interest
01/02/10 – 18/04/11	1% over base rate per annum	£9,126
19/04/11 – 16/05/12	10% over base rate per annum	£56,943
17/05/12 – 30/06/13	8% over base rate per annum	£47,968
	<b>Total Interest</b>	<b>£114,037</b>

6.7 The total reimbursement sum for Excess A is £639,438. The Council intends to reimburse those that held licences for the full period with £42,629.20 by the 30<sup>th</sup> June 2013 except for those who have applied to renew their licence this year where the fee level will be deducted from their reimbursement (see paragraphs 10 below). The intended reimbursement date of the 30<sup>th</sup> June 2013 is reflected in the final interest rate period calculation.

## 7. 2011/12 (Excess B)

7.1 The fees and any surplus for the licence year 1<sup>st</sup> February 2011 to the 31<sup>st</sup> January 2012 only relates to that year as all surpluses from previous years are included within the payment of Excess A. The fee levels established for new and renewal applications are set out in the table below.

	New	Renewal
Processing/Administration	£1,433	£800
Compliance	£1,162	£1,162
Fee	£2,595	£1,962
Licences issued for full term	1 New and 12 Renewals	
<b>Total Recoverable Fee</b>	<b>£26,141</b>	

7.2 The Council received £378,326 in income associated with these applications. The court order requires the Council to reimburse any surplus accrued as a result of this fee setting process. That reimbursement for this amount is called Excess B within the order and totals £352,185.

7.3 The Council must pay interest on Excess B as directed within the court order. The period in which interest is to be calculated and the percentage of interest is set out below.

Period	Rate	Interest
01/02/11 – 18/04/11	1% over base rate per annum	£1,114
19/04/11 – 16/05/12	10% over base rate per annum	£39,918

17/05/12 – 30/06/13	8% over base rate per annum	£33,626
	Total Interest	<b>£74,658</b>

7.4 The total reimbursement amount for the licence year for 2011/12 (Excess B), including interest will be £426,843.

## 8. 2012/13 Fees

8.1 The fee level for the licensing year 1<sup>st</sup> February 2012 to the 31<sup>st</sup> January 2013 are set out in the table below.

	New	Renewal
Processing/Administration	£1,637	£1,443
Compliance	£1,240	£1,240
Fee	£2,877	£2,684
Licences issued for full term	1 New and 10 Renewals	
Total Recoverable Fee	<b>£29,714</b>	

8.2 In calculating the fees for this licensing year the processing and administration costs are more, especially for renewal applications than the previous two years. The reason for this increase processing and administration costs represent the additional work carried out due to the Judicial Review and review of the work undertaken in relation to Sex Establishments going back over a number of years.

8.3 The Council received £216,472 in licence fees for this licensing year. As a requirement of the court order the Council must reimburse any surplus, referred to as Excess C. The total Excess C surplus amount is £186,758.

8.4 The Council must pay interest on Excess C as directed within the court order. The period in which interest is to be calculated and the percentage of interest is set out below.

Period	Rate	Interest
01/02/12 – 30/06/13	10% over base rate per annum	£27,722
	Total Interest	<b>£27,722</b>

8.4 The total reimbursement amount for the licence year for 2012/13 (Excess C), including interest will be £214,481.

## 9. 2013/14 Fees

9.1 As part of this process officers have also establish the fees for the licensing year 1<sup>st</sup> February 2013 to the 31<sup>st</sup> January 2014. It is necessary to set these fees to enable the Council to recover its reasonable costs in carryout the licensing function for each application received. In addition to the fee for a new and renewal application officers have also established the fees for the variation,



transfer and request for a waiver from the requirements of a licence under paragraph 7, Part 1, Schedule 3 of the Local Government (Miscellaneous Provisions Act 1982. The fee levels for applications along with the processing/administration and compliance breakdown is set out in the table below.

2013/14	New	Renewal	Variation	Transfer	Para 7 Waiver
Processing and Administration	£1,593	£1,400	£749	£246	£487
Compliance	£1,240	£1,240	£0	£0	£0
Fee	£2,833	£2,640	£749	£246	£487
Applications received	0	10	0	0	0
Applications for upcoming renewals		3			
Total Project Income	£0	£34,320	£0	£0	£0

- 9.2 The Council has already received 10 renewal applications for this licensing year and 3 further licences are due to renew later this year. However, for those applications that the Council has already received no fee has been paid. Officers were awaiting the outcome of its appeal when these applications were made. It was agreed, following legal advice that officers would defer the requirement for payment of the renewal fee until the outcome of the Council's appeal to the Court of Appeal was known.
- 9.3 Now that the appeal judgement is known officers intend to deduct the fee for this licensing year from the reimbursement amount for those who have applied to renew their licence that were also party to the Judicial Review. For the one applicant who was not party to the Judicial Review, officers will contact them to advise them of the new fee level for 2013/14. Officers will also explain that it is their intention to deduct the fee amount from any reimbursement amount owed unless advised of an alternative method of payment. Any applicant who fails to pay the required fee will have the licence application returned as invalid.

