

<b>LICENSING AND APPEALS COMMITTEE</b> <b>12 DECEMBER 2013</b>
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<b>*PART 1 – PUBLIC DOCUMENT</b>	<b>AGENDA ITEM No.</b>  <b>6</b>
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**TITLE OF REPORT: REVIEW OF LICENSING FEES AND CHARGES**

REPORT OF THE HEAD OF HOUSING AND PUBLIC PROTECTION  
PORTFOLIO HOLDER: COUNCILLOR BERNARD LOVEWELL

**1. SUMMARY**

- 1.1 To advise the Committee of the current position relating to fees and charges for the licences, permits and authorisations administered and enforced by the Housing and Public Protection Service.
- 1.2 To advise the Committee of recent case law and other factors to be considered when setting future fees and charges.
- 1.3 To seek the Committee's views on the proposed criteria and strategy for the setting of licensing fees and charges for the financial year 2014/15 and beyond.

**2. RECOMMENDATIONS**

- 2.1 That the Committee considers the criteria suggested within the report and supports the following principles for the setting of future licensing fees and charges:
  - (a) licensing fees and charges should be set having regard to the need to promote local economic growth provided that they are consistent with the following objectives:
    - (i) that the local Council Tax payer does not, unless provided for by law or decision of the Council, subsidise the operating costs associated with businesses or other trading entities (i.e. the Council seeks to fully recover the lawful costs licensing activity);
    - (ii) the Council may not *fully* recover its lawful costs associated with licensing activity if a) this would result in significant hardship to third parties, or b) the effect of fees or charges associated with licensing may encourage unlicensed activity and where formal enforcement is unlikely to be an effective control, or c) where the Council specifically wishes to encourage the growth a specific licensable activity;
  - (b) an analysis of licensing costs, including detailed analysis of all recharges, should be undertaken every three years vis-à-vis licensing fees and charges;
  - (c) in the years between cost reviews, fees and charges should ordinarily be subject to the Council's published inflationary increase;

- (d) any under/over recovery of full cost within existing licensing fees and charges should be rectified without undue delay, where legislation allows. However, where this may result in a significant increase in a licence fee/charge then consideration will be given to a phased introduction of the new levy;
- (e) that enforcement activities in respect of unlicensed businesses/individuals should continue with the associated costs being financed from the General Fund; and
- (f) that enforcement activities are periodically reviewed to ensure that they are delivered in the most cost effective manner including, where appropriate, the use of other internal departments or external statutory bodies.

### **3. REASONS FOR RECOMMENDATIONS**

- 3.1 To recognise the relevance of the Council's licensing fees and charges to the economic vitality of local businesses.
- 3.2 To ensure that the fees and charges set by the Council in respect of its licensing services fully reflect the 'living within our means' priority for the District as adopted by Full Council on 5<sup>th</sup> September 2013.
- 3.3 To ensure that, where legislation allows, fees and charges are set at a level to allow full permitted cost recovery to take place.
- 3.4 To ensure that the costs of enforcement activity as regards unlicensed businesses/individuals continues to be met by the General Fund.

### **4. ALTERNATIVE OPTIONS CONSIDERED**

- 4.1 Continuation of the existing strategy of increasing all licensing fees and charges in line with inflation (as part of the Council budget setting process) was considered, but rejected as it would not guarantee full cost recovery (where legislation permits) or ensure funding for enforcement activity to take place in order to protect the public.

### **5. CONSULTATION WITH EXTERNAL ORGANISATIONS AND WARD MEMBERS**

- 5.1 The Council's Constitution states that the setting of fees and charges is a matter for the Strategic Director, or nominated deputy in consultation with the relevant Portfolio Holder (in this instance, Housing and Environmental Health) and the Strategic Director of Finance, Policy & Governance. However, as part of the process of setting licensing fees and charges, the Portfolio Holder and/or the Strategic Director may choose to consult further. This report forms part of the consultation exercise prior to the setting of future fees and charges. Whilst, in the majority of cases consultation would not be a statutory requirement, some licensing legislation requires that a public notice is placed in a local newspaper for certain licences such as hackney carriage and private hire licensing.
- 5.2 The Portfolio Holder for Housing and Environmental Health, Cllr Bernard Lovewell, has been consulted on the contents of this report and supports its recommendations.

## **6. FORWARD PLAN**

- 6.1 This report does not contain a recommendation on a key decision and has not been referred to in the Forward Plan.

## **7. BACKGROUND**

### **7.1 Responsibility for setting of licence fees and charges**

- 7.1.1 North Hertfordshire District Council has the statutory responsibility for the administration of a wide range of licences, registrations, consents and permits. A number of these regimes allow the Council to charge a fee, payable by an applicant as part of an application for the grant or renewal of a licence, registration, consent or permit.
- 7.1.2 Legislation may prescribe the extent of the costs that may be recovered through fees and charges, however, some of the older legislation refers to the recovery of "reasonable costs". In the majority of cases, legislation allows the Council to recover administrative costs and in some cases the recovery of additional costs relating to enforcement activity or other indirect costs associated with the licensing function.
- 7.1.3 The setting of fees by a local authority can fall into one of two categories: fees set by the Executive or fees that cannot be set by the Executive. The Local Authorities (Functions and Responsibilities) (England) Regulations 2000 detail functions which are not to be functions of the Executive, the Executive being Cabinet in the case of North Hertfordshire District Council.

Where the setting of a fee cannot be the responsibility of the Executive the responsibility falls to Full Council. Full Council can delegate the function to a committee or an officer, but not to a member of the Executive.

