

SEX ESTABLISHMENT FEES & CHARGES

SUMMARY AND RECOMMENDATIONS

Following legislative changes, case law developments and a challenge to existing fee level arrangements this report recommends new fees and charges for the licensing of sex establishments.

The recommended fees take account of all recoverable costs following a comprehensive review of the officer time and work involved in the administration and enforcement of the licensing regime concerned.

Members are asked to approve the revised fees and charges set out at **Table 1** to this report to take effect from 1st June 2018.

1. BACKGROUND & INTRODUCTION

- 1.1 Historically, discretionary licensing fees and charges (including sex establishment fees) have been reviewed on an annual basis using a percentage uplift based on changes in Council costs and the annual rate of inflation. However, the annual determination of these charges was put on hold in 2010 following a legal challenge on implementation of the Provision of Services Regulations 2009 (POSR09).
- 1.2 These Regulations, which themselves implement the European Services Directive (EUSD) 2006/123/EC, state that licensing authorities must not charge fees that exceed the actual costs of a relevant authorisation process. Specifically, fees for in-scope authorisations (including sex establishment fees) must be reasonable and proportionate to, and must not exceed the cost of the procedures and formalities concerned.
- 1.3 Collectively, these provisions have presented problems for many local authorities as sex establishment fees have historically been set at a high level by taking account of both administrative, enforcement and other costs. These fee levels have subsequently been challenged in the Courts, most recently and most notably by a group of sex establishments in Westminster (see *R (on the application of Hemming t/a Simply Pleasure Ltd and others) v Westminster City Council [2017]*). This has provided the leading case in this area and established a number of fee setting principles, outlined at **appendix A**.

1.4 Applicability to Rushmoor Borough Council

- 1.5 On the basis of POSR09, Darker Enterprises Ltd (DEL) (the only remaining sex establishment on district) has sought to contest sex establishment fees which they consider excessive whilst the leading case on this matter has transitioned through the Courts to its conclusion. Relevant correspondence to this effect was received by the Council in 2011 and 2013. DEL have also made enquiry as to our review of fees each year since on annual renewal of their licence. Currently, sex establishment licensing fees stand at £6,925 for first time grant and £3,200 on renewal.
- 1.6 In November 2016, Cabinet approved a new process for the annual review of the Council's fees and charges, introducing a Fees and Charges booklet which shows current and proposed fees and the methodology for reviewing each type of fee or charge. The review process, first reported in November 2017 in the Head of Finance's Report FIN 17 35, is designed to link to the Council's Medium Term Financial Strategy, contribute to its budget planning process, reduce administration and facilitate better transparency and a robust methodology for reviewing fees. The review process will commence September each year with the intention to implement revised fees from the 1st April each year.
- 1.7 Due to the complexities of regulating legislation, a number of chargeable areas were (and continue to be) subject to detailed review (including Licensing) and were not subject to proposed fee changes at this time. As the Council's Licensing service provides a range of chargeable functions, a report on the wider review of Licensing fees and charges will be put before Members for scrutiny and approval in due course (estimated in September).
- 1.8 However, following the legislative changes, case law developments and a challenge to the Council's existing fee levels for sex establishment licences, the fees for this licensing regime have been subject to an expedited and detailed review. This has since concluded and these are now subject to Member scrutiny and approval.
- 1.9 Notably, Regulation 2(6)(e) of the Local Authority (Functions & Responsibilities) (England) Regulations 2000 specifically precludes the setting of Licensing fees as a function of the executive; effectively placing responsibility for the determination of Licensing fees and charges on the Licensing & General Purposes Committee. This report is therefore brought before Members of the Committee for determination of the proposed fees and charges.

2. DETAILS OF THE PROPOSAL(S)

2.1 General

- 2.2 It is proposed that the fees and charges set out in **Table 1** below take effect from 1st June 2018.

