

**Committee:** Licensing Committee

**Date:** 28 January 2021

**Agenda item:**

**Wards:** All

**Subject:** London Local Authorities Act 1991, Review of Special Treatment Licensing

**Lead officer:** Chris Lee, Director of Environment and Regeneration.

**Lead member:** Councillor Nick Draper, Chair of Licensing Committee.

**Forward Plan reference number:** N/A

**Contact Officer:** Caroline Sharkey, Licensing Manager, London Boroughs of Merton, Richmond Upon Thames and Wandsworth Joint Regulatory Services Partnership and Guy Bishop Senior Lawyer SLLP

## **Recommendations:**

- A. The Licensing Committee to adopt the standard conditions for Special Treatment Premises Licences as set out in Appendix B to this report to take effect from the 1<sup>st</sup> April 2021, or the date of first renewal thereafter.
- B. The Licensing Committee to approve the proposed fee structure to take effect from the 1<sup>st</sup> April 2021 and to recommend fee levels for approval by the Director of Environment and Regeneration in February 2021 as set out in Appendix A to this report.
- C. The Licensing Committee to confirm the adoption of the regulations governing applications for grant, renewal, transfer and variation of special treatment licences and their determination as set out in Appendix C to this report to take effect on the 1<sup>st</sup> April 2021.
- D. The Licensing Committee to confirm approval that broad categories of treatments will be licenced to take effect on the 1<sup>st</sup> April 2021, or the date of first renewal thereafter.

## **1. PURPOSE OF REPORT AND EXECUTIVE SUMMARY**

- 1.1 Premises where special treatments establishments are provided must be licensed under the London Local Authorities Act 1991 as amended by the London Local Authorities Act 2000 ('The Act).
- 1.2 The Act allows the Council to make regulations prescribing the terms, conditions and restrictions on or subject to which licences, or licences of a particular class, are to be granted, renewed or transferred. Where such regulations have been made all licences granted are subject to those standard conditions unless they have been expressly excluded or amended.
- 1.3 With the implementation of the Merton, Richmond and Wandsworth Regulatory Services Partnership a review of the Special Treatment licensing processes across the Boroughs was undertaken with the intention that a single system of

licensing be implemented across the three Boroughs. At its meeting on the 9<sup>th</sup> June 2020, the Licensing Committee agreed, subject to consultation with existing licence holders:

- i) the adoption of new standard conditions;
- ii) the adoption of regulations governing applications for grant, renewal, transfer and variation of special treatment licences and their determination; and
- iii) to amend the licence to specify the category of treatment that can be carried out at the premises rather than to specify every particular treatment.

- 1.4 The Licensing Committee also noted a proposed revision to the fee structure based on risk to more accurately reflect the actual cost. Before making a final decision, the Licensing Committee sought more details as to the effect such a revision would have on individual premises in the borough.
- 1.5 All existing licence holders were notified of the proposed changes in late August/early September with the closing date for receipt of comments being the 18<sup>th</sup> October 2020.
- 1.6 No negative responses were received to the proposals from Merton Special Treatment licence holders. Three responses were received from Richmond licence holders which have been considered. Small modifications are proposed to the draft licence conditions, shown as tracked changes to the conditions attached at Appendix B to this report.
- 1.7 This report seeks:-
- (i) the adoption of standard conditions as laid out in Appendix B to this report.
  - (ii) confirmation of the decisions made by the Committee on the 9<sup>th</sup> June 2020 with regard to the regulations governing applications set out at Appendix C to this report, and the licensing of broad categories of treatments
  - (iii) approval of the proposed fee structure for Special Treatment Establishments with a recommendation of fee level to go to the Director of Environment and Regeneration for approval in February 2021 as set out in Appendix A to this report.

## **2. DETAILS.**

### **2.1 Background**

- 2.2 Part II of the London Local Authorities Act 1991 requires that persons providing premises where special treatments are offered must hold a licence. A Special Treatment Establishment is defined in the Act as a premises that is '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'. The Act does provide for a number of exemptions (e.g. medical practitioners, dentists and bona fide members of a body of health practitioners). Since the introduction of the Act many new types of treatments have come onto

the market and a judgment must always be made as to whether they fall within the definition of a special treatment.

