

**LICENSING AND APPEALS COMMITTEE  
28 NOVEMBER 2017**

**PART 1 – PUBLIC DOCUMENT**

**AGENDA ITEM No.**

**10**

**TITLE OF REPORT: CONSIDERATION OF AMENDMENTS TO THE SEX ESTABLISHMENT POLICY**

REPORT OF THE HEAD OF HOUSING AND PUBLIC PROTECTION  
EXECUTIVE MEMBER: HOUSING AND ENVIRONMENTAL HEALTH  
COUNCIL PRIORITY: PROSPER AND PROTECT

**1. EXECUTIVE SUMMARY**

- 1.1 Licensing of sex establishments, whilst governed by national legislation, provides for local discretion. Having a clear and transparent policy will assist applicants' understanding of the process and facilitate consistent decision-making by the Council.
- 1.2 Any Council Policy should be kept under review to ensure it remains fit for purpose therefore a public consultation was recently undertaken in respect of some minor amendments to the Policy.
- 1.3 This report seeks Members' approval of amendments to the existing Policy.

**2. RECOMMENDATIONS**

- 2.1 That the Committee:
  - (i) Consider the results of the public consultation and support the policy amendments;
  - (ii) Determine that the proposed amendments are minor in so far as they do not amend the licensing principles or main focus of the existing Policy;
  - (iii) Recommend that the Executive Member for Housing and Environmental Health approves the policy amendments under delegated powers;

**3. REASONS FOR RECOMMENDATIONS**

- 3.1 The existing policy has worked well since its adoption with effect from 4 January 2011 therefore no significant amendments were deemed necessary.
- 3.2 This view was supported by the fact that no adverse responses to the public consultation were received.

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

- 4.1 An alternative option would be a Sex Establishment Policy that may differ in content and extent, for example a different local interpretation of suitable locations for sex establishments.
- 4.2 An alternative option would be to have a 'nil resolution' policy that automatically precludes any new applications for sex establishments. Whilst the legislation does not explicitly provide for this, case law has established that there is the opportunity for an application to be refused on the grounds of location and sufficiency of such premises within the area, where the Council has the option of determining the sufficiency of a specific area to be 'nil'.
- 4.3 Having considered all options, the proposed amendments to the existing Policy are considered to be the most suitable option.

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

- 5.1 The proposed amendments to the existing policy were highlighted in red and publicised on a specific licensing consultation webpage on the Council's website. All existing licence holders were contacted and signposted to the consultation page.
- 5.2 The Executive Member for Housing and Environmental Health was consulted throughout the process.
- 5.3 No consultation responses were received.

#### **6. FORWARD PLAN**

- 6.1 This report contains a recommendation on a key decision that was first notified to the public in the Forward Plan on 22 August 2017.

#### **7. BACKGROUND**

- 7.1 The Local Government (Miscellaneous Provisions) Act 1982 Schedule 3 provides the legal framework for the control of sex establishments in England and Wales. The legislative framework is not an automatic entitlement and Council's must formally adopt the legislation if it wishes to regulate street trading in its area.
- 7.2 Having adopted Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 ("the Act") with effect from 1 March 1983, the Council are able to control and regulate sex shops, sex cinemas and sexual entertainment venues<sup>1</sup> within North Hertfordshire. No such premises would be able to lawfully operate without first having obtained a licence from the Council.
- 7.3 In order to ensure a clear and transparent licensing process, the Council adopted its first modern, effective policy with effect from 3 April 2008 that ensured that the trade and the public had a Policy that fully explained the licensing process. It also ensured consistency of approach by the Council ensuring fairness to the trade.

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<sup>1</sup> Any live performance involving nudity for the purpose of sexually stimulating an audience (introduced by virtue of the Policing and Crime Act 2009) for example, lap dancing or pole dancing  
LAC (28.11.17)

- 7.4 The Policy was reviewed and amended with effect from 4 January 2011 following a public consultation process, incorporating the new provisions for regulating sexual entertainment venues that did not exist when the original Policy was adopted. In order to regulate the new sexual entertainment venue provisions, Schedule 3 of the Act, as amended, had to be adopted. The Council adopted the revised Schedule 3 of the Act on 11 November 2010.

## **8. RELEVANT CONSIDERATIONS**

- 8.1 To assist the Committee with their deliberations, every proposed amendment is highlighted in red in the proposed amended Policy attached as Appendix A.

