

# Taunton Deane Borough Council

## Corporate Governance Committee – 23 September 2013

### Update on objection to license fees to the Hackney Carriage and Private Hire Trade

#### Report of the Community Protection Lead

(This matter is the responsibility of Executive Councillor Hayward)

#### 1. Executive Summary

This report provides an update to Members on the review and conclusion of the Council's external auditor regarding the objection to license fees in 2011/12 to the Hackney Carriage and Private Hire Trade, as highlighted to Members in the meeting of 4<sup>th</sup> February 2013.

The objection to the 2011/12 Accounts was received as in the elector's view "the Council has levied licence fees in excess of its own calculation of 'reasonable costs', and the Council's 'reasonable costs' are excessive".

The external auditor has now concluded his review of the points of objection, and issued his Decision and Statement of Reasons on 8 July 2013.

The elector had a period of 28 days within which to appeal the Auditor's Decision, and has chosen not to do so.

The auditor has reported several findings within the Statement of Reasons, and has highlighted some historic weaknesses in process that have indicated a potential for an item of account that is contrary to law. However, he is also satisfied that the Council has rectified many of the deficiencies identified through the Council's own internal process review. Importantly, despite previous process deficiencies – primarily a lack of evidence to support fee calculations – the auditor's view is that taxi license fees in 2011/12 were not unreasonably high and therefore not unlawful.

In reaching his decision, the auditor has elected not to use his powers to either issue a "public interest report" or apply to the High Court to seek a declaration for an item that may appear contrary to law, as he sees there is little or no benefit in doing so. However, in light of his findings the auditor has indicated instead his intention to include two recommendations – identified within the Decision and Statement of Reasons report – within his Annual Audit Letter in the autumn this year.

The Council has prepared and is continuing to work through an Action Plan in response to the matters raised by the elector and specifically to address the two imminent recommendations from the Auditor. This Action Plan is included as an Appendix to this report.

## **2. Background**

### ***The Objection***

As reported to Corporate Governance Committee on 4 February 2013, a local elector submitted an objection to the Council's Auditor - Messrs Grant Thornton - on 26 September 2012 regarding the Council's 2011/12 Accounts.

The Notice of Objection relates to Licence Fees to the Hackney Carriage and Private Hire Trade levied for 2011/12 because in the elector's view "the Council has levied licence fees in excess of its own calculation of 'reasonable costs', and the Council's 'reasonable costs' are excessive".

The Auditor has now completed his work in response to the Objection, and this report summarises the key findings and recommendations from this review.

### ***Engaging the Elector***

The elector has been in extensive and protracted communication with the Council since at least 2010 in relation to the fees charged and various other matters in respect of taxi licensing. This has included email correspondence and meetings with officers, advice from the Finance and Legal teams and elected member involvement from the elected ward Member to the Taxi Forum and the Licensing Committee. The Council has responded to the elector's requests in detail. Correspondence has continued regularly during the course of Auditor's consideration of the Objection.

Contrary to the elector's view that he has not had opportunity to raise his concerns, he has had several in depth meetings with officers, including a visit to his place of work to understand better the workings of his business, as well as several opportunities to raise items at the Taxi Forum and other public meetings which the Council holds. He has also engaged with his elected ward member who has made great effort to understand the position of both sides.

### ***2013/14 License Fees***

In 2012, the Licensing Service undertook a review of the process for calculating its fees related taxi licensing. This was an extensive process,

and has resulted in an activity-based costing model that includes unprecedented levels of detail. The Council's view is that this clearly satisfies the legislative requirement to demonstrate 'reasonable costs', and in doing so provides a very robust basis for calculating each individual fee item.

The Council shared working drafts with the elector through the development of the model, and took into account feedback from this open and transparent dialogue.

This new level of detail was used to inform the 2013/14 license fees that were approved by the Council on 4 December 2012.

### **3. Auditor's Findings and Recommendations**

The Auditor has undertaken an independent review of the points of objection. The process was extensive, involving consideration of relevant documentation provided by the elector and the Council, and of relevant statute and case law.

