

Croydon Council

REPORT TO:	LICENSING COMMITTEE 20 March 2019
AGENDA ITEM:	
SUBJECT:	Special Treatments Licensing Fee Setting – London Local Authorities Act 1991
LEAD OFFICER:	Executive Director, Place Department
CABINET MEMBER:	Councillor Hamida Ali Cabinet Member for Safer Croydon & Communities
WARDS:	All
CORPORATE PRIORITY/POLICY CONTEXT: N/a	
FINANCIAL SUMMARY: <p>This report concerns the setting of fees for special treatments licensing in the borough of Croydon. The Council is entitled to calculate fees that will generate income to offset the estimated costs to the Council of providing the service. The estimated income from fees will offset the costs of the service. There are no other financial implications.</p>	
FORWARD PLAN KEY DECISION REFERENCE NO.:	

For general release

1. RECOMMENDATIONS

The Committee is asked to:

- 1.1 Note that the Leader has delegated authority to the Director of Public Realm to undertake reviews and fee setting under the provisions of the London Local Authorities Act 1991 in respect of Special Treatment Licensing. Such delegation shall not preclude the Director from bringing the matter back before the Committee should the Director consider it appropriate to do so.
- 1.2 Recommend to the Director of Public Realm that he adopt the fees set out in Appendix 2 to this report for the grant, renewal, transfer or variation of a special treatments licence to take effect from 1 June 2019.

2. EXECUTIVE SUMMARY

- 2.1 The purpose of this report is to ask the committee to determine the fees for the grant, renewal, transfer or variation of a special treatments licence under the London Local Authorities Act 1991 (“the Act”).

3. DETAIL

- 3.1 The Council is the licensing authority for the purposes of special treatment licensing under the London Local Authorities Act 1991 (the ‘Act’) and is responsible for licensing the premises where special treatments are provided. Under Part II of the Act, ‘establishment for special treatment’ means any premises in the borough used, intended to be used or represented as being used for the reception or treatment of persons requiring massage, manicure, acupuncture, tattooing, cosmetic piercing, chiropody, light, electric or other special treatment of a like kind or vapour, sauna or other baths but does not include —

(a) any premises which are not used for gain or reward;

(b) any premises where the special treatment is carried out by or under the supervision of —

(i) a medical practitioner duly registered by the General Medical Council; or

(ii) any bona fide member of a body of health practitioners which has given notice in writing to the borough council that it—

(A) has a register of members;

(B) requires as qualification for membership qualifications by way of training for, and experience of, the therapy concerned;

(C) requires its members to hold professional indemnity insurance;

(D) subjects its members to a code of conduct and ethics, including a prohibition of immoral conduct in the course of their practice; and

(E) provides procedures for disciplinary proceedings in respect of its members; and has supported that notice with satisfactory documentary evidence, if required by the council; or

(iii) in the case of acupuncture, a dentist registered under the [1984 c. 24.] Dentists Act 1984.

- 3.2 There are a range of treatments offered, many of which have emerged since the Act was written and therefore the Act does not list them all. A Working Group of professional officers from the London boroughs has been in place for a number of years and this group assesses all treatments and decides, collectively as to whether a specific treatment should be defined as a special treatment and therefore requires licensing. Attached at Appendix 1 to this report, for the committee’s information, is a list of current treatments that the Special Treatments Working Group consider require licensing.
- 3.3 There are 156 premises in the borough currently licensed for special treatments and this includes beauty therapists, health clubs, tattooists and body piercers. A special treatments licence is issued for one year, from 1 April to 31 March and the holder is then entitled to apply to renew their licence. A licence holder may also apply to vary their licence, perhaps to add or remove a treatment(s) or to add or remove a treatment provider (ie. a tattooist) and a licence may also be

transferred to another person/body.