### **Policy Duration**

- 8.2 In order to ensure that a policy is reviewed periodically, historically each policy has included the date by when it should be reviewed. If this date is passed, the Policy doesn't lapse but is at risk of challenge for not being kept under review.
- 8.3 A fixed term policy could be considered inappropriate particularly with ever-changing legislative or local requirements. A policy should be kept under regular review with the ability to amend or re-consult where necessary. As policy is a matter for Members, it is felt that the Executive Member for Housing and Environmental Health is best placed to determine when a policy should be amended or reviewed.
- 8.4 The Policy therefore has no fixed duration but will be kept under periodic review by the Executive Member who will have the authority to amend, approve for continuation or require a full consultation prior to a new policy being considered by Cabinet.

### **Exchange of Information**

- 8.5 Given the nature of the sex establishment industry, there may be occasions whereby the Council need to share information with partner agencies for the purpose of detecting or reducing crime in the district. Whilst legislative provision exists to facilitate this process, clarification of the Council's responsibility in this regard has been included as an amendment to the existing Policy.

### **Safeguarding Children and Vulnerable Adults**

- 8.6 The Council is acutely aware of its safeguarding responsibilities and has included a new section within the Policy outlining the expectations placed on licence holders. Clarification has been included that the Council will place *significant weight* on safeguarding issues when assessing the fitness of an applicant to hold a licence.

### **Fees**

- 8.7 The recent conclusion of the *Hemming*<sup>2</sup> case has confirmed the existing licensing fee principles of recovering the reasonable cost of administration and enforcement. In order to comply with the EU Services Directive<sup>3</sup>, a Council may only charge the reasonable cost of administration of an application as an upfront application fee. Enforcement costs, including those of investigating unlicensed premises, can be

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<sup>2</sup> R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) v Westminster City Council [2017] UKSC 50

<sup>3</sup> Provision of Services Regulation 2009 (SI 2009/2999)  
LAC (28.11.17)

recovered by way of an annual fee after the grant of the licence. Clarification of this fee setting principle has been included as an amendment to the existing Policy.

### **Grounds for Refusal**

- 8.8 Whilst the grounds for refusal, split between mandatory refusal and discretionary refusal, are contained within the Act, it was deemed appropriate to assist applicants, licence holders and the public to include a new section within the Policy outlining these grounds. This provides all necessary information in one document and ensures transparency.

### **Standard Conditions**

- 8.9 As the district has only one sex shop, previous policy conditions related specifically to sex shops. If the current position were to change, the existing Policy does not adequately cover sex cinemas or sexual entertainment venues therefore the appendices detailing standard conditions for each establishment type have been amended.
- 8.10 A separate appendix has been introduced detailing standard conditions applicable to all sex establishments with an appendix for each establishment type.
- 8.11 The standard conditions specifically relating to sex shops remain predominately as the existing Policy however some minor clarification has been included.
- 8.12 The standard conditions specifically relating to sexual entertainment venues have been enhanced, incorporating best practice identified in other Council's policies particularly those with sexual entertainment venues within their district.
- 8.13 New conditions relating specifically to sex cinemas have been included within the amended Policy, incorporating best practice from Council's with sex cinemas within their district.

### **Clarification**

- 8.14 Since the adoption of the Sex Establishment Policy, a number of minor administrative issues have arisen whereby some clarification of the wording of the Policy was necessary. The main areas for clarification have been the Council's position in regard to the right to waive the need for a licence, the definition of character of the locality, the process for determining a revocation of a licence and data protection issues in respect of hearings to determine applications. This clarification has been included within the amended Policy.

### **Definition of Minor Amendments**

- 8.15 The Council's Constitution reserves *"to prepare and agree to implement policies and strategies other than those reserved to Council"* for Cabinet and all new licensing policies, other than those reserved to Council, have been referred to Cabinet for adoption. Once a policy has been adopted by Cabinet, an Executive Member has the authority for *"making minor amendments to adopted strategies, policies and procedures"*.

- 8.16 The Constitution is however silent on the definition of a minor amendment therefore a definition can be sought from the existing adopted Policy. The current Policy adopted by Cabinet included a section entitled “Amendments to Policy”. Within that section, a *substantial amendment* was defined as one that is likely to have:
- (i) a significant financial effect on licence holders; or
  - (ii) a significant procedural effect on licence holders; or
  - (iii) a significant effect on the community.