In summary of its response to the Objection, the Council believed that it had acted entirely within the law and within the spirit of the law.

The Auditor provided his "Provisional Views" in respect of the Objection on 21 May 2013, inviting comments from the elector and the council. To ensure independence the Auditor was not prepared to meet with or discuss these Provisional Views with Council Officers (and presumably with the elector).

The Auditor issued his final "Decision and Statement of Reasons" report on 8 July 2013 to both the Council and the elector.

The Auditor has been critical of the Council's 'broad and approximate' approach to setting fees, which took the previous year's fee as its baseline assessment of reasonable costs. He has stated that the Council needs to have a detailed knowledge of its cost base, and fees set must be tailored to the parameters of the particular charging power. It is the Auditor's view that the provisions within the Local Government (Miscellaneous Provisions) Act 1976 cannot be discharged by the broad and approximate approach previously applied by the Council. The Auditor accepted the Council's argument that it did not need to undertake a detailed re-assessment of costs every year in order to be satisfied that its fees are reasonable, but that evidence should be available to demonstrate the historic calculations. Regrettably the Council was unable to provide evidence to the Auditor's satisfaction of recent detailed workings to support fee 'calculations'.

In his conclusions, the Auditor has quoted this inability to provide evidence (in detail) of how the fees were calculated, and taken the view that **for this**

**reason alone** this has led to an item of account in 2011/12 which is contrary to law.

He notes elsewhere that “clearly only a court of law can definitively rule that a decision made was unlawful and unless and until this happens, as a general proposition any decision taken in public law remains valid.”

A key conclusion for the Council is the auditor’s view that “Overall, taking all the evidence available whilst recognising some conflicting evidence, our view is that **taxi licence fees, in 2011/12 were not unreasonably high and therefore (not) unlawful** on that basis. ... Whilst not unreasonably high, there are some indications that certain types of taxi licence fees were more than they should have been...”.

Author’s comment: by implication, indications would therefore be that certain types of fees were less than they ‘should have been’. The Council’s assessment of total costs v total income indicates that overall the level of fee income recovered was reasonable.

He notes elsewhere that “As a proxy for workload, the number of taxi licences processed amounts to 33% of the total licensing department workload. This would indicate...that taxi licence fees in total are not out of line with workload and further, on this basis, taxi licence fees, in total, are not excessive.” It is this distinction that is important. Overall, the level of fees was based on reasonable estimates of costs. However, the Council was unable to demonstrate to the Auditor’s satisfaction that the individual fees within taxi licensing were set according to identified costs for each fee.

Importantly, the Auditor has provided a provisional conclusion that the model used for 2013/14 fee setting is based on a “reasonable framework for the calculation of costs of license fees”.

The Auditor has considered whether it is appropriate to exercise any of the formal audit powers under the Audit Commission Act. These include the power to issue a public interest report under section 8 and the power to apply to the High Court for a declaration under section 17(1) that an item of account is unlawful.

The Auditor has taken the view that the Council has acted to regularise its position in 2013/14; that the cost of seeking a declaration that there is an unlawful item of account is high and... borne by local taxpayers (and is therefore not proportionate to any benefit); that this is not a financial loss to the Council which has had a negative impact on all local tax payers; and that concerns identified (can be addressed)... by making recommendations to the Council.

The Auditor has therefore decided not to exercise the above powers, and that a more appropriate way to report these matters is in the Annual Audit letter – a public document that will be reported to this Committee in the

Autumn. The Auditor has reported that the Annual Audit letter will include the following recommendations:

*Recommendation 1: Consider the costs and benefits of introducing a system of time recording, or employ a time and motion study, to provide a more robust evidence base for cost apportionment for the purposes of licence fee setting.*

*Recommendation 2: Consider whether it has charged certain types of taxi licence fee payers more than they should have and whether any refunds are appropriate.*

The Council has sought external advice in relation to the statement of reasons to help inform its approach to dealing with the substantive points raised by both the elector and the Auditor.