2.3 The Act provides a mechanism for the Council to prescribe the terms, conditions and restrictions it deems appropriate with regard to the licensing process. This includes the setting of fees at a level to fully recover its costs in administering and enforcing the licensing regime and the adoption of standard conditions to which all licensed premises must adhere unless specifically exempted. The Act lays out a number of areas that such conditions should relate (although these are not to be taken as exclusive) and includes: -

- the maintenance of public order and safety;
- the number of persons who may be allowed to be on the premises at any time;
- the qualifications of the persons giving the special treatment;
- the taking of proper precautions against fire, and the maintenance in proper order of means of escape in case of fire, means for fighting fire and means of lighting, sanitation and ventilation of the premises;
- the maintenance in safe condition of means of heating the premises;
- the hours of opening and closing the establishment for special treatment;
- the safety of any equipment used in connection with the special treatment and the way in which the treatment is given;
- the cleanliness and hygiene of the premises and equipment;
- the manner in which the establishment is operated and the way it is advertised.

#### **2.4 Consultation with existing licence holders**

2.5 At its meeting on the 9<sup>th</sup> June 2020, the Licensing Committee agreed, subject to consultation with existing licence holders:

- i) the adoption of new standard conditions;
- ii) the adoption of regulations governing applications for grant, renewal, transfer and variation of special treatment licences and their determination; and
- iii) to amend the licence to specify the category of treatment that can be carried out at the premises rather than to specify every particular treatment.

2.6 The Licensing Committee also noted a proposed revision to the fee structure based on risk.

2.7 All existing licence holders were notified either by email or by letter of the proposed changes in late August/early September 2020. They were advised to submit any comments by the 18<sup>th</sup> October 2020. The consultation was carried out when businesses were open and trading again after the protracted closure due to the COVID pandemic. No comments were received from Merton licence holders to the proposals.

2.8 However, a similar consultation in the London Borough of Richmond resulted in the receipt of three comments. Two of the respondents largely supported the proposed amendments, although one had concerns about some individual conditions. The third respondent did not believe that body piercing establishments should be within the highest risk band, and consequently the highest fee band, particularly in view of the proposal that ear lobe and nostril piercing are judged to be low risk.

2.9 In response to the consultation minor amendments are proposed to the standard conditions as laid out in Appendix B.

2.10 The comments relating to piercing establishments were noted. However, these are high risk establishments and require more in-depth inspections to gauge competence and safe working practices compared with other special treatment establishments. As a type of premises tattooists and piercers attract a higher level of complaint than other special treatment establishments, although this does detract from the fact that many such premises are extremely well run. Currently, in Merton, tattooists and piercers attract an additional fee.

2.11 It is, therefore proposed that the Licensing Committee:

- (a) adopt the standard conditions for Special Treatment Premises Licences amended as set out in Appendix B to this report to take effect from the 1<sup>st</sup> April 2021, or the date of first renewal thereafter.
- (b) confirm the adoption of the regulations governing applications for grant, renewal, transfer and variation of special treatment licences and their determination without amendment as set out in Appendix C to this report to take effect on the 1<sup>st</sup> April 2021.
- (c) confirm the approval that broad categories of treatments will be licenced to take effect on the 1<sup>st</sup> April 2021, or the date of first renewal thereafter.

## 2.12 **EU Services Directive and Hemmings and others v Westminster City Council**

The EU Services Directive, brought into British law by the Provision of Services Regulations 2009, came into effect on 28th December 2009 and requires EU Member States to put in place a system to allow service providers located in the EU to apply for, vary and pay for licences and permits on-line. Amongst other matters, the Services Directive has been introduced to ensure that any licence application, authorisation or administrative procedure that must be followed in order to establish a business in a relevant service sector is transparent with any burden on the business kept to a minimum. This basic concept also applies to the fees charged by local councils for approving licence applications, authorisations or other administrative processes.

2.13 In setting and charging fees local authorities must ensure that they are non-discriminatory, justified, proportionate, clear, objective, made public in advance, transparent and accessible. 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.