- 3.4 The Council is the licensing authority under the Act and is responsible for the grant, renewal, variation or transfer of special treatments licenses. Section 7 (6) of Part II of the Act states 'An applicant for the grant, renewal or transfer of a licence shall pay a reasonable fee determined by the council.' Section 12 (2) of the Act states 'The person making an application for such a variation of a licence shall on making the application pay to the borough council a reasonable fee determined by the council.'
- 3.5 Licensing is an integral part of councils' broader regulatory services. While economic growth is a priority for every council in the country, there is also the need to ensure that licensing regimes can continue to protect communities and visitors; manage public health risks; and remain responsive to local concerns. All of this work requires funding and it is an accepted principle that licensed activities should be funded on a cost-recovery basis, paid for by those benefiting from the licensed activity, rather than drawing on the public purse. However, in setting the fees under this and many other Licensing regimes which the Council is required to operate, the Council is required to have regard to a number of different considerations and legislative requirements and parameters, including in relation to the European Services Directive ("the Directive"). This Directive, which remains applicable in the UK, aims to make it easier for service and retail providers to establish a business anywhere within Europe. It includes the principle of ensuring that regulation is transparent and that the burdens placed on businesses are kept to a minimum. The legal requirements in the Directive do have practical implications for local licensing regimes, including fee setting.
- 3.6 The general principles of the Services Directive apply to all processes and administrative procedures that need to be followed when establishing or running a service or retail business, including the setting, charging and processing of fees for licenses. The core principles of the Directive: non-discriminatory; justified; proportionate; clear; objective; made public in advance; transparent and accessible, apply to fee setting.
- 3.7 Whilst the majority of the principles are self-explanatory, in the context of fee setting, the principle of 'non-discrimination' requires a little more explanation. In the Directive it is defined as meaning 'the general conditions of access to a service, which are made available to the public at large by the provider [and] do not contain discriminatory provisions relating to the nationality or place of residence of the recipient'.
- 3.8 This applies to the Council when considering fee setting meaning that all applicants must be treated equally irrespective of location and/or nationality. The Council should not, for instance, seek to subsidise businesses operating in one geographical area by offering comparatively lower fees than required of those operating in another. Such an approach discriminates against those businesses located elsewhere in the locality.
- 3.9 In the licensing context, the importance of this approach has also been established by case law on taxi and PHV (Private Hire Vehicles) licensing.

Cummings v Cardiff ruled that the charges within a licensing regime for different categories of licence should not subsidise each other; so a surplus gained on hackney carriage licenses should not reduce the cost of a private hire vehicle licence. Guidance in this area indicates that this analogy be extended to mean that the fees received under one licensing regime must not subsidise fees charged under another. For instance, a surplus generated by taxi fees must be reinvested back into taxi licensing and not used to reduce the cost of, for instance, a scrap metal dealer's licence.

- 3.10 Under the Directive Councils need to ensure that details of any fees are easily accessible online, including the ability to make payments online. Councils should be able to separate out the cost of processing an initial application from those costs associated with the ongoing administration of a scheme, because this latter element cannot be charged to unsuccessful licence applicants.
- 3.11 This was a key issue in the Hemming v Westminster case, in which the Supreme Court asked the European Court of Justice (ECJ) to rule on how Westminster applied its licence fees. The Supreme Court identified two different approaches to charging fees:
 - (a) Whereby a council charged a fee upon application (covering the costs of authorisation procedures) and a subsequent fee to successful applicants (covering the cost of administering and enforcing the framework) - the 'type A' approach;
 - (b) Where a council charged a single fee on application covering all costs, on the basis that the relevant proportion of the fee would be refunded to unsuccessful applicants – the 'type B' approach.
- 3.12 The ECJ published its ruling on the issue on 16 November 2016, following an earlier opinion by the Advocate General in July 2016. The ECJ ruled that the type B approach of fee setting is not compatible with the Services Directive, arguing that the Directive 'precludes the requirement for the payment of a fee, at the time of submitting an application for the grant or renewal of an 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.'
- 3.13 Therefore, in setting the current fees the Council will need to ensure that the fee structures for fees covered by the Services Directive relate solely to the cost of authorisation procedures (i.e. the costs associated with reviewing an application and granting/refusing a licence). Under the type A approach, on which the Supreme Court ruling is still relevant, successful licence applicants could subsequently be charged an additional fee relating to the costs of administering and enforcing the relevant licensing framework.
- 3.14 The Directive also includes specific requirements that apply to the charging of fees. Charges must be reasonable and proportionate to the cost of the processes associated with a licensing scheme. Councils must not use fees covered by the Directive to make a profit or act as an economic deterrent to deter certain business types from operating within an area.
- 3.15 The Guidance anticipates that fees should be broadly cost neutral in budgetary

terms, so that, over the lifespan of the licence, the budget should balance. Those benefitting from the activities permitted by the various licenses should not, so far as there is discretion to do so, be subsidised by the general fund.

