

ABERDEEN CITY COUNCIL

COMMITTEE	Licensing Committee
DATE	12 September 2017
REPORT TITLE	Review of Street Trader Policies
REPORT NUMBER	CG/17/087
CG LEAD OFFICER	Fraser Bell
REPORT AUTHOR	Lynn May

1. PURPOSE OF REPORT:-

- 1.1 To request that the Licensing Committee agree to the review of the policies and vary the standard conditions in relation to Street Trader Licences.

2. RECOMMENDATION(S)

2.1 That the Committee:-

- (a) approves the proposed amended draft schedule of conditions (Appendix 2) for issuing for consultation; and
- (b) instructs the Head of Legal and Democratic Services to consult the holders of Street Traders Licences and The Chief Constable, Police Scotland, on these proposals and in accordance with paragraph 10 of Schedule 1 of the Civic Government (Scotland) Act 1982 invite them to be heard at the next meeting of the Licensing Committee on 7 November 2017 regarding the terms of the proposals.

3. BACKGROUND/MAIN ISSUES / OTHER HEADINGS AS APPROPRIATE

- 3.1 Section 39 of the Civic Government (Scotland) Act 1982 provides that a street trader's licence is required for street trading by a person, whether on his own account or as an employee. This means that a licence is required for persons who are both employers and employees.

Street trading is defined as hawking, selling or offering or exposing for sale any article, or offering to carry out, or carrying out for money or money's worth

any service in a public place. It includes doing any of these things from a vehicle, a kiosk or a moveable stall not entered in the valuation roll.

For any activity which involves the sale of food, a street trader must have a Food Safety Certificate issued by the environmental health service of the Council.

- 3.2 The Licensing Committee at its meetings on 17 November 2010 and 23 March 2011 reviewed and updated the practices and procedures in relation to street traders licences. In particular this involved revoking the previous condition 10 which prohibited a street trader from engaging in street trading within 100 metres of any other licence holder or establishment or premises in which are sold or offered for sale any goods or articles or services of the same or similar class and description as those to be offered for sale by him, when operating out with a recognised market, and they also added a new condition 21 which prohibited street traders from engaging in hawking, selling or offering for sale any type of food and/or drinks within a 400 metre radius of the outer boundary of a school at any time. A copy of the updated schedule of conditions as agreed in 2011 is attached to this report (Appendix 1).
- 3.3. In relation to the aforementioned new condition 21 (Appendix 1), the Licensing Committee added this to the schedule of standard conditions, in 2011, for the holders of street traders licences because they had received complaints about street traders selling food near schools and there were both health and safety concerns about children leaving school to purchase items from these vans. They also considered that the Council had an obligation to discourage unhealthy eating in children.
- 3.4 A number of licensing authorities including Aberdeen City and North Lanarkshire have had a condition, similar to condition 21 above (Appendix 1), prohibiting street trading in the proximity of schools. In 2015 a number of licensed street traders in North Lanarkshire appealed against that Councils decision to vary their licences to impose a condition prohibiting them from operating within a distance of 250 metres of the perimeter of all secondary schools in the North Lanarkshire Area from 8.00am to 5.00pm on any school day during term time. The prohibition applied to snack vans selling or offering for sale hot or cold food, fish and chip vans and ice cream vans. On 27 November 2015 the Sheriff reversed the Councils decision to impose this condition. The sheriff's decision was reported in 2016 in the case of McCluskey v North Lanarkshire Council. The Sheriff held that the condition was ultra vires and the quality of food that consumers bought was covered by legislation to be found elsewhere and had Parliament intended to provide for the protection of consumers by means of conditions under the licensing system, that would have been set out in the Civic Government (Scotland) Act 1982 with regard to street traders and attempts to insert conditions might have effects for the customer which were entirely arbitrary. The court stated that child obesity was not a licensing purpose and neither was the promotion of school meals nor a ban on trading for the majority of the calendar year. The Court said that Parliament could not have intended local licensing authorities

to have the implied power to attach a condition with such a significant effect on the commercial contracts of street traders, regardless of the aim of the condition.

- 3.5 The scope of condition 21, in the current schedule of conditions (Appendix 1), is even wider than the North Lanarkshire Condition, in that condition 21 prohibits the sale of any type of food or drink within the 400 metre radius of a school at any time, not just during school hours or term time. North Lanarkshire shared the same motives for adding this condition, namely tackling childhood obesity and promoting healthy eating. Therefore given the very clear similarities between the two conditions and the Sheriff's decision in the case against the North Lanarkshire condition it is advised that condition 21 is ultra vires and should be revoked.
- 3.6 In terms of paragraph 10 of Schedule 1 of the Civic Government (Scotland) Act a licensing authority may at any time vary the terms of a licence, e.g. the conditions, on any grounds they think fit. In order to vary a licence the authority have to notify the licence holder and the Chief Constable of the proposed variation to be considered, giving them not less than 7 days notice; and give each of the persons notified an opportunity to be heard by the authority, at a specified meeting of the Licensing Committee to which they will be invited.
- 3.7 Therefore in order to revoke condition 21, and therefore vary the terms and standard schedule of conditions for holders of street traders licences (Appendix 1), the Licensing Committee would have to notify licence holders and the Chief Constable of this proposed variation and invite them to the next appropriate meeting of the Committee in order to hear any representations or consider any written responses.
- 3.8 Licence holders would have the right to appeal any decision to vary their licence conditions within 28 days, from the date of the decision. Therefore any amended schedule of conditions would not come into effect until 28 days from the date of that decision, or if an appeal is lodged, it would only come into effect if the appeal was abandoned or determined in favour of the licensing authority.
- 3.9 Condition 2 (Appendix 1) currently makes reference to Aberdeen City Council's Employment of Children Byelaws (made 18 October 2001) which provide that a child aged 14 years or over may engage in street trading in certain circumstances, otherwise the holder of a street trader's licence shall not be less than sixteen years of age. These byelaws have been updated and therefore the schedule of conditions requires to be updated to reflect this and now state, "Aberdeen City Council's Employment of Children Byelaws (made 14 April 2016)".
- 3.10 The Air Weapons and Licensing (Scotland) Act 2015 amended the Civic Government (Scotland) Act 1982. This included, in section 78, giving licensing authorities the additional sanction of revoking a licence. Therefore it is