## 10. Financial Implications

- 10.1 The Council has undertaken enforcement activities in relation to illegal operators undertaking a range of licensable activity within Westminster. This cost (projected spend in 13/14 budgets of £860k) was borne by the licensed operators prior to the introduction of the EU Service Directive and subsequent regulations to instigate that Directive in British law. That cost can no longer legally be collected from licence fees. As such the implications for the Council's

enforcement activities, not only in relation to Sex Establishments are considerable. It will be necessary to consider the level of enforcement required by the Council in relation to a range of illegal activities going forward and how any such enforcement will be funded

- 10.2 The total repayment of £1,280,762 has been partly provided for in the 2012/13 financial accounts. A provision of £1.1m was raised.

Period	Surplus	Interest	Restitution Amount
Excess A (2010/11 plus surplus from previous years)	£521,145	£118,293	£639,438
Excess B (2011/12)	£352,185	£74,658	£426,843
Excess C (2012/13)	£186,758	£27,722	£214,481
Total restitution			£1,280,762

- 10.3 The excess liability £180,762 has been raised as a red risk in the corporate risk register and will be moved to 2013/14 revenue budgets once the total liability is realised.

- 10.4 Additional risk has been raised on the corporate risk register to reflect the additional impact of the Court Judgement. .

## 11. Legal Implications

- 11.1 Under the Local Government (Miscellaneous Provisions) Act 1982, an applicant for the grant, variation, renewal or transfer of a sex establishment licence must pay “a reasonable fee determined by the appropriate authority”.

- 11.2 It is for the City Council to determine what the fee for each applicable year should be, provided that the fee must be “reasonable” and, in this case, provided that the fees are set in accordance with the Order made by the Court of Appeal.

- 11.3 The Council is not of course permitted to set fees with a view to making a “profit” The power of a local authority to charge a “reasonable” fee for the grant of a street trading licence was said in *R v Manchester City Council ex p. King* (1991) 89 LGR 696 to preclude the raising of revenue for purposes other than street trading.

"The fees charged ... must be related to the street trading scheme operated by the district council and the costs of operating that scheme. The district council may charge such fees as they reasonably consider will 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 consider

reasonable. One consequence of the wording used is that, if the fees levied in the event exceed the cost of operating the scheme, the original position will remain valid provided that it can be said that the district council reasonably considered such fees would be required to meet the total cost of operating the scheme."

Those principles apply equally to fees set for sex establishments, save that "the cost of operating the scheme" may not, after the coming into effect of the Provision of Services Regulations 2009, include the costs of enforcement action taken against unlicensed operators.

- 11.4 As set out in the body of the report, in calculating the historic costs of operating the regime, the figures used are taken from the City Council's audited accounts, on the basis that that is the best and most accurate information available. It should be noted that those costs were subjected to a sustained attack by the claimants in the course of the litigation, and the claimants do not accept that the figures are correct or that the costs were necessarily incurred, or that they are necessarily "reasonable".
- 11.5 The High Court made no ruling on those arguments. Nevertheless they have been considered for the purposes of this report. In one respect, but in one respect only, it is recommended that the audited figures are not used, because it was accepted in evidence to the Court that they are wrong. The figures relate to the number of compliance visits carried out by Licensing Inspectors, as set out at paragraph 7.4 above. In all other cases it is considered that the audited figures are the best available and can be justified.
- 11.6 The order made by the Court of Appeal requires the fees to be set by 1<sup>st</sup> July and for repayment of any excess to be made by 1<sup>st</sup> August. A failure to comply with the order would technically constitute a contempt of court.

## **Appendices**

Appendix 1 – Fee levels for licensing periods 2010/11 to 2013/14

**If you have any queries about this Report or wish to inspect any of the Background Papers please contact the report author:**

**Mr Kerry Simpkin, Assistant Service Manager on Tel: 020 7641 1840 or Email: [ksimpkin@westminster.gov.uk](mailto:ksimpkin@westminster.gov.uk)**

**BACKGROUND PAPERS**

- Local Government (Miscellaneous Provisions) Act 1982
- Provision of Service Regulations 2009
- Hemming and Others v Westminster City Council High Court Judgement dated 16<sup>th</sup> May 2012
- Hemming and Others v Westminster City Council High Court Judgement dated 12<sup>th</sup> June 2012
- Hemming and Others v Westminster City Council High Court Order dated 17<sup>th</sup> July 2012
- Hemming and Others v Westminster City Council Court of Appeal Judgement dated 24<sup>th</sup> May 2013
- Hemming and Others v Westminster City Council Court of Appeal Order dated 24<sup>th</sup> May 2013
- 2004/05 to 2012/13 Summary Income and Expenditure for Sex Establishments spreadsheet
- 2010/11 Officer hourly rates and timings spreadsheet
- 2011/12 Officer hourly rates and timings spreadsheet
- 2012/13 Officer hourly rates and timings spreadsheet
- 2013/14 Officer hourly rates and timings spreadsheet
- Excess A Interest rate calculations spreadsheet
- Excess B Interest rate calculations spreadsheet
- Excess C Interest rate calculations spreadsheet
- Licensing Service Interpretation of court of appeal order calculations for fee setting and restitution spreadsheet.

## 2010/11 – 2013/14 Sex Establishment (Sex Shops) Fees

Proposed Fees					
Licensing Year	New	Renewal	Variation	Transfer	Para 7 Waiver
<b>2010/12</b>	£2,718	£2,051			
<b>2011/12</b>	£2,595	£1,962			
<b>2012/13</b>	£2,877	£2,684			
<b>2013/14</b>	£2,833	£2,640	£749	£246	£487

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<sup>i</sup> T out