

# CARLISLE CITY COUNCIL

Report to:- **THE CHAIRMAN AND MEMBERS OF THE REGULATORY PANEL**

Date of Meeting:- 15<sup>th</sup> October 2008

Agenda Item No:-

Public	Operational	Delegated Yes
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Accompanying Comments and Statements	Required	Included
Cumbria Fire Service	No	No
Cumbria Constabulary	No	No
Environmental Services	No	No
Corporate Planning & Information Unit	No	No

Title:- **APPLICATION TO REVIEW THE ANNUAL FEE FOR SEX ESTABLISHMENTS**

Report of:- **LEGAL AND DEMOCRATIC SERVICES**

Report reference:- **LDS 67/08**

## Summary:-

An application has been received from Darker Enterprises Limited, requesting that the Council review the fees charged for a Sex Establishment Licence. This application was considered by this Panel on 2<sup>nd</sup> April 2008 when it was deferred to this meeting.

## Recommendation:-

Options open to members are:

1. Make no change to the annual licence fee in respect of Sex Establishments
2. Vary the annual licensing fee to an amount determined by the Panel, which could differentiate fees for the grant, renewal or transfer of the licence.

J A Messenger  
Licensing Manager  
Legal & Democratic Services

Note: in compliance with section 100d of the Local Government (Access to Information) Act 1985 the report has been prepared in part from the following papers:- Letters from Darker Enterprises and AITA.

## **To the Chairman and Members of the Regulatory Panel 15<sup>th</sup> October 2008**

### **1. Background**

1.1 The control of sex establishments is subject to section 2, Schedule 3 Local Government (Miscellaneous Provisions) Act 1982.

1.2 Paragraph 19 states:

“An applicant for the grant, renewal or transfer of a licence under this schedule shall pay a reasonable fee determined by the appropriate authority”. In this case the authority is Carlisle City Council.

1.3 The Regulatory Panel agreed the licensing budget for 2008/09 on 17<sup>th</sup> October 2007 when a fee of £13, 278 was approved for sex establishment licences.

1.4 This application was originally considered by this Panel on 2nd April 2008 when it was resolved:

‘That a further more detailed report be submitted to a future meeting of the Panel to include information on fees in other areas and the possible review of the Council’s policy on the number of establishments in the City.’

1.5 Information on fees in other local authority areas is included at paragraph 3 below.

1.6 The Council’s policy to issue only one sex establishment licence is restricted to the ‘locality’ where the current licence holder operates. It would be for the Panel determining any future application to decide how far that locality extended. They would then make a decision on the merits of the new application. This Panel has the authority to make or amend the policy.

### **2. Application**

2.1 Letters have been received from the Adult Industry Trade Association (AITA) (Appendix 1) and Darker Enterprises Limited (Appendix 2), requesting that we reconsider the annual fee in respect of Sex Establishment licences.

2.2 The one licensed shop we have in Carlisle is owned by Darker Enterprises Limited.

2.3 The licence holder is entitled to request a review of the licence fees at any time.

2.4 I will comment on the points raised in the letter from Darker Enterprises Limited (Appendix 2) in the same order as their bullet points:

2.4.1 There may be a subtle difference between an application fee and a licence fee, however, paragraph 19 that is quoted regarding fees, is immediately followed by paragraph 20 which deals with enforcement. It is the officer’s

view that the legislators intended local authorities to recover the cost of enforcement from the council tax, more likely that the fee should cover the whole cost of the licensing activities.

- 2.4.2 According to our records, the licence fee was originally set in 1989 at £1,000, but was raised to £7,000 in 1990 as it was recognised that the original fee was not covering the cost of administering and enforcing the legislation. Since then all licence fees have increased annually in line with the recognised index which is currently about 3%. There are two notable high court case where the level of fees has been considered; *R v Stoke on Trent City Council Ex p. Sheptonhurst Ltd and Quitlynn Limited* (1985) 83 L.G.R. where a transfer fee of £5,000 was upheld because no irrelevant factors had been taken into account when setting the level of that fee. The Sweet & Maxwell publication "Local Authority Licensing and Registration" refers to the *Westminster* case where it was held that a fee increase from £5,000 to £11,000 was not unreasonable on the same criteria.
- 2.4.3 It is accepted that considerable experience of the work involved has now been acquired, but this also gives officers the confidence to enforce proactively.
- 2.4.4 In the normal course of events renewals would not attract as much interest, however the fee increase in 1990 was for exactly that reason, to deal with the numerous representations received and the ensuing committee hearings. Each year at least one query has been received but these have been resolved without the necessity to hold a hearing. The grant and renewal fees are the same, however the transfer fee has been determined at 50% of this fee.
- 2.4.5 Officer advice is that licence fees under the same Act do not need to be proportionate with each other. The types of licence under this legislation are varied and all require different degrees of administration and enforcement and should be considered individually on their own merits. There is also a greater likelihood of receiving representations against a sex establishment than for example a street trader. Also the high court hearings in respect of the former far outweigh the number for any of the other authorities granted under the Act.
- 2.4.6 It is correct that some activities previously covered by the Act are now dealt with under the Licensing Act 2003. These changes do not affect the applicant's sex establishment licence. However, the applicant does point out that the fees under the Licensing Act 2003 is set for council's to fully recover the administration, inspection and enforcement costs of licensing authorities which arise from carrying out their licensing functions under the Act. This supports the position in the first bullet point, that enforcement should be part of the licensing fee.
- 2.4.7 The final bullet point refers to central government setting the fees for the Licensing Act 2003 at a reasonable level. It must be remembered that of