The elector had 28 days to appeal against the Auditor's decision and has chosen not to do so, therefore the Auditor has been able to issue his notice for the completion of the audit of the 2011/12 financial statements.

#### **4. Service Actions**

The Licensing Service has undertaken a number of actions to improve its processes around fee setting, including:

- Developed a detailed activity based costing model, to inform fee setting for 2013/14;
- In support of this, assessed in great detail the allocation of staffing and other resources to each type of chargeable taxi license;

The activity based costing model is being further refined and updated in preparation for 2014/15 fee setting and reflecting recent service developments.

The service has prepared an Action Plan which includes its proposed response to the two above recommendations from the Auditor, plus further actions to continue to improve the governance and accounting arrangements for the licensing. These actions, which aim to secure improved governance for fee setting, include:

- Undertaking an evidenced 'time and motion' study (auditor recommendation 1)
- Assess under-/over-recovery for 2011/12 and 2012/13, and take into account within 2014/15 fees (auditor recommendation 2)
- Improve clarity of legal requirements for Members within fee setting Committee reports
- Provide Member Briefings related to fee setting
- Enhance the accounting arrangements by formally establishing a separate account for taxi licensing

The current copy of the Action Plan which provides further information, including specific actions in addressing the Auditor's recommendations, is provided in Appendix 1.

## 5. Fee Setting – Further Information

The Local Government Association has recently published a guide for setting application fees relating to Scrap Metal Dealers. Many of the principles are transferable. They are also in line with the Council's understanding of the requirements of the legislation.

In calculating their fees, councils will want to take into account:

- All the activity required with processing and granting a licence such as considering applications and assessing the suitability of the applicant
- The costs of staff associated with supporting the service, including senior staff with managerial responsibility for the service
- Support provided by other parts of the council to the licensing team such as legal services and any recharges there might be for rooms, heating and lighting from the centre of the authority
- The cost of providing advice and guidance to applicants
- Carrying out inspections and ensuring compliance with the law
- Training for staff and councillors in the requirements of the new legislation
- Costs associated with consulting other agencies and bodies when considering if an applicant is a suitable person
- Working with any partners in ensuring compliance
- Making and reviewing any policies in relation to the operation of the licensing regime
- Issuing the licence

These costs are likely to differ over the period from the initial grant of a licence through to the renewal of the licence (up to) three years later, which suggests the need to reassess the fees on a regular basis.

It is important to reiterate that fees can only be set to cover the costs of issue and administration. They cannot be used as an economic deterrent or to raise funds.

The Local Government Association has recommended that all councils review the costs covered by locally set licence fees in light of the recent Court of Appeal judgment in the *Hemming* case. *R (Hemming & Others) v Westminster City Council*

In May this year the Court of Appeal held in *Hemming* that – as a result of Article 13.2 of the Services Directive (2006/123) coming into force in 2009 – licensing authorities could not charge licensees more than the costs of the authorisation procedures themselves.

The briefing recommended that councils, as well as ensuring compliance with the position in *Hemming*, “take the opportunity to ensure that all locally set licence fees are based on an up to date cost recovery approach, which is established and regularly reviewed in a transparent manner that can be understood by both businesses and residents”.

The Local Government Association will shortly publish guidance on what can be included in locally set licence fees.

Any under-recovery or over-recovery of costs established at the end of the financial year should be rolled forward and used to inform the subsequent year’s fees. As the under-/over-recovery will not be known until the financial year is closed, there will be a gap in the roll forward; e.g. 2013/14 year end balance will not be known until June 2014 – after the fees have been set for 2014/15 (in December 2013) – therefore the 2013/14 balance will be used to inform fee setting for 2015/16 (in December 2014). However, it is feasible that the in-year Q2 forecast outturn position for 2013/14 can be used as a reasonable estimate for setting fees in the following year.