Where the setting of a fee can be, or is, the function of the Executive the responsibility can be delegated to a member of the Executive, ordinarily the relevant Portfolio Holder.

The Council's recently adopted Constitution reflects these arrangements by delegating the setting of relevant fees and charges to the Strategic Director of Planning, Housing and Enterprise (but in practice this function is delegated to the Head of Housing and Public Protection) in consultation with the relevant Portfolio Holder and Strategic Director of Finance, Policy & Governance.

- 7.1.4 Licensing fees and charges are routinely set annually for each financial year beginning on 1<sup>st</sup> April. Where legislation dictates, for example hackney carriage and private hire licensing, proposed fees are advertised in the local press. Where there are no prescribed advertising requirements, the schedule of fees and charges is published on the Council's website and the trade are advised accordingly, generally through licence reminder letters or invoices.

When a new licensing regime is introduced, such as that recently adopted as regards the regulation of the scrap metal trade, new fees and charges are developed at the statutory commencement of that regime having regard to published guidance and emergent best practice.

## 7.2 Current strategy

- 7.2.1 Historically, the fees charged by the Council have been increased year-on-year in line with the Council's benchmark rate (which is based on national inflation data). A full review to ensure that the fees charged cover the cost of providing the licenses has not been carried out for some time. Therefore, the fees charged may no longer accurately reflect the costs of providing the respective licensing service.
- 7.2.2 The only fee costing exercise undertaken in recent years (other than associated with the Scrap Metal Dealers Act) was the initial costing exercise undertaken in 2007 in relation to the setting of gambling fees that became a local authority responsibility that year. As with other fees and charges, these have increased in line with the process set out in 7.2.1. above. In some cases, the gambling fee has reached the statutory maximum and, therefore, has not increased in line with inflation from that point.
- 7.2.3 The setting of fees and charges should have regard to the Council's Medium Term Financial Strategy (MTFS), in particular that subsidised services should be reviewed with a view to elimination of any subsidy. Whilst the MTFS sets the corporate stance of inflating fees and charges by the benchmark inflationary rate, the Head of Housing and Public Protection has a local discretion, in consultation with the Portfolio Holder for Housing and Environmental Health, as to the final level of fees and charges.
- 7.2.4 Consideration has to be given to the fact that the majority of the Council's licensing function relates to public safety. There is a risk that the setting of high fees and charges may deter applications leading to unregulated activity and an increased risk to the public. Therefore, the cost of an authorisation should be balanced against the public interest of ensuring a regulated trade.

## 7.3 Legislative restraints

### Licensing Act 2003

- 7.3.1 All fees relating to the Licensing Act 2003 are currently set by the Secretary of State based on the non-domestic rateable value of the premises and cannot be amended by local authorities.
- 7.3.2 It is not clear whether the centrally set fees cover administration only or include an element of enforcement activity; the Act just states that the set fee may be levied.
- 7.3.3 During the Police Reform and Social Responsibility Bill's passage through Parliament, the Home Office issued an Information Note during April 2011 explaining one of the Bill's provisions regarding the local setting of licensing fees. This note states:

*"The policy aim is to ensure that fees recover the full costs of local licensing authorities in exercising their functions under the Licensing Act. The current fees were intended to achieve the same aim, but they have not been increased since the Act was introduced in 2005."*

Whilst this confirms the intended principle of the existing centrally set fees, there is no clear definition of whether the fees includes administration, enforcement or a combination of the two.

## Gambling Act 2005

- 7.3.4 The majority of fees relating to the Gambling Act 2005 are set locally but are subject to a maximum fee level cap set by the Secretary of State.
- 7.3.5 Other minor fees such as lottery registrations, gaming permits and basic administrative fees, for example change of address, are directly set by the Secretary of State.
- 7.3.6 The split between administration and enforcement is not clear as the Act only constrains local authorities by virtue of s 212(2) (d) to:

*“aim to ensure that the income from fees of that kind as nearly as possible equates to the costs of providing the service to which the fee relates (including a reasonable share of expenditure which is referable only partly or only indirectly to the provision of the service).”*

## Hackney Carriages and Private Hire

- 7.3.7 Hackney carriage and private hire licensing is governed by two pieces of legislation, the Town Police Clauses Act 1847 and the Local Government (Miscellaneous Provisions) Act 1976.

In respect of driver’s licence fees, s. 53(2) of the Local Government (Miscellaneous Provisions) Act 1976 states:

*“Notwithstanding the provisions of the Act of 1847, a district council may demand and recover for the grant to any person of a licence to drive a hackney carriage, or a private hire vehicle, as the case may be, such a fee as they consider reasonable with a view to recovering the costs of issue and administration any may remit the whole or part of the fee in respect of a private hire vehicle in any case in which they think it appropriate to do so”.*

- 7.3.8 Therefore the cost of issuing driver’s licences can be included in the fee; however, the cost of any enforcement against unlicensed drivers cannot. It is a reasonable assumption that the cost of enforcement against licensed drivers can be included as the ongoing compliance checks undertaken against a licensed driver form part of the ‘fit and proper’ person test that is an integral part of the decision to grant a licence.
- 7.3.9 In respect of fees for hackney carriage and private hire vehicle licences and private hire operators’ licences, s. 70 of the Local Government (Miscellaneous Provisions) Act 1976 states:

*“Subject to the provisions of subsection (2) of this section, a district council may charge such fees for the grant of vehicle and operators’ licences as may be resolved by them from time to time and as may be sufficient in the aggregate to cover in whole or in part-*

- (a) the reasonable cost of the carrying out by or on behalf of the district council of inspections of hackney carriages and private hire vehicles for the purpose of determining whether any such licence should be granted or renewed;*
- (b) the reasonable cost of providing hackney carriage stands; and*
- (c) any reasonable administrative or other costs in connection with the foregoing and with the control and supervision of hackney carriages and private hire vehicles”*

- 7.3.10 Sub-section (c) above makes reference to the ‘*control and supervision*’ which suggests that enforcement against unlicensed vehicles and operators can be included.

