AGENDA ITEM No: 2

City of Westminster

Minutes

Meeting:	**Licensing Committee**
Time and date of meeting:	**10:00 hours on Wednesday 26 June 2013 at City Hall, 64 Victoria Street, London, SW1E 6QP**
Attendees:	**Councillors:** **Audrey Lewis (Chairman)** **Alan Bradley** **Susie Burbridge** **Melvyn Caplan** **Nicholas Evans** **Gwyneth Hampson** **Andrew Havery** **Tim Mitchell** **Aziz Toki**
Apologies:	**Councillors Ahmed Abdel-Hamid, Michael Brahams, Jean-Paul Floru, Lindsey Hall, Patricia McAllister and Jan Prendergast.**
Contact:	**Jonathan Deacon** **Senior Committee and Governance Officer**
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1. DECLARATIONS OF INTEREST

1.1 There were no declarations of interest.

2. MINUTES

2.1 The minutes of the Licensing Committee meeting held on 20 March 2013 were agreed as a correct record and were signed by the Chairman.

2.2 The Chairman stated in respect of item 3 of the minutes that further proposals from the DCMS on the deregulation of entertainment were awaited. In respect of item 6, a betting shop working party was being established to consider aspects similar to those that had been discussed at the previous meeting of the Licensing Committee. There had been a recent decision of note at Thames Magistrates Court where Newham Council's decision to refuse an application submitted by Paddy Power for a new betting shop operator's licence on the grounds of the prevention crime and disorder had been overturned by a magistrate. It had been noted that in reaching their original decision, councillors at Newham had been concerned that the company would gain a high proportion of its profits from the new shop through fixed odds betting terminals.

3. THE HEMMING JUDGMENT – OUTCOME AND IMPLICATIONS

3.1 Peter Large, Head of Legal and Democratic Services, advised the Committee that the purpose of the report was to provide information on the outcome of the Hemming litigation and set the scene for item 4 on the agenda. Essentially the outcome of the litigation had been that the Council had lost the case in the Court of Appeal. The result in the short term was that the Council would need to pay significant sums to the proprietors of licensed sex shops in Westminster. There was also longer term implications for what the High Court and Court of Appeal had said was the correct interpretation of Directive 2006/123/EC on services in the Internal Market ("the Services Directive").

3.2 Mr Large stated that the decision of the High Court was that the Council had not lawfully set fees for sex establishments since September 2004. There were some lessons which were already being learnt in respect of this. What officers had thought had been the case when the fees had been set in 2004 was that they would take effect on a rolling basis from 2005/06 and for subsequent years unless there was a need to specifically review and amend the decision. The High Court had decided that the decision in 2004 only applied to 2005/06. There was a need in the future both from a financial and a legal point of view to review fees on a regular basis. A decision had been taken not to appeal this aspect and the consequences of this was that the Council now had to set a fee for 2010/11, taking into account the deficits and surpluses incurred. In legal terms, the Council had been 'unjustly enriched', charging fees that it was not entitled to.

3.3 Mr Large stated that the implications regarding the interpretation of the Services Directive were profound. It was now the case following the Court of

Appeal's interpretation that licensing regimes and other regulatory regimes under the Directive could not be self-financing and would not be able to recover the costs of enforcement taken against those who did not have the necessary licence. A startling aspect of this outcome was that it was not prefaced by advice from the Department for Business, Innovation & Skills ("BIS") in Central Government when they introduced the Provision of Services Regulations which implemented the Services Directive into domestic law. When the Provisions had been introduced, the Council had responded to the emphasis from BIS on removing barriers to businesses setting up in the UK and making processes simple and not dissuasive. This included setting up a single point of contact so that people could make applications online. BIS had not spoken of the consequences of the Services Directive in terms of overturning what licensing authorities had considered was the fundamental principle that licensing regimes should be self-financing. Central Government had indeed passed legislation relating to the Licensing Act 2003 (section 121 of the Police Reform and Social Responsibility Act 2011 which provided for the insertion of new sections 197A and 197B into the Licensing Act 2003) which specifically allowed the Licensing Authority to set fees designed to achieve full cost recovery. There was therefore some conflict between the Court of Appeal decision and what Parliament had enacted on this particular issue. The Parliament legislation was yet to come into force and the Council waited to see with some interest what the Home Office's response would do in light of the outcome of the Court of Appeal's decision.