The principles described above are adhered to in the Council’s fee-setting approach to the new costing model which was created for 2013/14 and is being updated for 2014/15 fee setting. Other actions relating to the setting of fees and further work in response to the Auditor’s report are set out at Appendix 1.

## **6. Finance Comments**

This paper relates to the proper and appropriate spend of public funds.

The Accounting for costs of licensing activities must comply with the CIPFA Service Reporting Code of Practice (SeRCOP). The mandatory requirements are met by separately accounting for “regulatory services”. However there is a discretionary (but recommended) sub-analysis for regulatory services that includes:

- Alcohol and entertainment licensing
- Taxi licensing

It is common practice to account for licensing services as a whole. However, this objection and recent legal cases indicates the level of external scrutiny is high and is likely to continue. Whilst there is a significant resource impact in creating and maintaining the Council’s costing model that has been developed for taxi licensing, it is likely that this will be a necessary cost (ultimately borne by the license fee payer) in order to ensure the Council can provide transparency of its finances and defend itself in the face of external challenge.

The current activity-based costing model exceeds the requirements of SeRCOP but provides an excellent basis for separately identifying the

reasonable costs associated with each license type. The further improvements to the accounting system included in the Action Plan (Appendix 1) will strengthen the Council's ability to report costs of taxi licensing separately.

Under the provisions of statute, the Council must set fees based on estimates of reasonable costs. This can be at a level that fully-recovers the costs of the service, or can be subsidised to partly-recover costs. The Council cannot (and does not) seek to make a 'profit' from license fees. The accounting principle applied to licensing is such that any under- or over-recovery of costs will be taken into account with fee setting for subsequent years, and there is a risk that the trade could see some volatility in prices from year to year. It should be noted that some elements of licensing activity are not chargeable; therefore the Council should expect a small net cost in the service rather than a "break-even" position.

It should be noted that in accordance with the Audit Commission Act 1998 and the annual letter on fees published by the Audit Commission, the cost of deciding the objection (comprising the auditor's time, that of his colleagues and the cost of any specialist advice) falls on the Council and is in addition to the normal audit fee. This cost (estimated in excess of £20,000) will be borne within the General Fund as a cost to be funded by the taxpayer. The cost will not be allocated to the License Service.

## **7. Legal Comments**

This paper relates to the proper and appropriate spend of public funds.

The power to set fees for Hackney Carriage and Private Hire is covered within the Local Government (Miscellaneous Provisions) Act 1976 sections 53(2) for Drivers Licence Fees and 70(1) for Vehicles and Operators' Licences.

Sections 53 and 70 of the Local Government (Miscellaneous Provisions) Act 1976 allow the Council to charge fees for the grant of licences in respect of Hackney Carriage and Private Hire drivers, vehicles and operators. The Council must set the fees for these licences to only recover those costs that it incurs in issuing and administering the scheme.

In respect of vehicle and operator's licences, the Act states that the Council may charge such fees as may be sufficient in the aggregate to cover in whole or in part:

- The reasonable cost of inspecting Hackney Carriages and Private Hire vehicles to ascertain whether any such licence should be granted or renewed
- The reasonable cost of providing Hackney Carriage stands
- Any reasonable administrative or other costs in connection with the above and with the control and supervision of Hackney Carriages and Private Hire vehicles



The Act also states that the Council may charge in respect of driver's licences:

- Such a fee as it considers reasonable with a view to recovering the costs of issue and administration associated with the grant of Hackney Carriage and Private Hire drivers' licences.

It is important to note that enforcement costs cannot be recovered through the Licence fee.

The Council believed that it had set fees in accordance with the legislation above as well as the relevant case law. Fees are set in the autumn and winter of each year in a budget setting process and historically are discussed in full by the relevant service managers (Environmental Health Lead and Health and Housing Manager) prior to recommendations going to Committee where they are then the subject of democratic process. The previous year's fees and income are used to set the precedent for future budgets, therefore historic precedent had been important in setting the fees.