Table 1 – Current and proposed fees for Sex Establishments licensing

Service	EUSD scope Y/N	Unit	Charge from 01.04.17 (£)	Recommended charge from 01.06.18 (and percentage change on current charge)		Methodology in reviewing the charge	VAT Indicator *
				Application fee	Maintenance fee		
Sex establishments licence (<i>New</i>)	Y	per application	£6,925	£1115 (- 83.9%)	£0 (+/- 0%)	As above	O/S
Transfer of sex establishments licence	Y	per application	£6,925	£1115 (- 83.9%)	£0 (+/- 0%)	As above	O/S
Sex establishments licence (<i>Renewal</i>)	Y	per annum	£3,200	£270 (- 91.6%)	£0 (+/- 0%)	As above	O/S

*O/S – Outside scope

2.3 Methodology of calculation

2.4 The proposed fees have been derived following a comprehensive review of the recoverable cost elements and work involved in the administration and enforcement of the licensing regime concerned. For reasons outlined below, licensing administration and compliance work has been specifically accounted for separately.

2.5 In summary, the proposed fees take account of the officer time taken to process each individual authorisation type. This will include, where appropriate, additional elements to cover time spent by the licensing service on related matters (e.g. for process escalation, reports and policy development etc).

2.6 This is multiplied by the average hourly rate for a member of the Licensing service. The hourly rate is inclusive of employer on-costs, support costs, management expenses, office accommodation and corporate policy allocation. Where appropriate, supplies and services costs are also added; covering cost centre expenditure budgets and supporting services costs. In addition, where stocked and/or of significance, the cost of materials (e.g. secure licence certificates) are also taken into account.

2.7 Collectively, these cost factors accord with Local Government Association (LGA) guidance on locally set licence fees. The proposed licence fees have been established using the number of relevant licence applications received in 2016/17 (as the last available full years accounts at the time of writing) as a proxy reference year.

3. RELEVANT CONSIDERATIONS

3.1 Legal Considerations

3.2 Provisions for sex establishment licensing are set out in Schedule 3 of the Local Government Miscellaneous Provisions Act 1982 (LGMP82). Paragraph 19 of this schedule sets out the associated fee charging provisions and states that an applicant for the grant, renewal or transfer of a licence shall pay a reasonable fee determined by the appropriate authority.

3.3 On the face of it, this provides wide ranging discretion of what may be taken into account and the level of fees that can be set. However, these provisions must also be read in conjunction with several Court cases which have also established various principles by which discretionary fees should be set, managed and / or used. These are collectively summarised in **appendix A** for reference.

3.4 As an in-scope authorisation scheme, these provisions must also be read in conjunction with the aforementioned POSR09 and EUSD Regulations. These state that licensing authorities must not charge fees that exceed the actual costs of a relevant authorisation process and do not exceed the cost of the procedures and formalities concerned (i.e. must be reasonable and proportionate).

3.5 Further and on conclusion of the leading case in this area last year, it is also now clear that these Regulations also effectively require the Council to disaggregate its administrative and enforcement costs. This is so as to establish a distinction between the fee charged to deal with any application for a licence and any further fee(s) to maintain the licence (i.e. to cover post licence regime running and enforcement costs). In practice, this means that in-scope authorisation processes must be subject to separate –

(a) application fees - which must not exceed the cost of the application procedures and formalities concerned; and

(b) maintenance fees - which may be charged following the grant or renewal of any in-scope authorisation for the subsequent running and enforcement costs of the licensing regime concerned.

3.6 Specific sex establishment licensing regime considerations

3.7 The proposals provide for a notable reduction in sex establishment licence fees in relation to new applications, renewals and transfers. This takes account of the limited resources that the Council generally commits to this particular licensing function. Whereas, there is just one licensed sex establishment on district which has hitherto been subject to few complaints and/or compliance issues. Indeed there were no interventions necessary during the proxy reference year. Fees may of course be adjusted should additional compliance work be required in to the future.