3.4 Mr Large advised that the Council had made an application for permission to appeal to the Supreme Court. There was no guarantee that the application would be granted. One factor which could potentially have an impact was whether there was interest from other licensing authorities or regulatory bodies about the outcome of the case. The Council had received interest from the Law Society, the General Dental Council and the Royal Institute of British Architects who were all concerned about the implications for the regulatory regimes they were responsible for.

3.5 Councillor Caplan informed those present that in his capacity as Cabinet Member for Finance & Customer Services a general protocol had been introduced that all fees and charges were examined on an annual basis across the Council. It was good practice to formally review these even if they were not amended once the review had taken place. He added that the review process had not been instigated directly as a result of the sex establishment licensing fees litigation.

3.6 **RESOLVED:** That the contents of the report be noted.

4. SEX ESTABLISHMENT (SEX SHOPS) FEES FOR 2010/11 TO 2013/14 AND RESTITUTION AMOUNTS FOLLOW COURT ORDER

4.1 Steve Harrison, Operational Director for Premises Management, introduced the item. The original report examined the setting of sex shop fees for 2010/11 to 2013/14 in the light of the judgment of the Court of Appeal. The structure of the report with terms such as 'Excess A, B and C' mirrored the

language of the Court order to demonstrate how fees would be applied. A Supplemental Report had been tabled at the meeting and this would be discussed in more detail by Mr Large and Kerry Simpkin, Assistant Service Manager. The new Services Directive had an impact on what the Council could reasonably charge. The Council was able to demonstrate that it did properly incur expenditure against the pursuit and closure of unlicensed sex shops over recent years. Efforts of officers had been considerable in terms of conducting multiple raids, seizing evidence and being involved in hard fought cases for closure orders in courts. The number of unlicensed sex shops in Westminster had reduced from approximately 60 down to 6 and the aim was to further reduce this number. He made the point that this area of work had significantly contributed to the improved look and feel of Soho.

4.2 Mr Large explained the recommendations in the report. The Council had to comply with the Court of Appeal's Order and in doing so exercise a statutory function under the Local Government (Miscellaneous Provisions) Act 1982 which states that an applicant for a sex establishment licence has to pay a reasonable fee set by the appropriate authority. It was for the Licensing Committee to decide what constituted a reasonable fee. This decision could potentially be challenged. Potentially contentious matters included the figures themselves set out in the report in the agenda and the supplemental report being tabled, the methodology being used and whether the fee set was 'reasonable' as required under the 1982 Act. As set out in the High Court judgment, the claimants had been very critical of the figures the Council had produced in justifying the expenditure that had been incurred. There had been a number of Freedom of Information ('FOI') requests from the claimants and they had received different figures at times in relation to the same item of expenditure. The claimants had asked questions such as how much officers were paid, the time they had spent on specific activities and the overheads involved and had reached the conclusion that the figures proposed were not correct based on their own calculations.

4.3 Mr Large stated that in writing the report for the current meeting, officers had examined the figures that had been criticised during the litigation process. The 2009/10 figures on Council income and expenditure were taken from the audited accounts. The one respect in which officers did believe it was now necessary to change the figures related to the cost of compliance visits by enforcement officers to licensed premises. The Council had accepted during the course of the litigation process that prior to 2009/10 there had not been the number of compliance visits undertaken as had thought to be the case. Officers had therefore made an allowance for this in the figures.

4.4 Mr Large advised that the exercise of calculating the proposed fees in the report was complicated in the light of what the High Court and Court of Appeal had said. They were requiring the Council to set a fee for 2010/11, taking into account surpluses and deficits of previous years. There was therefore an issue about how many years prior to 2010/11 the Council needed to take into account. In the original report in the agenda papers, officers had gone back as far as 2006/07. Although the Council had not consulted the claimants in the litigation, they had written to Mr Large after having looked at the report

and made the case that it was not correct to restrict the calculations to 2006/07. They had made the point that the Court of Appeal Order requires the Council to taken into account any previous surpluses or deficits including 2004/05 and 2005/06. Mr Large informed Members that the reason officers had gone back as far as 2006/07 was due to the comments of Lord Justice Keith in the High Court decision which was quoted in the Supplemental Report tabled at the meeting. Lord Justice Keith had expressed the view that there was no basis for going further back than the year ending 31 January 2007 and had made an Order that 'the Defendant shall… determine a reasonable fee for the years ending 31st January 2008, 31st January 2009 and 31st January 2010… having regard to the need to carry forward from year to year any previous surpluses or deficits from each of the said years'. The Court of Appeal had, however, varied that part of the Order because there had been a debate as to whether it was necessary to determine a fee for each of those years and then re-pay any excess or whether that should be done overall so that any surplus is re-paid at the end. The question of how far back officers should go was not discussed at the Court of Appeal. What officers were advising today was that the surplus for 2005/06 should be taken into consideration in the figures. The debate about setting the fees for each year had assumed that the Council would need to look back to the year before and take into account any deficits or surpluses from that year. Excess A of the Supplemental Report reflected the subsequent recalculation. Officers did not believe it to be appropriate to go back as far as 2004/05 in the light of Lord Justice Keith's comments in the High Court.