#### Sex Establishments

- 7.3.11 Sex establishment licensing is governed by Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982.

Fees for sex establishment licensing are locally set and have historically been set at a high level across the country which, until the recent *Hemming* case (see paragraph 7.6 below), had been accepted by the industry as standard practice. The fee historically partly reflected the potential workload that may be associated with processing a sex establishment licence due to the likely level of public interest and the associated costs of enforcing both existing licence conditions and against any unlicensed premises.

- 7.3.12 It is not clear whether the fees cover administration only or include an element of enforcement activity, the Act just states at Schedule 3 paragraph 19:

*“An applicant for the grant, renewal or transfer of a licence under this Schedule shall pay a reasonable fee determined by the appropriate authority”.*

#### Animal Licensing

- 7.3.13 Animal Licensing is governed by the following pieces of legislation:

Animal Boarding Establishments Act 1963  
Pet Animals Act 1951 and Pet Animals Act 1951 (Amendment) Act 1963  
Riding Establishments Act 1964 and 1970  
Dangerous Wild Animals Act 1976  
Breeding of Dogs Act 1973 and 1991  
Breeding and Sale of Dogs (Welfare) Act 1999

All fees for animal licensing are locally set, but it is not clear whether the fees cover administration only or include an element of enforcement activity, the various Acts state:

Animal Boarding Establishments Act 1963 section 1(2)

*“..... on payment of such fee as may be determined by the local authority .....”*

Pet Animals Act 1951 section 1(2)

*“..... on payment of such fee as may be determined by the local authority .....”*

Riding Establishments Act 1964 section 1(2)

*“..... on payment of such fee as may be determined by the local authority .....”*

Dangerous Wild Animals Act 1976 section 1(2) (e)

*“..... such fee as the authority may stipulate (being a fee which is in the authority’s opinion sufficient to meet the direct and indirect costs which it may incur as a result of the application).”*

### Breeding of Dogs Act 1973 section 3A (3)

*“A local authority may set the level of fees to be charged by virtue of subsection (2) of this section-*

- (a) *with a view to recovering the reasonable costs incurred by them in connection with the administration and enforcement of this Act and the Breeding of Dogs Act 1991.....”*

### Zoo Licensing Act 1981 section 15(5)

*“The local authority shall secure that the amount of all the fees and other sums charged by them under this section in a year is sufficient to cover the reasonable expenditure incurred by the authority in the year by virtue of this Act.”*

- 7.3.14 Prior to granting a licence for a riding establishment, dangerous wild animal establishment or a zoo, the premises and animals must be inspected by a veterinary surgeon appointed by the local authority. The respective legislation provides for the cost of this inspection to be recovered in full from the applicant as part of the application fee.

### Street Trading

- 7.3.15 Street trading licensing is governed by Schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982.

All fees for street trading licensing are locally set. It is not clear whether the fees cover administration only or include an element of enforcement activity, the Act just states at Schedule 3 paragraph 9(1):

*“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.”*

### Charitable Collections

- 7.3.16 Charitable collections are governed by the Police, Factories, etc, (Miscellaneous Provisions) Act 1916 for collections in the street and the House to House Collections Act 1939 for collections made from door to door. Neither piece of legislation makes any provision for the local authority to make any charge for administering this statutory function.

### Scrap Metal Dealers

- 7.3.17 The registration of scrap metal dealers has historically been governed by the Scrap Metal Dealers Act 1964. The Act does not make any provision for the local authority to make a charge for administering this statutory function.

From the 1<sup>st</sup> October 2013, the Scrap Metal Dealers Act 2013 replaces the previous registration system for scrap metal dealers . In its place it establishes a new licensing regime which will be administered by local authorities. Every scrap metal dealer will be required to have a licence and operating without one will be a criminal offence. Under the new legislation the definition of scrap metal dealers is extended so it now includes motor salvage operators, and the provisions in the Vehicles (Crime) Act 2001 under which they operate will end once the new Act comes into effect.

The fee is set by the local authority having had regard to guidance issued by the Home Office. In setting their fees local authorities will of course have to have regard to the requirements of the European Union Services Directive and any licensing case law, of which the recent case of *Hemming* is especially relevant.

#### Motor Salvage Operators

7.3.18 The registration of motor salvage operators has historically been governed by the Motor Salvage Operators Regulations 2002 made under the Vehicles (Crime) Act 2001.

7.3.18 Section 3(2) of the Vehicles (Crime) Act 2001 states:

*“A local authority may set the level of fees to be charged in respect of applications-*

*(a) with a view to recovering the reasonable costs incurred by them in connection with the administration of this Part;.....”*

No comment is made as to recovery of enforcement costs.

As mentioned in 7.3.17 above, the Scrap Metal Dealers Act 2013 will now supercede these arrangements from the 1<sup>st</sup> October 2013.

#### Hypnotism

7.3.20 The regulation of public performances of hypnotism for entertainment purposes is governed by the Hypnotism Act 1952. The Act only permits a fee to be charged by London Boroughs.

#### Licensing Functions undertaken by Environmental Health Officers

7.3.21 Historically, various licensing functions have been undertaken by an Environmental Health Officer (EHO) in particular where the specialist knowledge of an EHO is required. The licensing service Value for Money Review considered the option of bringing those functions within the licensing service, however, it was decided to continue with the existing arrangements.