- 3.16 To ensure that fees remain reasonable and proportionate the Council considers it appropriate to undertake a review and to establish a review process. It is for this reason, and due to the fact that it will entail an administrative assessment of the costs to be recovered rather than an engagement of discretion by Members', that a delegation is sought to the Director of Public Realm to undertake reviews and fee setting under the provisions of the London Local Authorities Act 1991. Such delegation should not preclude the Director from bringing the matter back before the Committee should the Director consider it appropriate to do so. In addition, if members are minded to agree the delegation, exercise of this delegation could be reported back to members for information following the annual fee review.
- 3.17 In recommending the proposed fees set out at Appendix 2, officers have had regard to the Open for business: LGA guidance on locally set license fees and this guidance includes information on what could be considered reasonable fees. These considerations are reflected below within the body of this report for members' consideration. Reference has also been had to the BEIS Guidance for Business on the Provision of Services Regulations. As with other areas of licensing, regard should also be had to the principles in the Regulators' Code.
- 3.18 In this regard, the LGA guidance makes a number of suggestions as to which elements (subject to legislative restrictions) the Council may wish to consider including within the fees set. In accordance with the Case law set out above, these suggested fees are broken down into two separate elements: initial application costs ("Application fee" – Part A) and further compliance and enforcement costs ("Grant/Enforcement fee" – Part B).
- 3.19 The Guidance suggests that initial application costs ("Application fee") could include:
- Administration – this could cover basic office administration to process the licence application, such as resources, photocopying, postage or the cost of handling fees through the accounts department. This could also include the costs of specialist licensing software to maintain an effective database, and printing licenses.
 - Initial visit/s – this could cover the average cost of officer time if a premises visit is required as part of the authorisation process. Councils will need to consider whether the officer time includes travel. It would also be normal to include 'on-costs' in this calculation. Councils will need to consider whether 'on costs' include travel costs and management time.
 - Third party costs – some licensing processes will require third party input from experts, *such as is the case for animal related premises where veterinary attendance during licensing inspections is required for certain license types.*

- Liaison with interested parties – engaging with responsible authorities and other stakeholders will incur a cost in both time and resources.
- Management costs – councils may want to consider charging an average management fee where it is a standard process for the application to be reviewed by a management board or licensing committee. However, some councils will include management charges within the ‘on-costs’ attached to officer time referenced below.
- Local democracy costs – councils may want to recover any necessary expenditure in arranging committee meetings or hearings to consider applications.
- On costs – including any recharges for payroll, accommodation, including heating and lighting, and supplies and services connected with the licensing functions. Finance teams should be able to provide a standardised cost for this within each council.
- Development, determination and production of licensing policies – the cost of consultation and publishing policies can be fully recovered where they pertain to the licensing regime in question.
- Web material – the EU Services Directive requires that applications, and the associated guidance, can be made online and councils should effectively budget for this work.
- Advice and guidance – this includes advice in person, production of leaflets or promotional tools, and online advice.
- Setting and reviewing fees – this includes the cost of time associated with the review, as well as the cost of taking it to a committee for approval.

3.20 The Guidance suggests that further compliance and enforcement costs (“Grant/Enforcement fee”) could include:

- Additional monitoring and inspection visits – councils may wish to include a charge for risk based visits to premises in between licensing inspections and responding to complaints. As with the initial licensing visit, councils can consider basing this figure on average officer time, travel, administration, management costs and on costs as suggested above.
- Local democracy costs – councils may want to recover any necessary expenditure in arranging committee meetings or hearings to review existing licences or respond to problems.
- Registers and national reporting – some licensing schemes require central government bodies to be notified when a licence is issued. The costs of doing this can be recovered.
- Charging for action against unlicensed traders Councils’ ability to charge for these costs as part of a licensing scheme depends on the licensing scheme in question.

3.21 In setting the proposed fees, an hourly rate for the particular role(s) that will

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undertake the particular task(s) has been calculated. This is the 'on costed' hourly rate for the particular role(s) that perform the task(s) and this also includes basic office administration such as resources, photocopying, postage, processing fees through the accounts department, recharges for payroll, accommodation, including heating and lighting, supplies and services connected with the licensing functions and management and supervision costs (where relevant). Appendix 2 then sets the associated processes out into a series of tasks and the relevant hourly rate was then multiplied by the amount of time, in minutes, that it was considered, based on previous experience that the individual tasks of that nature would take to complete. These figures were then added together to give a recommended fee for Members' consideration. Members will note that the proposed fees have been split between application (Part A) and enforcement (Part B) parts. When someone applies for a licence, they will be asked to pay the application portion when they apply (Application fee) and then, if their application is granted, they will be asked to pay the enforcement part (Grant/Enforcement fee) prior to the licence being issued to them.