4.5 Mr Large stated that it was the claimants' view that the Council had not set a 'reasonable' fee as required under the 1982 Act. The Courts had said that the costs have to be reasonably incurred based on the work undertaken. The Committee needed to decide whether the figures being proposed in the original report and Supplemental Report were reasonable, including whether it was reasonable to charge quite significant sums to a small number of sex establishment proprietors due to the fact that before 2009 they included enforcement costs for unlicensed premises. He clarified in response to questions from Councillor Bradley that 2010/11 included deficits and surpluses from previous years and the Committee needed to be satisfied that the figure being proposed in 2010/11 of £2718 was reasonable taking into account criteria such as whether the Council was recovering money reasonably which it had spent on the sex establishment licensing regime and also whether a fee of £2718 might discourage operators. Mr Large also clarified that the Court of Appeal had said that the Council could not after 2009 include in the charges to the licensed proprietors the costs of enforcement for unlicensed premises. In the past the Council had taken the position that it was reasonable to demand the charges on the basis that the licensed proprietors benefited from enforcement action against unlicensed premises.

4.6 Councillor Caplan stated that it was particularly important for officers to explain what costs the Council was recovering and confirm that the Council was incurring those costs. Mr Simpkin stated that it was necessary to explain the position prior to 2010/11. From 2005/06 to 2009/10 officers had used

figures from the audited accounts taking into account matters including incurred charges for legal and committee services and direct costs as well as income received. Costs involved the process of handling the applications and enforcement of unlicensed premises although this was not factored in after 2009. In paragraph 6.3 of the Supplemental Report was a table setting out income received in relation to sex establishments. An adjustment had been made prior to 2011/12 of £1,250 per licence. The adjustment reflected the fact that the Council accepted 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. Mr Simpkin explained that from 2005/06 to 2007/08, there been a surplus for the operation, albeit a decreasing one. In 2008/09, the operation had been in deficit. 2009/10 only took 10 months into account from 1 February. Any income received prior to 1 February was carried into the financial year and covered costs. The total surplus of £207,869 from 2006/07 was carried over into the restitution amount. He clarified that the costs included enforcement against unlicensed premises from 2005/06 to 2009/10 before the Services Directive came into effect.

4.7 Mr Simpkin explained that Excess A took into consideration the surplus for previous years. It was necessary to calculate a reasonable fee without the enforcement costs being factored in. The Licensing Service, Licensing Inspectors and Environmental Health had spent considerable time working out the time and costs involved with processing applications, assessing the applications, Environmental Health officers inspecting the venue and Licensing Inspectors making compliance visits. They had established collectively what the reasonable timing was for each of these steps and calculated the officers' hourly rates in order to come up with the appropriate fee level. The Council was therefore ensuring that costs were recovered. In paragraph 6.2 of the Supplemental Report the fee level was split between compliance and processing the applications. In paragraph 6.5, the fee was multiplied against the number of applications received during the year minus the applications withdrawn or surrendered during the period. There had been 15 renewals for the licensing year 2010/11 which equated to a total recoverable fee of £30,768. £1,250 had been deducted per the 15 licences due to less compliance visits taking place up to 2011/12 than the 4 per annum that had originally been calculated. The total re-evaluated fee income minus the adjustment for 2010/11 had then been deducted from the surplus amount from 2006/07 to 2009/10 which left a surplus of £195,851. The income for the licence year 2010/11 was £436,530 which when added to the surplus of £195,851 left a total amount of surplus to be reimbursed of £632,381 (Excess A). Mr Simpkin advised Members that in addition to this, the Court Order had required the Council to charge interest against Excess A going back to 1 February 2010. The total interest to 30 June 2013 was £143,542 which when added to the Excess A figure meant that the total reimbursement sum was £775,923 for restitution as part of the Court Order. This was the officers' reasonable belief of what the fee would be based on officers' time and associated costs for 2010/11. Prior to 2010/11 the costs were documented in the Council's audited accounts. Mr Simpkin confirmed in response to a

question from Councillor Caplan that only Excess A had been amended in the Supplemental Report. The tables for Excess B and Excess C and also relating to the 2013/14 fees set out in the original report were not being amended.