7.3.22 Whilst this report is focusing predominately on the licensing service, the setting of fees and charges for the licensing functions undertaken by EHOs is also considered below.

#### Skin Piercing

7.3.23 The registration of skin piercing activities (such as acupuncture, tattooing, cosmetic piercing, electrolysis and semi-permanent skin colouring) is a function undertaken by local authorities by virtue of Part VIII of the Local Government (Miscellaneous Provisions) Act 1982 and a local NHDC byelaw that took effect from 1<sup>st</sup> October 2007.

7.3.24 Sections 14(6) and 15(6) of the Local Government (Miscellaneous Provisions) Act 1982 state:

*“A local authority may charge such reasonable fees as they may determine for registration under this section”*

### Houses in Multiple Occupations

7.3.25 Under Part 2 of the Housing Act 2004 certain houses in multiple occupation, typically those of greater risk with three or more storeys, are required to be licensed by the local authority.

7.3.26 Section 63(7) of the Housing Act 2004 states:

*“When fixing fees under this section, the local housing authority may (subject to any regulations made under subsection (5)) take into account –*

- (a) all costs incurred by the authority in carrying out their functions under this Part, and*
- (b) all costs incurred by them in carrying out their functions under Chapter 1 of Part 4 in relation to HMOs (so far as they are not recoverable under or by virtue of any provisions of that Chapter.”)*

### Mobile (Park) Home sites

7.3.27 The Mobile Homes Act 2013 introduced amendments to the Caravan Sites and Control of Development Act 1960, including the power for local authorities to levy annual fees on licensed caravan sites from the 1st April 2014. Before fees can be levied, local authorities are required to publish a fees policy and they must inform site owners what factors they have considered in setting fees, including any surpluses or deficits. Enforcement costs cannot be included as Mobile Homes Act includes separate provisions to charge for enforcement action.

There is no provision within the 1960 Act to levy a fee prior to 1<sup>st</sup> April 2014.

### Environmental permitting (Local authority pollution prevention and control - LAPPC)

7.3.28 Certain businesses that operate industrial processes that have the potential to cause air pollution are required to obtain an environmental permit from their local authority. An initial application fee has to be paid plus a smaller annual subsistence fee. The fees are set by the Department of Environment, Food and Rural Affairs (DEFRA) and reviewed annually after consultation with businesses and regulators. Local authorities have no discretion to alter the fees set by DEFRA.

## **7.4 The Common Law in respect of Licensing Fees**

7.4.1 Where there is a legislative requirement for a local authority to set a fee, the level of fee should be set having regard to current common law.

7.4.2 Common law principles in terms of licensing fee setting lay within the sex shop licensing regime and the case of *R v Westminster City Council ex parte Hutton (1985) 83 LGR 461*.

7.4.3 In his judgement, Forbes J decided that the local authority had a wide remit in the setting of licensing fees and that the court should not interfere with the licensing authority's policy unless the decision was unreasonable.

7.4.4 Forbes J also decided that the cost of enforcement activity undertaken by Westminster City Council against unlicensed sex shops could be included within the fee.

- 7.4.5 Importantly, Forbes J also decided that if a local authority incurred a deficit in an individual year it would be entitled to carry that deficit forward and include it within the calculations of the fee for the subsequent year.
- 7.4.6 Finally, counsel for both parties agreed that when setting licensing fees the local authority would be entitled to have regard to the principle that ratepayers should not incur the cost of the control of sex shop licensing. In effect, the principle that commercial activity should not be subsidised by the local tax payer.
- 7.4.7 Similar principles were confirmed in the case of *R v Manchester City Council ex parte King (1991) 89 LGR 696*, which related to street trading. The City Council had increased its fees by a factor of ten to reflect what it considered to be a commercial charge for the street trading permission.
- 7.4.8 The court decided that the increase was unlawful and that the fee should only reflect the reasonable costs of operating the licensing regime including the costs of enforcement against unlicensed traders. Nolan LJ stated that the notion that the council could use its licensing powers as an income generator were “a fallacy”.

## **7.5 European Services Directive 2006 (“the Services Directive”)**

7.5.1 The European Services Directive 2006 was implemented in England by the Provision of Services Regulations 2009 (“the 2009 Regulations”), meeting the requirement that EU Member states implement the Services Directive by 28<sup>th</sup> December 2009.

7.5.2 Article 13.2 of the Services Directive states:

*“Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicant may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures and shall not exceed the cost of the procedures.”*

7.5.3 European law is binding on Member States and supersedes corresponding UK legislation. Despite each individual UK licensing law prescribing the constraints on any fees set for licences, registrations, consents and permits issued under that Act, the requirements of the Services Directive take precedence.

7.5.4 The Services Directive was, therefore, duly enacted into UK law by the Provision of Services Regulations 2009. Regulation 18(4) of the 2009 Regulations states:

*“Any charges provided for by a competent authority which applicants may incur under an authorisation scheme must be reasonable and proportionate to the cost of the procedures and formalities under the scheme and must not exceed the cost of those procedures and formalities”.*

7.5.5 The effect of the Services Directive and the 2009 Regulations, therefore, is that a profit must not be made from the provision of the service (in the case of licensing, a licence, registration, consent or permit).

What was not immediately clear from either the Services Directive or the 2009 Regulations was whether the phrase ‘procedures and formalities’ restricted the fee only to the costs of administering the process or whether the fee could cover the cost of enforcement. Equally, if enforcement could be included, was it just enforcement against *licensed* premises or could it include enforcement against *unlicensed* premises.

