

ABERDEEN CITY COUNCIL

COMMITTEE	Licensing Committee
DATE	7 November 2017
REPORT TITLE	Review of Street Trader Policies
REPORT NUMBER	CG/17/118
CG LEAD OFFICER	Fraser Bell
REPORT AUTHOR	Lynn May

1. PURPOSE OF REPORT:-

- 1.1 To request that the Licensing Committee consider the views of the holders of street trader licences, the Chief Constable and relevant consultees, who have been invited to attend the Licensing Committee meeting on 7th November, on the review of the policies and variation of the standard conditions in relation to Street Trader Licences.

2. RECOMMENDATION(S)

2.1 That the Committee:-

- (a) notes that all holders of Street Traders Licences, the Chief Constable, Police Scotland, and relevant consultees have, in accordance with Paragraph 10 of Schedule 1 of the Civic Government (Scotland) Act 1982, been notified of the proposed review and variation of conditions, as agreed by the Committee at their meeting on 12 September 2017, and been invited to attend and be heard at this meeting of the Committee;
- (b) considers the views of the holders of street traders licences, the Chief Constable, Police Scotland, and other relevant consultees on the proposed review and variation of conditions (Appendices 3 to 8);
- (c) thereafter approves the proposed amended draft schedule of conditions (Appendix 2); and
- (d) instructs the Head of Legal and Democratic Services to give written notice of the Committees decision to the holders of Street Traders Licences, The Chief Constable, Police Scotland, and other relevant consultees on the review and variation of conditions in accordance with paragraph 10 of Schedule 1 of the Civic Government (Scotland) Act 1982.

3. BACKGROUND/MAIN ISSUES

- 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 of Compliance issued by the Environmental Health service of the Council. Certificates of Compliance now last for a period of 3 years and a Certificate from any Local Authority in Scotland is valid in any other area of Scotland.

- 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. Consultees may submit their responses in writing prior to the Committee meeting and if available these will be included with the report, or if too late will be presented to the Committee at their meeting. However the Act specifies that consultees should be invited to attend a specified meeting of the Committee and be given an opportunity there to be heard and express their views on the proposed variation. Therefore consultees views/responses may not be known until the Committee meeting commences.
- 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. Other relevant consultees have also been consulted regarding this report and have been invited to attend, for example the Council's Roads Service, Education and Children's Services, Communities Housing and Infrastructure and the Environmental Health Service.

- 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 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)". (Appendix 2)
- 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) requires to be amended to reflect this change and include the additional words "revoked or varied" after the word "suspended" where this already appears. (Appendix 2)
- 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 The Licensing Committee at its meeting on 12 September 2017 agreed to consult on the proposed variation of the licence conditions as outlined above (and Appendix 2) and in accordance with the procedure in paragraph 10 of schedule 1 of the Civic Government (Scotland) Act 1982 invite the relevant parties to attend and be heard at the Committee's meeting on 7 November 2017.

3.14 In addition the Committee on 12 September 2017 also agreed that they wished to consult holders of street traders licences, the Chief Constable and relevant consultees including the Council's Roads Service on the proposed variation to the current condition 9 of the Schedule of Conditions (Appendix 1) to read instead:-

“The stance from which a street trader hawks, sells or offers or exposes for sale their goods requires to be moved daily at the end of trading”(Appendix 2)

3.15 The current condition 9 of the Schedule of conditions (Appendix 1) already states that the stance from which the licence holder trades **“shall be of a form that can be removed within a reasonable timeframe if so required upon reasonable request by a relevant person”**. Therefore the variation, as proposed, to move the stance at the end of each trading day would have significant implications for licence holders and the Roads Service of the Council. Therefore the Roads Service will also be included in this consultation and be invited to attend the Committee meeting on 7 November 2017. An initial consultation with the Roads service has already taken place and a copy of their written response is attached to this report (Appendix 3)

3.13 A copy of the new proposed schedule of conditions which includes the amendments detailed above (which are highlighted in bold), and which has been issued for consultation, 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 advised of the decision to vary the schedule of conditions, approximately 150 letters
- copies of the new schedule of conditions to be produced and 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.