4.8 Members asked a number of questions to Mr Large and Mr Simpkin as follows:

- Councillor Mitchell asked if the Council was given permission to appeal to the Supreme Court what the position would be in respect of the Council reimbursing costs. Mr Large responded that under the terms of the Court of Appeal Order the Council would be required to pay these to the claimants. An application had been submitted for a stay pending an appeal to the Court of Appeal but a decision had been taken not to submit an application for a stay pending the decision of the Supreme Court on the grounds that it was almost certain the Council would lose. If the Council was successful was successful with its appeal at the Supreme Court there was the potential for reimbursement. It depended on the Order made.
- Councillor Mitchell requested more details on the costs incurred for sex establishment licences applications. Mr Simpkin stated that an application would initially be submitted. In addition to entering data, it would be necessary for the Licensing Service to validate the information in the application, assessing the documentation and accompanying financial records. The Licensing Service would consult Environmental Health and Licensing Inspectors on applications. New sex shop licences were often opposed and there would be costs related to the production of reports and attendance at the Licensing Sub-Committee. The Licensing Service also oversaw the shop front signage, advertising outside and the compliance visits by Licensing Inspectors. Environmental Health would be served with a copy of the document and an officer would be allocated the case. They would then assess the application, visit the venue and discuss the application with colleagues and the applicant. If the application was opposed the Environmental Health officer would attend the Licensing Sub-Committee hearing and often visit the premises after the hearing particularly if a 'works' condition was attached to the licence. A licensing inspector would also assess the application and the applicant, would undertake a visit of the premises and send documentation to the Licensing Service. A licensing inspector would also attend the Licensing Sub-Committee hearing if the application was opposed. It was necessary for Licensing Inspectors to carry out compliance visits. Officers had produced a standard average application cost calculation which ultimately determined the fee. There had been considerable work on the fee structures, identifying how the fee would be calculated and the management meetings on how to take this matter forward which had been taken into account in determining the fee. Depending on the actual cost recovery, the fee could fluctuate either up or down in future years.
- Councillor Bradley asked whether it would only be known at the end of 2013/14 whether the proposed costs were accurate. Mr Simpkin replied that the timings for the work carried out had been very similar in recent years and he was confident that they were accurate. Mr Harrison

confirmed that the 2013/14 figures were what the Licensing Service believed were correct in order to recover costs. They would be reviewed at the end of the financial year. Councillor Caplan stated that it was encouraging that the proposed fees for sex shops were consistent over a number of years.

- Councillor Hampson asked Mr Simpkin how many applications there were likely to be in the current year. Mr Simpkin replied that ten applications had been received for the renewal of the sex shop licences and it was expected that three more would be received by the end of the year. They had not paid their fee yet because they were waiting on the outcome of the court case. It was possible that there could be an impact in terms of the number of applications if the fee was reduced. Mr Harrison added that the Council's policy allowed for a maximum of eighteen licensed sex shops. There were six unlicensed sex shops. The Council was currently pursuing closure orders in the courts for the shops and this process was at an advanced stage. There would need to be a further debate about how the Council managed its resources in respect of licensing activities.

4.9 Mr Large asked Mr Simpkin a question in order to clarify the content of paragraph 8.2 of the original report. He stated that the claimants had said to him that the 'additional work carried out due to the Judicial Review' should be considered litigation costs not costs relating to the applications and there should not be a charge for this. Mr Simpkin responded that due to the judicial review, officers in the Licensing Service had had to examine how they internally calculated fees. There had been a high level of managerial input. The subject matter had also required the production of a number of committee reports, including for the current meeting. Mr Simpkin added that when the report referred to the 'additional work carried out due to the Judicial Review', it did not specifically refer to the work undertaken for the court case but the internal actions carried out to ensure that the Council was not judicially reviewed in the future. Mr Simpkin advised Councillor Mitchell in response to his question that the Licensing Service was required to be more transparent about the methodology used including the calculations of timings and the hourly rates and ensure that the way in which it was documented was robust in the event the Council was challenged again. This was reflected in the costs for 2012/13 and 2013/14.