The Policy then clarifies that a minor amendment is defined as any amendment that does not fall within the scope of a *substantial amendment* and:

*“Any minor amendments to this Policy may be authorised by the Executive Member for Housing and Environmental Health”*

In the absence of a definition of minor in the Constitution, the existing Policy can be considered an indication of Cabinet’s interpretation of minor when considering the initial adoption of the Policy.

- 8.17 It is suggested that none of the proposed amendments fall within the scope of the *substantial amendment* definition therefore are classified as minor amendments that can be made by the Executive Member. This is further supported by the fact that the four licensing objectives of the Policy remain unchanged.
- 8.18 If the Committee support the contention that the amendments to the existing Policy are minor then the amendments can be authorised by the Executive Member. If however the Committee believe the amendments are not minor and, in effect, a new Policy should be adopted then the proposed Policy should be referred to Cabinet.

## **9. LEGAL IMPLICATIONS**

- 9.1 By virtue of The Local Authorities (Functions and Responsibilities) (England) Regulations 2000, adoption of a local policy in respect of sex establishment regulation is a matter for the Council’s Executive.
- 9.2 The Licensing and Appeals Committee’s terms of reference within the Council’s Constitution includes at section 8.2.3:

*“to consider all Licensing matters with the exception of the statements of licensing policy under the Licensing Act 2003 and the Gambling Act 2005 and those matters delegated to the Licensing Sub-Committee and the Strategic Director of Planning, Housing and Enterprise.”*

The Committee’s role therefore is to consider the draft policy in light of the public consultation and decide whether to make a recommendation to the Executive in respect of adopting the proposed amendments.

As part of that consideration, the Committee should determine whether or not the proposed amendments should be considered ‘minor amendments’ that could be dealt with by the Executive Member under delegated powers.

In the absence of a definition of ‘minor’ within the Constitution, the Committee should have regard to the definition of ‘minor amendment’ within the existing adopted policy.

- 9.3 If the Committee determine that the proposed amendments are ‘minor’, section 14.8.1(l) of the Constitution states that an Executive Member has authority for:

*“making minor amendments to adopted strategies, policies and procedures.”*

- 9.4 If the Committee determine that the proposed amendments are not ‘minor’ based on the definition included within the existing adopted policy then authority for adopting a new policy falls with Cabinet by virtue of section 5.6.1 of the Constitution that includes within the terms of reference for Cabinet:

*“to prepare and agree to implement policies and strategies other than those reserved to Council.”*

## **10. FINANCIAL IMPLICATIONS**

- 10.1 The amended policy would have no additional financial implications for the Council. Case law has determined that a Council can recover its reasonable costs of administration and enforcement through licensing fees.

## **11. RISK IMPLICATIONS**

- 11.1 The risk to the Council of not periodically reviewing and amending policy is that the Policy may become outdated and no longer fit for purpose. Given that the Policy is a fundamental element of consistent decision making, a policy that was not fit for purpose would increase the risk of judicial challenge.

## **12. EQUALITIES IMPLICATIONS**

- 12.1 In line with the Public Sector Equality Duty, public bodies must, in the exercise of their 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.
- 12.2 The proposed Policy does not place any barriers or unique requirements on any person on the grounds of ethnicity, gender, religion or any other protected characteristic. Officers work with all applicants and consent holders, where appropriate, to ensure that the Council’s duty under the Equality Act 2010 is met, for example, guidance notes could be provided in other languages upon request. The amendments within the revised Policy seek to ensure that victimisation does not occur within these premises.

## **13. SOCIAL VALUE IMPLICATIONS**

- 13.1 The Social Value Act and “go local” policy do not apply to this report.

## **14. HUMAN RESOURCE IMPLICATIONS**

- 14.1 The policy will not place any new human resource implications on the Council.

## **15. APPENDICES**

- 15.1 Appendix A - Proposed amended Sex Establishment Policy.

## 16. CONTACT OFFICERS

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## 17. BACKGROUND PAPERS

- 17.1 [Local Government \(Miscellaneous Provisions\) Act 1982](#)
- 17.2 [Existing Sex Establishment Policy](#)