Recent case law (Hemmings vs Westminster City Council) indicates that the Council "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... The adjustment does not have to be precise: a rough and ready calculation which is broadly correct will do."

The Legal and Democratic Services Manager has been consulted during the process, both prior to the objection being lodged and subsequently and is supportive of the Council's position. External advice has been sought on specific matters to help inform the Council's position.

- 8. Links to Corporate Aims** (Please refer to the current edition of the Corporate Strategy)  
There are no direct links to the Corporate Aims, however, the matter relates to the proper governance of the Council.
- 9. Environmental Implications**  
There are no environmental implications from this report.
- 10. Community Safety Implications** (if appropriate, such as measures to combat anti-social behaviour)  
There are no community safety implications from this report.
- 11. Equalities Impact**  
This report relates to the levying of taxi fees, specifically during 2011-12 but with broader implications for the Council. It is unlikely that the fee setting process will have specific impacts on those with protected characteristics.

**12. Risk Management**

There is a reputational risk to the Council should the Auditor's recommendations not be followed.

**13. Partnership Implications (if any)**

There are no partnership implications from this report.

**14. Recommendations**

Councillors are requested to note the contents of the report and the further work identified at Appendix 1.

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2	<p>Ensure Committee Report contents and recommendations clearly state the legislative requirements that are relevant and have been followed in arriving at the proposed fees for the service, and ensure clarity over any discretion for Members to amend proposed fees.</p> <p>Arrange Member updates on setting Licensing fees and principles</p>	<p>IC/TM/ MH</p> <p>IC/MH</p>	<p>Autumn 2013</p> <p>Autumn 2013</p>	<p>Keep under review.</p> <p>Initial requirement is for the Licensing Manager to set this out in his report on fees – ie that the Council can only recover its reasonable costs of administration and issue and nothing beyond that. This allows for up to full cost recovery or subsidy if full cost recovery not intended eg to stimulate growth in trade.</p> <p>There is also a requirement to reintroduce any surplus or deficit into the following year(s) fees; and budget estimate information will be included in future fee setting reports.</p> <p>Some of this is addressed with an enhanced request to Legal Services to provide additional legislative background within their section of committee reports.</p> <p>There is also a requirement for the Deputy Section 151 officer to be clear in presenting proposed fees to Committee for approval that fees are calculated for full recovery of reasonable costs; and to advise the Committee regarding legal parameters when approving fees. A briefing is being arranged.</p> <p>It is proposed to provide Member briefings in this matter, which must include Chair of the Licensing, Scrutiny and Executive committees and Portfolio and Shadow Portfolio Holders.</p>	
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3	Produce analysis of 2012/13 outturn to demonstrate analysis of costs v income for taxi licensing [this will subsequently be an annual task].	GS	30/09/13	This will establish any over/under recovery on individual elements of the taxi budget, to be used to inform 2014/15 fee setting – see next item.	
4	Quantify over/under recovery and feed into relevant part(s) of fee setting process for 2014/15 (this will subsequently be an annual task)	PF/GS	30/10/13	The relevant proportion of over/under recovery related to taxi licensing will be incorporated into 2014/15 fee calculations later this year.	
5	Establish a cost code for taxi licensing	GS	01/11/13	The principle is established within the SeRCOP reporting guidelines that this can be done. This will enable greater transparency for the accounting of costs and income for this service. This will be established for 2013/14 financial year.	

**Key to officers:**

SW – Scott Weetch, Community Protection Lead  
 IC – Ian Carter, Licensing Manager  
 TM – Tonya Meers, Legal and Democratic Services Manager  
 PF – Paul Fitzgerald, Financial Services Manager  
 GS – Gill Stratford, Accountant  
 MH – Maggie Hammond, Strategic Finance Officer and Deputy Section 151 Officer

**Key to status:**

	Action is on target/no significant issues
	Action may miss target/issues identified
	Action is off target.
	Action is complete

*Correct as at 23<sup>rd</sup> August 2013  
 Author: Scott Weetch*