3.8 Consultation Considerations

3.9 Whilst some licensing regimes require fees set by the Council to be subject to public consultation, there are no such consultation requirements as regards the setting of sex establishment fees.

3.10 Financial and Resource Implications

3.11 Using the proxy reference year as a comparator, the proposed fees and charges would result in an annual reduction of income by £2,930. However, as the number of licence applications may vary year on year, this figure could change into the future.

4. CONCLUSIONS

- 4.1 Following legislative changes, case law developments and a challenge to existing fee level arrangements, sex establishment licensing fees and charges have been subject to a full and comprehensive review. Taking account of LGA guidance and the principles established by case law developments, this has resulted in a marked reduction in the proposed licence application fees and charges as outlined in this report. These however also take account of the limited resources that the Council generally commits to this particular licensing function.
- 4.2 As there are no specified public consultation requirements and given an outstanding challenge to current fee levels, the report sets out proposed adoption of the revised fees and charges by 1st June 2018. Sex establishment fees will be reviewed again in accordance with the recently established corporate process and timetable.

BACKGROUND

DOCUMENTS: - None

CONTACT DETAILS:

Report Author – John McNab, Environmental Health Manager
Tel: 01252 398886, **Email:** john.mcnab@rushmoor.gov.uk

Head of Service – Qamer Yasin, Head of Environmental Health & Housing
Tel: 01252 398640, **Email:** gamer.yasin@rushmoor.gov.uk

SUMMARY OF CASE LAW CONCERNING SETTING OF DISCRETIONARY LICENSING FEES

SUMMARY OF CASE LAW CONCERNING SETTING OF DISCRETIONARY LICENSING FEES	
Case Reference	Established principle(s)
R v The Greater London Council ex parte The Rank Organisation (1982)	<ul style="list-style-type: none"> ➤ The level of fees is a matter of policy so long as the total fee income does not exceed the cost of the licensing system.
R v Manchester City Council ex parte King (1991)	<ul style="list-style-type: none"> ➤ Licence fees must not be used as a means of raising revenue. ➤ Council's must carry forward surpluses or deficits.
R v Westminster City Council ex parte Hutton (1985)	<ul style="list-style-type: none"> ➤ It is permissible for Council's, when considering the level of fees, to be guided by a policy that the ratepayers should, so far as is reasonable, be relieved of the burden of paying the costs of licensing administration. ➤ Council's are free to fix fees reflecting all the necessary elements on a rolling basis without adjusting surpluses and deficits in each year. Shortfalls in one year must be carried into the next year's accounts.
R v Tower Hamlets London Borough Council ex parte Tower Hamlets Combined Traders Association (1994)	<ul style="list-style-type: none"> ➤ Council's may recoup in one year the losses (deficits) which had accumulated over a period of years. ➤ Council's have a duty to administer its funds so as to protect the interests of the body of the council tax payers.
R (on application of Cummings et al.) v Council of the City and County of Cardiff (2014)	<ul style="list-style-type: none"> ➤ Councils must have regard to and/or account for any surplus or deficit generated in previous years. ➤ Councils must keep separate accounts for different licence types ➤ Councils must ensure that any surplus or deficit identified under each part of the licensing regime is only applied to the part of the system from which it has been raised/lost. ➤ Councils must ensure that any surplus from one licensing regime shall not to be used to subsidise a deficit in another.
R (on the application of Hemming et al.) v Westminster City Council (2017)	<ul style="list-style-type: none"> ➤ EUSD precludes 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. ➤ Under the Provision of Services Regulations 2009, only the costs of dealing with the application process for grant or renewal of a licence, permit etc can be charged for upfront. ➤ The costs of enforcement against both licensed and unlicensed operators is chargeable; but the costs of enforcement can only be charged for (i.e. on maintenance) once the licence has been granted. ➤ The interest due on any overcharging must also be part of any redetermination. ➤ Councils must carry forward surpluses/deficits each year when setting the fees for the following year.