the hundreds of applications received under the legislation, only a small proportion went to either a committee or court hearing. The costs were spread amongst many licences. In the applicant's case the Council determined that only one sex establishment would be granted in this locality, thereby reducing the opportunity to spread the cost of any hearings amongst a number of premises.

- 2.5 In the last couple of years alone, enforcement action has been taken on more than one occasion to enforce this legislation to ensure that only licensed sex establishments can operate. A year ago a protracted and complicated case was taken to Carlisle Crown Court, which involved the Police and Trading Standards. The offender was sentenced to a term of imprisonment and as is usual in these circumstances, no costs were awarded.

### 3 Officer Comments

- 3.1 A survey of forty four other local authorities reveals annual fees of between £625 and £20,360. The average fees over the forty four authorities are as follows:

Grant	£6,197
Renewal	£4,971
Transfer	£950

- 3.2 A prosecution and subsequent appeal to Crown Court with all the associated costs could amount to £8,000, however these are the exception.
- 3.3 Members will have to consider whether the fee of £13,278 can be justified as a reasonable fee, in the light of past experience and the potential costs to the Council of administering and enforcing the Sex Establishment licensing regime.

### 4. Financial Implications

- 4.1 The Regulatory Panel agreed the licensing budget for 2008/09 on 17<sup>th</sup> October 2007 when a fee of £13, 278 was approved for sex establishment licences.

- 4.2 Financial Services make the following comment with regard to this application:

“ There is a budget provision of £13,300 for income generated from the licensing of Sex Establishments in the City in 2008/09. If this appeal is successful there would be a shortfall which would then have to be met from existing base budgets”

- 4.3 In 2007 the council took over responsibility for gambling and gaming premises under the Gambling Act 2005. The exact fees were not known at the time of setting the budget, however it is anticipated that we will generate £15,800 in 2009/10. This is additional income with little associated expenditure.

## 5.0 Options

5.1 Make no change to the annual licence fee in respect of Sex Establishments.

5.2 Vary the annual licensing fee to an amount determined by the Panel, which could differentiate fees for the grant, renewal or transfer of the licence.

Prepared by:  
J A Messenger  
Licensing Manager



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APP. 1

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Carlisle City Council  
Civic Centre  
CARLISLE  
CA3 8QG

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Lucy

30 January 2008

Dear Sir / Madam

**LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT 1982**  
**SCHEDULE 3 Section 2 CONTROL OF SEX ESTABLISHMENTS 19 Fees**

The Adult Industry Trade Association (AITA) is contacting you in regards to the pending demise of UK Licensed Sex Shops, fundamentally seeking your support for lower Sex Establishment Licence Fees.

AITA has been established since 2002 and represents numerous adult trades including many of the UK's biggest retailers, wholesalers, publishers, manufacturers, distributors, mail order and internet companies as well as many smaller businesses.

By far the biggest source of complaints received by the Association has come from our Licensed Sex Shop Members who are now facing tremendously difficult trading conditions.

There are approximately 350 Licensed Sex Shops across the UK many now parts of national chains with many cities having multiple outlets. Regulation and enterprise has seen a vast improvement in terms of appearance and standards. They employ about 2,000 workers and support an estimated 5,000 supplier jobs; they trade successfully alongside many other retail outlets, and stock a wide range of goods which appeal to a broad cross section of the adult shopping population.

Licensed Sex Shops have now had many years of trouble free trading and they should not be confused with illegal sex shops that still blight some parts of the country.

Over the last three years the World Wide Web has totally changed the way that consumers purchase adult products and has had a dramatic declining affect on all our Licensed Sex shops. Not encumbered with regulation the internet offers lower prices and more choice, particularly from overseas sites offering un-censored adult material (DVD's) into this country.