- 2.14 In a landmark case for the setting of licence fees the Supreme Court delivered judgment in *R (on the application of Hemmings (t/a Simply Pleasure Ltd) and others) v Westminster City Council*. The case concerned the situation of an applicant who applied for the grant or renewal of a sex establishment licence for any year and who had to pay a fee made up of two parts. One part related to the administration of the application and was non-refundable and the other part (which was considerably larger) concerned the management and enforcement of the licensing scheme and was refundable if the application was refused.
- 2.15 The central issue for the court was whether it was legitimate under domestic and/or European Union Law for Westminster City Council to charge the fee for the management and enforcement of the licensing scheme. One of the arguments run by the Respondent (Hemmings) was that following the introduction of the Provision of Services Regulations 2009 Westminster City Council were no longer entitled to include within their fee the cost of managing and enforcing the licensing scheme.
- 2.16 The Supreme Court disagreed. Paragraph 17 of the judgment reads, “Nothing in article 13(2) (of the European Service Directive) precludes a licensing Authority from charging a fee for the possession or retention of a licence and making this licence conditional upon payment of such a fee”. The judgment went on to say that any such fee would need to be proportionate but that there was no reason why it should not be set at a level enabling the authorities to recover from licenced operators the full costs of managing and enforcing the licensing scheme including the costs of investigating and prosecuting those operating sex establishments without licences.
- 2.17 Whilst allowing Westminster's appeal to the extent explained above, the Supreme Court remained uncertain on one discrete aspect of the case. This concerned the Council's chosen method of exercising its right to recover the costs of enforcement from licensed sex shop operators. Westminster charged all applicants for sex establishment licences a fee that included both a sum to cover the cost of administering the application and a sum representing a contribution towards Westminster's costs of enforcement. The latter sum was refunded to unsuccessful applicants, whilst the former sum was not. It was the view of the Supreme Court that this aspect of the case should be referred to the European Court of Justice (ECJ) for decision.
- 2.18 In its final judgement, endorsed by the Supreme Court, the ECJ stated that Article 13(2) of the Services Directive must be interpreted as precluding a requirement for the payment of a fee at the time of submitting an application for the grant or renewal of an authorisation which includes a cost relating to the management and enforcement of the authorisation scheme concerned, even if that part is refundable if that application is refused. Consequently, the costs for any activities which postdate authorisation (such as management and enforcement) cannot be levied at the time of application.

2.19 Although the court case related to the licensing of sex shops, the judgement impacts on all licence fees set by Local Authorities. Consequently, Local Authorities are required to split the fees for licences within their control between the cost of administering the licence (the application fee) and the cost of on-going management and enforcement to be paid following successful application. Businesses may continue to choose to pay both fees 'up front' and in such cases the management and enforcement element of the fee would need to be refunded if the application was unsuccessful.

## **2.20 Fee Structure**

2.21. At its meeting on the 9<sup>th</sup> June 2020, the Licensing Committee noted the proposal that the fee structure should be changed from the current system based on the number of people who can be treated on the premises at any one time i.e. on the size of the premises, with an additional fee if skin piercing, light treatments: including UV (sunbeds), lasers, light therapy and electric treatments are provided and a higher additional fee if tattooing and/or body piercing is provided to one based on risk which will more accurately reflect the administration and enforcement work associated with the licensing regime.

2.22 Under the proposed new fee structure, premises will be split into three bands based on the risk of the treatments being offered and the time taken to inspect and carry out enforcement work.

2.23 Premises falling within the high risk band will be those offering body piercing (including piercing of body/face, beading, micro-dermal anchor);tattooing (including micro blading, micropigmentation, tattooing); laser treatments (including intense pulsed light, laser, tattoo removal).

2..24 Premises in the medium risk category include those offering skin piercing (acupuncture, dry needling, electrolysis – wart/skin tag removal, red vein treatment); massage treatments (including acupressure, aromatherapy, body massage, facial massage, reflexology); electric and light treatments (including infra red treatments, ultra violet tanning (sunbeds) electrolysis – hair removal, faradism, galvanism, lipolaser, micro current therapy, high frequency, therma vein, ultrasound); nail treatments (manicure, pedicure, acrylic nail extensions); bath/vapour (sauna, spa pool, steam room/bath, hydrotherapy, floatation tank).