7.5.6 The Services Directive and the 2009 Regulations apply to all aspects of licensing with the exception of the following exemptions:

- (a) Transport services, which include *inter alia* hackney carriages and private hire vehicles, drivers and operators;
- (b) Gambling activities; and
- (c) Audiovisual services, which include *inter alia* the exhibition of film under the Licensing Act 2003.

**7.6 R (Hemming and others) v Westminster City Council [2012] EWHC 1260 (Admin); [2012] EWHC 1582 (admin)**

7.6.1 *Hemming* was a landmark judgement in relation to the common law in respect of licensing fees as it confirmed the impact of the Services Directive and the 2009 Regulations on existing legislation. The case revolved around the sex shop fee set by Westminster Council that included a significant cost in relation to the enforcement against *unlicensed* premises.

7.6.2 The Court of appeal upheld the judgement of the High Court and confirmed that fees could only reflect the cost of administering the application, not the cost of enforcement against unlicensed premises. Beatson LJ stated:

*“The judge is clearly correct in stating that the language of regulation 18(4) particularly when read with the definition of “authorisation procedures” in Regulation 4, points strongly to a construction that only permits the costs of administering the application to be reflected in the fee.”*

7.6.3 Interestingly, he went further and confirmed the High Court’s interpretation that enforcement against licensed premises could be included by stating:

*“I agree with the judge that the cost of compliance monitoring and enforcement against an applicant who is given a licence can fall within the costs of “authorisation procedures”.”*

7.6.4 The effect of this judgement, once having determined that the particular licensing regime falls within the remit of the Services Directive, is that the fee cannot exceed the cost of administering the application. However, the Council is still at liberty to levy fees that are *below* the cost of administering the application, although this option may be at odds with the Council’s MTFS as regards the subsidisation of services. These costs can include the administrative cost of processing the application, the cost of vetting the applicant, and (in the case of a renewal application) the cost of investigating the applicant’s compliance with the conditions of their licence.

7.6.5 *Hemming* also produced some other significant considerations relating to the setting of fees.

- (a) The fee must be properly determined by a body with the delegated authority to do so.
- (b) That it would be unlawful not to carry forward any surplus in licensing fees in a particular year.

- (c) The court established that detailed fee calculations were not necessarily required every year, provided that the local authority could prove that no profit was made from the fees over a reasonable period of time. Beatson LJ stated:

*“..... it does not have to adjust the licence fee every year to reflect any previous deficit or surplus, so long as it ‘all comes out in the wash’ eventually. And the adjustment does not have to be precise: a rough and ready calculation which is broadly correct will do.”*

## **7.7 The impact of the Common Law in respect of Licensing fees, including the Hemming case, on North Hertfordshire District Council**

- 7.7.1 It follows from the Council’s current approach, as detailed in section 7.2 of this report, that a review of current licensing fees is required to ensure that they comply with the Common Law and are compliant with the Services Directive.
- 7.7.2 As *Hemming* related to sex shop licensing fees, and since the judgement received a significant degree of national media, interest it follows that these fees are probably the most prone to immediate challenge. In light of the judgement, a cost exercise was undertaken to establish a Services Directive compliant fee based on the initial High Court judgement in the Hemming case. This resulted in the fee for the grant of a sex shop licence in 2013/14 being set at £1,540 with the annual renewal fee being set at £770. This compares with the fee for grant or renewal in 2012/13 being set at £6,270.
- 7.7.3 The Authority has one sex establishment premises, the owner of which has been advised of the Council’s new fee. At the time of writing this report no adverse comments had been received from the local operator.
- 7.7.4 It should be noted, however, that Westminster City Council is likely to appeal this decision to the Supreme Court.

## **7.8 Future considerations**

- 7.8.1 The Home Office has recently announced that it will undertake a consultation exercise with view to introducing regulations in June 2014 allowing local authorities to set their own fees in connection with this Act. However, it is thought that maximum permitted fees will be prescribed within the final regulations.
- 7.8.2 The Local Government Association very recently published draft guidance on the setting of local licensing fees and charges – this is attached in Appendix F. This document contains a number of recommendations (albeit in draft form at present) relevant to the Committee’s deliberations; of particular note is the LGA’s provision position on the regularity of fee/charge reviews, the approach to the integration of enforcement costs, and the scrutiny of the fee setting process.

## **7.9 Service provision**

- 7.9.1 The licensing function is currently undertaken by the Licensing and Enforcement Team which also encompasses envirocrime issues such as fly-tipping, fly-posting and stray dogs. The team currently consists of the following six full-time posts:

Licensing and Enforcement Manager  
Senior Licensing and Enforcement Officer  
Licensing and Enforcement Officers (x2)  
Enforcement Officers (x2)