Our Members now face a multitude of problems including the following:

- The unfairness of the excessively high fees charged by Local Authorities for a Sex Shop Licence.
- The additional and high cost of BBFC R18 certification.
- The inability to sell R18 DVD online or via mail order.
- Enormous competition from the new IT and broadcast routes to market such as the internet, downloads, streaming, mobile phones, hotel TV and IP TV etc.
- Over regulation – too many out of date and unnecessary Licence conditions restricting trade.
- The sheer volume of availability of adult products, their providers, none of whom pay UK licence or certification fees, has forced prices down to an almost unviable low. Astute consumers are finding they can actually source an endless supply of adult material absolutely free.
- The huge influx of foreign street sellers and counterfeiters.
- Illegal and unlicensed shops continue to trade.
- Added to this UK consumer spending is noticeably down.

Unlike other retail trades who have set up web-sites to provide an online service for their customers, our Members who are reluctant to complain to the Authorities about high Licence Fees have found themselves trapped in the ramification of legislation, **paying a high price to trade, when they no longer have an exclusive situation with adult DVD and can not compete on the internet due to rules in the Video Recording Act.** Local Authorities appear to be oblivious to these conditions and have continued to increase License fees.

AITA is duty bound to advise all Local Authorities that market conditions have changed considerably and high Licence Fees can not be sustained without having an adverse effect on the whole of the UK adult industry. There is a serious danger that many of these small but important and legitimate businesses could reduce dramatically leaving the majority of demand to be fulfilled on an unregulated basis.

The number of Licensed Sex Establishments that peaked at just over 400 shops in 2005/6 has decreased to be between 340 and 350 outlets, should this number fall any lower then the whole production, certification and distribution of R18 films, already uneconomic, will cease. Before now three popular UK film companies have either gone into liquidation or have ceased to produce any new R18 films and many others are under extreme pressure to survive.

Local Authorities have considerable discretion when it comes to fixing fees for Licence applications. That discretion comes from both established case law and from guidance given by Central Government.

The principal which governs the fixing of fees is contained within schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982. Paragraph 19 which states; **Fees; "An applicant for the grant, renewal or transfer of licence under this Schedule shall pay a reasonable fee determined by the appropriate authority".** This rule has obviously been abused in its interpretation over the years and the fees are now unrealistic and irrelevant to the purpose that was originally intended.

Unfortunately the Act does not contain any statutory definition of the word "reasonable". To find the definition we have to rely upon case law. The case which helps us is R v Greater London Council Ex-Parte Rank Organisation (1982). **In summary the case defines "reasonable" by examining the costs of administration of the licensing scheme. The case concludes by saying that the Local Authority has considerable discretion to fix fee levels, so long as the revenue does not exceed the cost of administration and provided that appropriate allowances are granted to charities.**

This case raises the issue of transparency. It is very difficult to know how a Local Authority calculates the precise cost of administering a licensing scheme. However it is quite clear that other businesses such as Betting Shops, Pubs and Taxis requiring similar administration are considerably cheaper.

The subject has been considered by Central Government and the Home Office have issued a circular (ref no: 13/2000) which deals with this topic.

*Sched 1*  
Paragraph 1 of the circular makes it clear that the guidance contained within the document applies to the Local Government (Miscellaneous Provisions) Act 1982. Paragraph 6 confirms the principals which are set out within Crown v London Council Ex-Parte Rank Organisation. The circular continues to indicate at paragraph 7 that there is potential for Local Authorities, if they establish a rigid fee structure for this, then this could be unfair in individual cases.

The crucial part of the circular is paragraph 9 where the following guidance is issued;

**"Local Authorities should be prepared to charge lower fees than those proposed in their fee structure where this is justified. This is particularly relevant to repeat events where knowledge of the organisers and venue is good and little work is required of the Local Authority. In those cases especially, they should keep in mind the potential impact on venues and performers of high fee levels."**

The declining change in the market place and potential disappearance of the only legal route to market for UK consumers caused by the unregulated internet based supply should be considered as a justifiable reason for departing from the rigid fee structure imposed by many Local Authorities.

What is also of concern to AITA is that if businesses cease to trade because of the prevailing economic climate, assuming that the costs of the licence scheme are divided equally between the number of licences issued by a particular Local Authority, the burden in terms of fees could be raised for the remaining licence holders.