- 3.22 The council will aim to undertake a regular review of the special treatments licensing regime fees. When considering the fees the council will take into account the costs that it has incurred from the previous year/s and set a fee based on those costs. If the council does, in reviewing the fees identify a surplus or a deficit it will adjust the fees accordingly to either reduce the fee levels to reduce the surplus or increase the fee levels to repay that deficit in costs from previous years. This means that the fees may fluctuate each time the fees are set based on the review of income and cost associated with that relevant licensing regime and when having regard to officers' "on costed" hourly rates at that point in time.
- 3.23 In light of the above and the referenced guidance, Members are asked to consider Appendix 2 - which sets out the proposed fees for special treatments licensing under the Act and the component elements of the fees, which are recommended for approval.
- 3.24 The guidance referenced particularly in paragraphs 3.17-20 above regarding fee setting considerations can be accessed via the below links -

LGA Guidance:

https://local.gov.uk/sites/default/files/documents/5%2013%20%20OpenForBusiness_02_web.pdf

BEIS guidance:

<http://webarchive.nationalarchives.gov.uk/20121205034810/http://www.bis.gov.uk/files/file53100.pdf>

Regulator's Code:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf

- 3.25 In determining the fees to be set, Members are referred to the High Court case of Hemming v Westminster City Council which established that authorities, in

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setting/determining fees to be charged could not include within the fees set an element for enforcement against unlicensed operators. In addition, one of the effects of the EU Services Directive, which remains in force, is that fees determined may encompass the reasonable costs of reimbursing the Council for the administrative processes of dealing with an application but may not include costs of broader enforcement. However, compliance of the licensed premises can be taken into account when fee setting.

- 3.26 In the light of the above the Council's fees for special treatments licence applications under the Act have been reviewed and the fees set out in Appendix 2 attached are recommended for approval by Members.

4. POLICE COMMENTS

- 4.1 As this report relates to local authority fee setting, comments have not been sought from the Croydon Police licensing officer regarding this matter.

5. APPEALS

- 5.1 There are no direct appeal provisions within the legislation with regard to fee setting. However, the local authority must only set fees that cover administrative and other reasonable costs and an aggrieved party may seek judicial review if they believe the fees set are excessive. Judicial review proceedings present financial and reputational risk to the Council.

6. CONSULTATION

- 6.1 There are no statutory consultation or advertisement requirements with regard to fee setting under the London Local Authorities Act 1991.

7. FINANCIAL AND RISK ASSESSMENT CONSIDERATIONS

- 7.1 The Council is entitled to calculate fees that will generate income to offset the estimated costs to the Council of providing the service. The estimated income from fees will offset the costs of the services.

Approved by: Flora Osiyemi, Head of Finance Place, Gateway, Engagement & Strategy

8. COMMENTS OF THE COUNCIL SOLICITOR

- 8.1 The Head of Litigation and Corporate Law comments on behalf of the Director of Law and Governance that there are no additional legal implications arising from the recommendations in the report other than those already set out within the body of the report.

(Approved by Sandra Herbert, Head of Litigation and Corporate law on behalf of the Director of Law and Governance and Deputy Monitoring Officer).

9. HUMAN RESOURCES IMPACT

9.1 There are no perceived human resources implications associated with this report.

10. CUSTOMER IMPACT

10.1 The London Local Authorities Act 1991 impacts on existing and potential licence holders however these fee changes are not due to have effect until 1 June. Well managed licensed premises attract customers and contribute to a vibrant local economy.

11. EQUALITY ANALYSIS (EA)

11.1 This report does not require a separate Equality Analysis to be undertaken.

12. ENVIRONMENTAL AND DESIGN IMPACT

12.1 Fee setting in respect of licensed special treatments premises in Croydon are not considered to adversely impact on the local environment.

13. CRIME AND DISORDER REDUCTION IMPACT

13.1 There are not considered to be any local crime and disorder implications associated with this report.

14. HUMAN RIGHTS IMPACT

14.1 Article 1 of the First Protocol provides a right to peaceful enjoyment of possessions. Both a person's business and an existing licence are a possession and cannot be taken away or interfered with unless the law allows it and the action is justified.

Further, when determining applications under the Local Government (Miscellaneous Provisions) Act 1982, it is necessary to ensure that, as far as possible, the Council's procedures are compliant with the principles in Article 6 of the Convention – the right to a fair trial.

15. FREEDOM OF INFORMATION/DATA PROTECTION CONSIDERATIONS

15.1 Information that is provided to or held by the Council in relation to applications must only be processed and disclosed strictly in accordance with the Freedom of Information Act 2000 and Data Protection Act 2018 and other appropriate legislation.

CONTACT OFFICER: Michael Goddard, Licensing Manager, X61838.

BACKGROUND DOCUMENTS: None