- 7.9.2 Following a Value for Money exercise undertaken in 2012, it is intended to relocate the two Enforcement Officers with responsibility for envirocrime to another service area leaving a specialised licensing service.
- 7.9.3 One of the recommendations from the Value for Money Review was to explore the most cost effective split of administrative work between the Management Support Unit (MSU) and the specialist licensing and enforcement officers. This exercise had already commenced prior to the Value for Money Review resulting in basic administrative tasks being transferred to the MSU leaving the specialist officers to deal with more technical issues, inspections, and enforcement activities.
- 7.9.4 Summarising the workload of the licensing service is difficult, so to give an indication of the demand on the service, a copy of the 2012 Annual Report to the Licensing Committee is attached as Appendix A.
- 7.9.5 The licensing pages on the Council's website have been modified to make them more user-friendly and to assist the Customer Service Centre (CSC) with basic licensing enquiries. For enquiries that cannot be answered by the CSC, the caller is transferred to the MSU; only the more specialised enquiries are referred to the licensing and enforcement officers.
- 7.9.6 In March 2013, Shared Internal Audit Services (SIAS) undertook a licensing audit focusing on two areas which have involved the most delegation to the MSU, temporary event notices and hackney carriage and private hire licensing. The outcome of the audit was the award of the "substantial assurance" category, the second highest of the five available categories.
- 7.9.7 The audit demonstrated the effectiveness of the sub-delegation of work to the MSU which allows the administrative costs involved in those two licensing areas to be significantly reduced from that of a licensing and enforcement officer. Other smaller areas of work have been delegated to the MSU but were not subject to the latest audit.
- 7.9.8 Whilst a few opportunities remain for further delegation of licensing administration to the MSU (for example, personal licences, street trading licences), there will always be licensing administrative tasks that will need to be retained within the licensing service, in particular specialist licensing knowledge is required to process/determine and application.
- 7.9.9 As part of the Government's "Reducing the Burden on Businesses" agenda and in promoting the Hampton principles, the licensing service have explored other ways of delivering a licensing inspection programme. As the majority of licensed premises are also registered as food business they had previously received two inspection visits annually, one from a licensing officer and one from an environmental health officer. To reduce the burden on businesses, where an environmental health officer visits a licensed premises to undertake a food hygiene inspection they have also been undertaking the licensing inspection. The licensing service are able to deliver a licensing inspection regime that is both cost effective and less burdensome on the businesses.
- 7.9.10 In November 2011, the animal welfare officer post was deleted as part of the Council's budgetary restraints. The administrative work of licensing animal establishments was absorbed by the licensing and enforcement officers. In order to ensure that the inspections were undertaken by a suitably qualified officer with specialist knowledge, the Licensing Team appointed the services of Stevenage Borough Council's animal

welfare officers who were contracted on an hourly rate. This arrangement proved to be very effective, however, Stevenage Borough Council are no longer able to provide this service and a similar arrangement is now in place with Central Bedfordshire Council.

## 7.10 Current fees and charges

7.10.1 The current schedule of licensing fees and charges for 2013/14 is attached as Appendix B; these were set in accordance with the current convention as detailed in section 7.2 of this report.

7.10.2 The fees and charges are a combination of centrally and locally set fees, a detailed breakdown summarising the powers to set fees in respect of licensing applications and any limitations on those powers is attached as Appendix C.

## 7.11 Benchmarking with neighbouring authorities

7.11.1 A benchmarking exercise has been undertaken comparing a sample of NHDC's locally set licensing fees against those of our neighbouring authorities. The source of this information has been from the ten Hertfordshire District/Borough Council's websites and where no figures have been quoted the information was not available. A summary of the results is attached as Appendix D.

7.11.2 *Hemming* has led to varied responses from local authorities ranging from no action through to full costing exercises. Additionally, some local authorities such as Dacorum BC predetermined the outcome of the case and removed all enforcement costs from their fee calculations. In general terms, it appears that few local authorities have undertaken a full costing exercise in the light of the *Hemming* case against all *individual* licensing fees or charges.

## 8. ISSUES

### 8.1 Current fees and charges versus actual costs

8.1.1 The H&PPS Group Accountant has provided the following analysis of the licensing service (excluding the small amount of licensing undertaken by environmental health officers).

**Table 1: Licensing Service (Surplus) / Deficit**

	2010/11 (Actual)	2011/12 (Actual)	2012/13 (Actual)	2013/14 (Projection based on current fees)
Licensing Act	135,066	20,931	67,367	114,380
Street Trading	0	0	(4,667)	21,670
Sex Shops	0	0	(6,270)	3,390
Scrap Metal	0	0	0	13,720
Gambling Act	23,328	15,899	5,231	8,050
Animal Licensing	(4,187)	(4,804)	(1,913)	22,220
Hackney Carriage and Private Hire	(2,819)	13,773	24,504	(14,220)
Charitable Collections	(1,045)	9,552	4,193	18,480
<b>Total</b>	<b>150,343</b>	<b>55,351</b>	<b>88,445</b>	<b>187,690</b>

8.1.2 It is apparent from Table 1 that the licensing service is currently under-recovering in most licensing functions, although the most significant deficit is that of the Licensing Act 2003 which operates under centrally set fees. Additionally, the locally set fees for hackney carriage and private hire licensing forecast a surplus for 2013/14 which should be seen in the context of the two previous year's deficits. Animal licensing is showing a deficit in 2013/14 compared to previous years surpluses. This is due to the fact that most of the costs of licensing were shown on one budget code rather than sub-divided into licensing functions. This was changed in 2013/14 so that the finances associated with each licence type could clearly be seen rather than just the profitability of the service as a whole.

#### Difficulties in providing accurate costings

8.1.3 The complex and varied nature of the licensing function makes it difficult for licensing and enforcement officers to accurately time-record their daily workload. Much of the workload covers telephone or written advice which can often cover a variety of licence types within a particular licensing function (for example, an enquiry concerning both a hackney carriage driver licence and a hackney carriage vehicle licence) and an officer can often be working on different licensing functions at the same time (for example, a public house under the Licensing Act 2003 that also requires a gaming permit under the Gambling Act 2005 and a street trading licence).

8.1.4 Additionally, the fact that the licensing and enforcement service is effectively an amalgamation of two separate service areas, licensing and envirocrime, makes it difficult to accurately apportion fixed overhead costs between the two service areas, particularly when officers' workloads overlap: for example, the cost of the Service Manager being split accurately between varying demands of two service areas.