proposed that the wording of condition 7b) (Appendix 1) requires to be amended to reflect this change and include the additional words “revoked or varied” after the word “suspended” where this already appears.

- 3.11 Conditions 11 and 14 in the current schedule of conditions (Appendix 1) both deal with the issue of litter which may result from the licence holders activity as a street trader in a public place. As the decision in the aforementioned *McCluskey v North Lanarkshire Council* case shows conditions must be for a licensing purpose only. Therefore these conditions regarding litter should only relate to litter which has accumulated as a result of the street trading in question and should not put a more onerous obligation on the licence holder to remove litter generally which may have accumulated as the result of other businesses. It is therefore proposed that the wording of condition 14 be amended to reflect this. It is further proposed that as conditions 11 and 14 both relate to litter it would be more appropriate if these were together in the schedule of conditions, and therefore the amended condition, formerly number 14, would now become condition 12 (Appendix 2).
- 3.12 It is proposed a new condition 21 be added in association with the existing condition 22 (Appendix 2). Both of these relate to the statutory duty of a licence holder to advise the licensing authority of any material change in circumstances affecting them, for example a change of address or being convicted of an offence. Although a licence holder is obliged in terms of paragraph 9 of schedule 1 to the Civic Government (Scotland) Act 1982 to provide this information, practically they often don't. By adding a requirement to advise of any change of name or address as a condition would seek to highlight and reinforce this duty to the licence holders and would assist in terms of administration and enforcement.
- 3.13 A copy of the new proposed schedule of conditions which includes the amendments detailed above is attached to this report (Appendix 2).

4. FINANCIAL IMPLICATIONS

- 4.1 The approval of the recommendations would require :-
- all Licence holders and the Chief Constable, Police Scotland to be written to and consulted and invited to attend a further meeting of the Licensing Committee, approximately 150 letters
 - copies of the new schedule of conditions to be produced issued to all street trader licence holders, approximately 150.
- There will therefore be a financial cost to the Licensing Team, Legal and Democratic Services in producing and issuing the above documentation. This expenditure will be contained within existing budgets.

5. LEGAL IMPLICATIONS

- 5.1 If Condition 21 of the standard schedule of conditions for street traders licences (Appendix 1) is not revoked, it is highly likely, as a result of the

decision in the McCluskey v North Lanarkshire case, that should the Council as licensing authority be legally challenged, either by appeal to the sheriff in respect of an application for a new grant of a licence or judicial review in respect of existing licence holders, any challenge would be successful as the condition is invalid.

6. MANAGEMENT OF RISK

- Financial

6.1 There are no direct financial implications arising from the recommendations of this report.

- Employee

6.2 There is no risk to employees arising from the recommendations of this report

- Customer/Citizen

6.3 There is no risk to customers/citizens arising from the recommendations of this report

- Environmental

6.4 There is no risk to the environment arising from the recommendations of this report.

- Technological

6.5 There is no risk to technology arising from the recommendations of this report.

- Legal

6.6 Implications as per 5.1.

- Reputational

6.7 As decision in the case of McCluskey v North Lanarkshire was made on 27 November 2015, the Council as Licensing Authority, require to take the actions recommended now to ensure their standard conditions now comply with current case law. Further delay could result in a similar legal challenge to the North Lanarkshire case and as a result reputational damage to the Council.

7. IMPACT SECTION

Economy

7.1 There will be no impact on the economy arising from the recommendations.

People

7.2 The proposals to vary and amend the schedule of conditions applicable to a street traders licence have a neutral impact on groups with protected characteristics and an impact assessment is therefore not required.

7.3 Therefore in order to revoke amend and vary the terms and standard schedule of conditions for holders of street traders licences (Appendix 1), the Licensing Committee would have to notify licence holders and the Chief Constable of this proposed variation and invite them to the next appropriate meeting of the Committee in order to hear any representations or consider any written responses.

Place

7.4 There will be no impact on the place arising from the recommendations.

Technology

7.5 There will be no impact on technology arising from the recommendations

8. BACKGROUND PAPERS

8.1 None

9. APPENDICES (if applicable)

9.1 Appendix 1 – The Current Schedule of Conditions applicable to a Street Traders Licence

Appendix 2 - The Amended Schedule of Conditions proposed for Street Trader Licences

10. REPORT AUTHOR DETAILS

Lynn May
Solicitor, Licensing
lynmay@aberdeencity.gov.uk
01224 523173

HEAD OF SERVICE DETAILS

Fraser Bell
Head of Legal and Democratic Services
frbell@aberdeencity.gov.uk
01224522084