In the last year one chain of ten shops has gone into liquidation and many other shops are up for sale or closing down. Councils worried about the loss of revenue caused by reduced license fees should note that in one town both of its licensed shops closed leaving them with no revenue and no regulated consumer outlet for adults. Although some cynics may be pleased about this, we at AITA believe there has never been a more important time since the emergence of the www to have a sufficient number of legitimate outlets for the safe sale of adult material to the public.

AITA like Central Government is concerned over the explosion of un-licensed and un-censored adult material and the extremes of such available via the internet which inadvertently harbours the new underground for extremes of sex and violent media.

The Government and Local Authorities and Licensee's must come together to provide a walled garden around the UK in which British consumers can safely buy approved adult products away from exposure to these extremes and risks of offshore web sites.

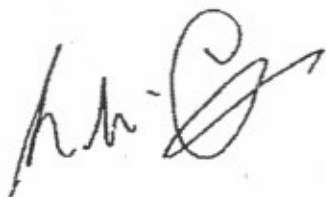
Licensed Sex Shops are the platform for this and should be maintained and protected with new regulations and with reasonable fees. Trials for online R18 via download and streaming are already taking place with the BBFC but all routes to market need satisfactory regulation.

AITA are seeking your support and lobbying of the Government to provide the necessary legislation for the safe sale of R18 DVD online and we welcome any further dialogue you may have on the subject.

In the current market it is totally unfair for our Members to have to challenge Licence Fees. Chain store operators would have to challenge numerous Authorities and small operators just cannot afford the time out and the Legal costs. In light of this AITA urge all Authorities to take urgent action to drastically reduce Licence Fees to genuinely reasonable and legitimate level without our Members having to take legal action.

**Licence Fees should be no more than those set by the Government for the Licensing of Pubs. There being no good reason to justify a higher amount being a "reasonable fee".**

It is absolutely essential that Local Authorities adopt a sympathetic approach to these fees to save the UK Licensed Sex Shops from demise and maintain a regulated market place.



Mike McCann  
Chairman

Correspondence;  
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The Licensing Manager  
Environmental Protection Services  
Carlisle City Council  
Civic Centre  
Carlisle, CA3 8QG

14 January 2008

Dear Sir/Madam

**Re: Local Government (Miscellaneous Provisions) Act 1982  
Private Shop, 6 London Road, Carlisle CA1 2EL**

We are writing to you in connection with the level of licencing fees charged in respect of our licence under Schedule 3 of the above Act.

We would formally request that the level of fees charged be reviewed. As you are aware, Para 19 of the Schedule states 'An applicant for the grant, renewal or transfer of a licence under this Schedule shall pay a reasonable fee determined by the appropriate authority'.

There are a number of points which we would wish you to consider.

- Under the Act, the fee is an application fee not a licencing fee. We would submit that this means that in assessing 'a reasonable fee', the level should be set only to reflect the work involved in processing and determining the application.
- When the levels were originally set, there was no proper idea of the costs likely to be incurred in considering the application.
- There has now been considerable experience of the work generated by applications.
- It is quite clear that renewals (and, indeed, transfers) attract much lower levels of interest and representation than applications for initial grants.
- We also submit that the reasonableness of the fee should also be proportionate in relation to the various other activities licenced under the same Act. If the fee charged in respect of our type of licence is of a different order to that charged in respect of acupuncture, tattooing or ear-piercing or street trading, we feel that concerns might be raised.
- Some of the activities previously covered by the Act now come under the 2003 Licensing Act. In this case the level of fees has been set by Secretary of State for Culture, Media and Sport. It is stated that
  1. The central setting of fees removes the considerable and widespread regional inconsistencies that previously existed with fee levels.

2. The fee is to fully recover the administration, inspection and enforcement costs of licensing authorities, which arise out of carrying out their licensing functions under the Act.

- Again, we would submit that the reasonableness of fees should be judged against the fees levels set by central government. For example, we note that the fee for the transfer of a premises licence is set at £23. Even if the multipliers (of the fee) in respect of large premises supplying alcohol were applied, the fee levels, set centrally, do not even begin to approach that set in respect of our licence.

We would submit that given the changes in circumstances, the current level of our renewal fee can no longer be considered reasonable. We would request that it be reviewed and reduced to a level proportionate to the other licence fees set by the council.

You will realise that the fee is a significant factor in determining the viability of our operations. We think that not only is the fact that the Council now has clearer evidence of the work involved, but, that the Government has set some fee levels, should combine to ensure that any review will lead to a drastic reduction in the level set.

Thank you for considering this. If we can assist further in any way, please do not hesitate to contact us.

Yours faithfully  
for and on behalf of  
DARKER ENTERPRISES LIMITED



B Francis  
Licensing Administrator