8.1.5 In the case of the MSU, with that service consisting of a number of generic officers that provide administrative support across the Council, accurately apportioning internal recharges is also difficult. Any one officer could be working on a variety of functions on any given day.

#### Recent analysis of current fees against best estimate actual cost

8.1.6 Some work has been undertaken by the licensing service in conjunction with the Group Accountant to calculate best estimate cost recovery fee levels to compare against current actual fees, these fees are **indicative only**. A summary of this work is attached as Appendix E.

#### Other factors likely to impact on fee setting calculations

8.1.7 As the Government is likely to seek a further deregulation of some entertainment under the Licensing Act 2003, it is possible that the Council will receive fewer applications in the future. Nevertheless, the Council will still be expected to respond to complaints and enforcement complaints.

## **8.2 Future cost reviews**

8.2.1 Given that the common law in respect of licensing fees has established that a full cost recovery 'breakeven' position does not have to be achieved every single year it seems appropriate to specify a set period of time over which the licensing fees should achieve this goal.

8.2.2 The setting of fees will need to be reviewed regularly. This would include a period of detailed time recording by officers (including the MSU and CSC), coupled with a review of internal recharges to ensure that they accurately reflect the licensing service's proportion of fixed costs. This is a significant piece of work and it is therefore recommended that this is undertaken every three years. This would allow for annual fluctuations in costs to have the opportunity to balance out with any surplus or deficit over the three year period being taken into account when setting the next set of fees and charges. This would comply with the judgement in the Hemming case.

### **8.3 Future fee setting principles**

8.3.1 With the common law in relation to licensing fees establishing that fees can reflect full cost recovery, the over-riding fee setting principle should be to fully recover those costs permitted through legislation. This would also meet the Council priority of "living within our means".

8.3.2 Should the Committee accept a three year period, then inflation based increases would appear a reasonable and justifiable approach in the intervening years.

### **8.4 Enforcement costs**

8.4.1 *Hemming* does not appear to prevent the cost of compliance against an existing licence being included within the remit of a license fee. Therefore, licences subject to the Services Directive can include the cost of both administration and ensuring compliance with the licence. There is still some debate amongst legal experts as to whether costs of all enforcement against existing licensees can be included within a licence fee, particularly costs of review hearings and prosecutions. The Council's interpretation will be kept under review, with relevant case law monitored and changes made where necessary.

8.4.2 Where legislation exists allowing the recovery of enforcement costs through licence fees, the Council can legitimately recover them; however, the definition of *enforcement* with regard to Services Directive-exempt legislation is still subject to debate. The term *administration* is relatively clear and where legislation specifically states that licensing authorities can only recover administration costs only (for example hackney carriage driver licences) it seems that no enforcement costs against existing licence holders can be set against the relevant licensing fee(s). Should the Committee be minded to support the recommendations within this report, future fees in this area will be set having regard to this interpretation and in conjunction with advice from the Council's Legal Service.

8.4.3 The only method of funding enforcement activity that cannot be recovered through licensing fees would be from the Council's General Fund. Whilst this is not desirable, there appears to be very limited scope for cost recovery, via fees or charges, as the law stands. Cessation of all enforcement work in respect of these licence types would be problematic as the respective trade would simply conclude that there is no business reason to either seek a licence from the Council (as there would be no penalty for not having one) or to comply with a condition attached to one already issued.

8.4.4 In order to minimise the impact upon the General Fund, enforcement will be undertaken in a proportionate way; joint working with other service areas within the Council or using the enforcement powers of other agencies will be explored further.

## 8.5 Licensing responsibilities where no fee can be charged

- 8.5.1 All of the licensing functions referred to in this report are statutory duties of the Council. Functions such as charitable collections, hypnotism, caravan site licensing and camping site licensing are currently undertaken by the Council without the ability to levy a fee.
- 8.5.2 Whilst the administration of these functions has to be undertaken, enforcement against both licensed and unlicensed premises is at the Council's discretion. The cost of any enforcement would again have to be recovered from the General Fund.

## 8.6 Implementation of full cost recovery

- 8.6.1 It is likely that some fees and charges will need to increase in order deliver recommendation 2.1 (a). However, until the Council is granted full local fee setting, a deficit on some licensing activity will continue to exist. There is still a small deficit showing in the areas where local fee setting is allowed – this relates to enforcement costs that the Council cannot recover through fees and charges.

**Table 2: Change in Deficit after new fees are implemented (reflecting current legislation)**

Licence Type	Estimated Deficit 2013/14	Revised Deficit 2013/14 after new fees implemented	Difference
	£'000	£'000	£'000
*Premises Licensing	114	114	0
Street Trading	22	1	-21
Sex Establishment	3	0	-3
Gambling	8	2	-6
Animal Licensing	22	1	-21
Taxis	-14	0	14
Scrap Metal	14	6	-8
Charity Licensing	18	18	0
	<b>187</b>	<b>142</b>	<b>-45</b>

\* At the moment these fees are statutory with local fee setting not likely until 2014/15. Revised fees have not been calculated as officers are awaiting guidance on what costs can be included in the new fee setting proposals.

- 8.6.2 If there were a significant increase in fees and charges to ensure full cost recovery there is a risk that businesses may not apply for, or may stop renewing, their licences. Not only would this result in an increased risk to the public, but the Council's enforcement costs against unlicensed activity would increase. Since these costs are not recoverable through licensing fees and charges, the General Fund would bear the cost of this additional enforcement activity.