In relation to the proposed variation to condition 9, requiring traders to move their stance at the end of each trading day, it should be noted that licensed traders require to pay a fee and enter into an agreement and also obtain a permit from the Roads Service of the Council. The Roads Service check and approve the location of stances before issuing these permits and agreements and are consulted on street trader applications by the Licensing Team. If a trader was required then to move at the end of each trading day, and as there are no parking restrictions in the areas approved for such traders, the trader may not be able to return to his approved stance the next day potentially causing loss of business or then moving to another site which has not been assessed and approved. Given that the Council has approved and entered into agreements with licensed traders for these stances and required payment of a fee for their use, the variation of this condition may breach this agreement and result in legal action against the council.

6. MANAGEMENT OF RISK

- Financial

- 6.1 There may be financial implications arising from the recommendations of this report in relation to the proposed changes to condition 9 if agreed. We have already initially consulted the Council's Road's Service on the proposed change to this condition and they advise that to ask traders to leave their stance each day and return to their stance the following day could involve issuing TTRO's for each site which would involve a lot of work and expense for that service in relation to pitches that occupy high demand sections of carriageways within industrial areas.

Street traders require to enter an agreement and to pay the Roads Service of the Council a fee in relation to their site. By being asked to move they may not be able to return to their site the next day, as it had been taken by someone else, which may result in loss of business. This could potentially lead to claims against the council in respect of such losses as the traders had already paid a fee for permission to trade from that site. This may also result in the loss of site fees.

- Employee
- 6.2 There is no risk to employees arising from the recommendations of this report
- Customer/Citizen
- 6.3 The variation of condition 9, requiring licensed traders to move from their stance at the end of each trading day, may result in them not being able to return to their stance which has been assessed and approved by the Council. Licensed traders may then move to stances which have not been assessed and approved potentially leading to the following risks:-
- in terms of Road Safety, causing a danger for citizens visiting the stance and other road users
 - to citizens at home/in residential areas from stances having to be relocated each night, leading to an impact on parking and amenity
 - to licensed traders through loss of business from not being able to potentially return to their approved site on the next trading day
- Environmental
- 6.4 The variation of condition 9, requiring licensed traders to move from their stance at the end of each trading day, may result in them not being able to return to their stance which has been assessed and approved by the Council. Licensed traders may then move to stances which have not been assessed and approved and their operation from there may have implications for the environment.
- Technological
- 6.5 There is no risk to technology arising from the recommendations of this report.
- Legal
- 6.6 Implications as per paragraph 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.
- 6.8 As the Council requires licensed traders into enter agreements with the Roads Service, pay a fee and obtain a permit for their approved

stance, to then amend condition 9 and require them to leave that stance each night and possibly not be able to return to it the next day, could be a breach of that agreement and lead to legal action against the Council for the breach and any resultant loss of earnings. Such breach of these agreements and any legal proceedings could result in 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 (Appendix 2) and invite them to the next appropriate meeting of the Committee in order to hear any representations or consider any written responses. Relevant Consultees will also be included in the process. Due to the proposed variation to condition 9 the Roads Service of the Council has also been consulted.

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 for Street Trader Licences

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

Appendix 3 - Consultation response from the Roads Service, Aberdeen City Council

Appendix 4 - Consultation response from Service Manager, Assets & Finance, Education & Children's Services, Aberdeen City Council

Appendix 5 - Consultation response from Facilities Manager, Communities, Housing & Infrastructure, Aberdeen City Council

Appendix 6 – Consultation response from Environmental Health Service, Aberdeen City Council

Appendix 7 – Consultation response from Mr E Scholes, Street Trader Licence Holder

Appendix 8 – Consultation response from Zhuqin Chen, Street Trader Licence Holder

10. REPORT AUTHOR DETAILS

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