4.10 The Chairman made two points. The first was that it had appeared that officers needed to be more careful in terms of responding to FOI requests. Mr Large commented that in the past there had been issues with delays in response to FOI submissions but these problems had been overcome. The lesson that needed to be learnt in this case was that it was important to ensure that the person who had the correct information answered the question that had been posed. Legal and Licensing were working together to ensure that the information being distributed accurately reflected the facts and the Council's position. The Chairman also made the point that she had been aware of the reasoning for the fee levels when they had been reviewed in the past and had considered the fee levels to be reasonable. It had been a very onerous process to reduce the unlicensed sex shops in Westminster and the only intention of the Council had been to recover costs.

4.11 Members discussed briefly whether it was necessary to consider matters such as what other local authorities were charging for a similar service in respect of sex shops and the percentage of turnover in comparison to other forms of licensing activity. However, the Committee decided to concentrate specifically on the information in the report and the advice received at the meeting as to whether a reasonable fee was being set for sex shops applications. The Committee approved the fee levels for the licensing years 2010/11 to 2013/14 as set out in Appendix 1 of the report, noted the requirement to meet the Court of Appeal order deadline of 30 June 2013 in relation to reimbursing the excess amounts as detailed within the report and authorised officers to make the necessary payments to comply with the Order as set out in the Supplemental Report.

4.12 **RESOLVED:** (i) That fee levels for the licensing years 2010/11 to 2013/14 as set out in Appendix 1 of the report be approved; and,

(ii) That the requirement to meet the Court of Appeal order deadline in relation to reimbursing the excess amounts as detailed within the report, and authorise officers to make the necessary payments to comply with the Order as set out in the Supplemental Report, be noted.

5. LICENSING APPEALS

5.1 Mr Large provided Members with an update on licensing appeals since the previous meeting of the Committee in March 2013 as follows:

- an appeal against the decision of the Sub-Committee in respect of Aura, 48-49 St James's Street had been dismissed. The appellant had now applied for permission to judicially review the District Judge's decision to dismiss the appeal. He had also applied for a stay of the District Judge's decision, pending determination of the application. The application for a stay was granted by the High Court without the City Council having been given an opportunity to make representations, so at present the decision of the Sub-Committee, upheld by the District Judge, was no longer in effect.
- an appeal against the decisions of the Sub-Committee in respect of Metra, 14 Leicester Square and Quintessentially Group, 29 Portland Place had been dismissed and costs had been awarded to the City Council.
- an appeal against the decision of the Sub-Committee in respect of Cherry Jam, 58 Porchester Road had been allowed. However, Mr Large advised that he did not consider this to be a defeat for the Council as the District Judge had been persuaded that the problems which had been apparent at the time of the review had since been resolved with the new proprietor having substantially changed the nature of the operation. Costs had not been awarded against the Council on the basis that the decision of the Licensing Sub-Committee was correct at the time and that the Council was right to defend the appeal.

5.2 The Chairman stated that she had requested that all appeal decisions were sent to the Members who had considered the original applications at the

Licensing Sub-Committee. Mr Large advised that this was now occurring. Councillor Hampson asked whether the costs awarded to the Council tended to be paid by the appellants. Mr Large replied that most orders for costs were paid although occasionally they were not when the appellant company folded. The solution to this had been to seek costs directly from the directors of the company, as in the case of Metra. Mr Large was asked a question by Councillor Toki about the significance of the figures relating to the number of appeals against the Sub-Committee's decisions that were allowed, dismissed, withdrawn or settled under the Licensing Act 2003. Mr Large stated that these had originally been monitored in order to assess the impact of the changes brought about by the Act. It had become clear that the courts had only tended to be persuaded to allow an appeal when convinced that the Council had made an error in its decision making. Members considered that the record of 14 appeals being allowed and 11 allowed only in part out of 444 appeals was a good record and thanked officers for their contribution.

5.3 **RESOLVED:** That the contents of the report be noted.

6. FUTURE LICENSING COMMITTEE MEETING DATES

6.1 It was noted that the next meetings of the Licensing Committee would be held on Wednesday 20 November 2013 at 10.00am and Wednesday 12 March 2014 at 10.00am.

7. OTHER BUSINESS WHICH THE CHAIRMAN CONSIDERS URGENT

7.1 There were no urgent items for discussion.

8. CLOSE OF MEETING

8.1 The meeting ended at 11.33pm.

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Chairman Date