## **9. LEGAL IMPLICATIONS**

- 9.1 Under the Council's Constitution, the terms of reference of the Licensing and Appeals Committee state that the Committee is able to consider all licensing matters, with the exception of statements of licensing policy and those matters delegated to the Licensing Sub-Committee and the Strategic Director of Planning Housing and Enterprise.
- 9.2 The legal basis for the setting of licensing fees and implications of the Provisions of Services Regulations 2009 are dealt with in the background and issues sections of the report.

## **10. FINANCIAL IMPLICATIONS**

- 10.1 The uncertain financial situation the Council faces due to reduced central government funding means that full cost recovery should be sought wherever possible in order to maximise the Council's income.
- 10.2 Fees have been calculated from a zero base position, i.e. reviewing estimates of the time spent by various officers in processing licence applications and then using hourly rates to work out the cost.
- 10.3 The fees calculated are subject to change as they will need to be recalculated based on the 2014/15 base budgets. Also the revised deficit position may be subject to change as it's based on 2012/13 application numbers, which could change.
- 10.4 Use of a licensing earmarked reserve would need to be considered for any surplus or deficits arising from the Licensing Service.
- 10.5 The principle that full cost recovery should be achieved over a three year cycle to allow for anomalies that may occur in any one single year has been previously established in a number of other areas, e.g. Building Control and Land Charges.

## **11. RISK IMPLICATIONS**

- 11.1 This report seeks to ensure that the Council achieves the full permitted cost recovery for its licensing activities. There is a possible risk of challenge against any charges made by the Council but this and any initial complaints will be managed by ensuring a fair and transparent calculation of the fee as well as prior notification of potential increases to affected businesses.
- 11.2 There is a risk of non-payment of a fee, however, this is managed by encouraging the use of direct debit payments and/or payments in advance. The direct debit service has been introduced for those who are existing licensees; all other fees are paid at the time of application. Failure to pay fees can result in a suspension of a licence or recovery through the debt recovery process operated by the Council.

## **12. EQUALITIES IMPLICATIONS**

- 12.1 The Equality Act 2010 came into force on the 1<sup>st</sup> October 2010, a major piece of legislation. The Act also created a new Public Sector Equality Duty, which came into force on the 5<sup>th</sup> April 2011. There is a General Duty, described in paragraph 12.2, that public bodies must meet, underpinned by more specific duties which are designed to help meet them.
- 12.2 In line with the Public Sector Equality Duty, public bodies must, in the exercise of its functions, give due regard to the need to eliminate discrimination, harassment, victimisation, to advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not.
- 12.3 The payment of a licensing fee or charge, as part of an application for a licence, permit or authorisation, is a requirement of a prescribed process and is not open to local variation. The General Duty described in paragraph 12.2 is considered as part of the application and determination process. For example, where potential applicants have difficulty in understanding the application process due to English not being their first language, appropriate assistance is given at that time.
- 12.4 Since the amount which can be charged for the majority of licences is determined by law, and generally reflect the aspiration of 'full cost recovery', there cannot be concessions. However, the proposal to build a cycle of three yearly service cost review will ensure that these charges remain at the most competitive level available.

## **13. SOCIAL VALUE IMPLICATIONS**

- 13.1 As the recommendations made in this report do not constitute a public service contract, the measurement of 'social value' as required by the Public Services (Social Value) Act 2012 need not be applied, although equalities implications and opportunities are identified in the relevant section at paragraphs 12.1 to 12.3 inclusive.

## **14. HUMAN RESOURCE IMPLICATIONS**

- 14.1 This report does not imply that there will be any impact on the current staffing arrangements or resources as ongoing costings are to be undertaken by the existing Team as specified in paragraph 7.9.1 of this report.

## **15. APPENDICES**

- 15.1 Appendix A - 2012 Annual Report to the Licensing Committee.
- 15.2 Appendix B - Licensing Fees and Charges 2013/14.
- 15.3 Appendix C - Analysis of Centrally and Locally Set Fees and the Application of the EU Services Directive.
- 15.4 Appendix D - Benchmarking with Other Local Authorities.
- 15.5 Appendix E - Analysis of Current Fees against Best Estimate Actual Cost.
- 15.6 Appendix F - Draft LGA guidance on locally set fees.

## **16. CONTACT OFFICERS**

- 16.1 Andy Godman, Head of Housing and Public Protection, 01462 474293  
[andy.godman@north-herts.gov.uk](mailto:andy.godman@north-herts.gov.uk)
- 16.2 Giovanna Silverio, Licensing and Enforcement Manager, 01462 474478  
[giovanna.silverio@north-herts.gov.uk](mailto:giovanna.silverio@north-herts.gov.uk)
- 16.3 Steve Cobb, Senior Licensing and Enforcement Officer, 01462 474833  
[steven.cobb@north-herts.gov.uk](mailto:steven.cobb@north-herts.gov.uk)

### Contributors

- 16.4 Liz Green, Head of Policy and Community Services
- 16.5 Andy Cavanagh, Head of Finance, Performance and Asset Management
- 16.6 Jodie Penfold, Group Accountant
- 16.7 Fiona Timms, Performance and Risk Manager
- 16.8 Kerry Shorrocks, Corporate Human Resources Manager
- 16.9 Liam Byott, Solicitor – Litigation and General
- 16.10 Peter Carey, Environmental Health Manager

## **17. BACKGROUND PAPERS**

- 17.1 Licensing Service Value for Money Review 3<sup>rd</sup> April 2012.
- 17.2 The European Services Directive 2006.
- 17.3 Provision of Services Regulations 2009.
- 17.4 R (Hemming and others) v Westminster City Council [2012] EWHC 1260 (Admin); [2012] EWHC 1582 (admin).