2..25 Low risk premises will be those offering ear piercing (lobe only) and nose piercing (nostril only).

2.26 When calculating the fee for administering the application the following costs are included:

- a) Basic office administration to process the licence application, such as resources, IT data entry, liaising with licensing officers, production of the licence.
- b) The average cost of officer time where a premises visit is required as part of the authorisation process.
- c) Liaison with interested parties such as the police and the fire brigade.

- d) Management costs for reviewing and authorising the issue of a licence.
  - e) Expenditure in arranging hearings to consider applications.
  - f) On costs including IT development, travel expenses, legal and office re-charges, general office expenses such as postage and stationery.
  - g) Web materials.
  - h) Advice and guidance.
- 2..27 When calculating the ongoing enforcement element the following is included:
- a) The cost of risk based visits to premises in between licensing inspections and responding to complaints. The figures are based on average officer time, travel and on costs.
  - b) Expenditure associated with arranging committee meetings to respond to problems.
  - c) Registers and national reporting.
  - d) The cost of enforcing against unlicensed businesses excluding any court costs as may be recovered through the courts.
  - e) Costs associated with fee setting and general oversight of the service.
- 2.28 Currently there are 65 licensed Special Treatment Establishments in Merton. Of these 18 will fall within the 'high risk' band and 45 within the 'medium risk' band and two in the low risk band.
- 2..27 The fees for Special Treatment Establishments are set annually by the Director of Environment and Regeneration in February. In order to assist the Committee in its decision regarding the proposed changes to the fee structure, Appendix A sets out the current fees for Special Treatment Establishments and the recommended fees for 2021-2022 to be presented to the Director for approval.
- 2.28 Currently there are 65 licensed Special Treatment Establishments in Merton. Of these 18 will fall within the 'high risk' band and 45 within the 'medium risk' band and two in the low risk band.
- 2.29 Based on the proposed fees for 2021-2022, of the existing 65 licensed premises in the borough and based on currently licensed treatments 14 will see a reduction in fees ranging from £504 (55.38%) to £13 (5.36%). The remainder will see an increase in fees ranging from £53 (11.37%) to £166 (47.03%).
- 2.30 The highest percentage increase falls to the smaller premises carrying out the highest risk activities such as tattooing/body piercing, laser treatments, and microblading/semipermanent makeup. Some establishments can make a commercial decision whether or not to continue providing the high risk treatments that place them in the highest risk band. However, this will not always be the case e.g. for tattoo establishments.
- 2.31 It is acknowledged that the proposed increase in fees for some establishments in the borough is significantly above the rate of inflation, but the fees do now reflect the accurate cost of the licensing process

### **3. Timetable**

If approved, the changes will come into effect on the 1<sup>st</sup> April 2021, or first renewal date thereafter for existing licensees.

### **4. Financial, resource and property implications**

- 4.1 One of the purposes of this report is to seek approval to amend the fee structure.
- 4.2 The method of fee setting will be on a cost recovery basis following government guidance on licensing fee setting, taking into account both the processing of the application and enforcement of the regime.

### **5. Legal and statutory implications**

- 5.1 The Council's powers and duties under Part II of the London Local Authorities Act 1991 and the Hemming case are set out in the body of this report. There are no further legal implications arising directly from this report.

### **6. Human rights, equalities and community cohesion implications.**

- 6.1 These are statutory functions and are applied globally.

### **7. Crime and Disorder Implications.**

- 7.1 None for the purposes of this report

### **8. Risk management and health and safety implications.**

- 8.1 All risk and health and safety implications have been considered when compiling this report. None are apparent.

### **9. Appendices – the following documents are to be published with this report and form part of the report.**

Appendix 'A' – Existing and proposed fees

Appendix 'B' – Proposed standard conditions

Appendix C- Proposed regulations governing applications for the grant, renewal, transfer and variation of special treatment licences and their determination



**10. Background Papers – the following documents have been relied on in drawing up this report but do not form part of the report.**

10.1 Existing licence conditions, Merton, Richmond and Wandsworth

10.2 Existing fee structure, Merton, Richmond and Wandsworth

10.3 Consultation response from existing licensees, London Borough of Richmond

10.4 Existing Rules Governing applications, London Borough of Merton.

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