

**Case 200802232: The City of Edinburgh Council**

**Summary of Investigation**

**Category**

Local government: licensing

**Overview**

The complainants (Mr and Ms C) operate a movable food unit (the Unit) in an area (the Area) where The City of Edinburgh Council (the Council) issue street traders' licences. When Mr and Ms C applied to renew their annual street trader's licence, they were told that the street trading policy for the Area had changed and that only temporary licences could be issued. Mr and Ms C complained that the Council had changed the street trading policy without consulting them. They also complained that they had been charged non-domestic rates as well as street trader's licences, contrary to street trading legislation, and that the handling of the temporary licence applications was inadequate. Mr and Ms C were also unhappy about the Council's delay in dealing with their complaint.

**Specific complaints and conclusions**

The complaints which have been investigated are that:

- (a) the Council changed their policy regarding street traders' licensing in the area where Mr and Ms C operate without consulting them (*upheld*);
- (b) Mr and Ms C were inappropriately charged for both non-domestic rates and street trader's licences (*upheld*);
- (c) the handling of the temporary licence applications was inadequate (*upheld*); and
- (d) the Council delayed unreasonably in dealing with the complaint (*upheld*).

**Redress and recommendations**

The Ombudsman recommends that the Council:

- (i) ensure that full written consultation is undertaken with those directly affected by any proposed change to street trading policy in future;
- (ii) remind staff involved in drafting reports to Council committees of the importance of ensuring that accurate information is presented;

- (iii) reimburse Mr and Ms C for the cost of the two temporary licence applications and take steps to ensure that information provided to applicants is clear and accurate;
- (iv) ensure that when officers are making a recommendation to the Licensing Sub-Committee to refuse a temporary licence application, the reasons for recommending refusal are clear and consistent;
- (v) ensure that, when a decision is made to refuse a temporary licence application under paragraph 5(3)(d) of Schedule 1 of the 1982 Act, the Council provides an adequate explanation for the 'good reason' which justified the refusal to the applicants;
- (vi) remind staff within the licensing department of the Council's stated timescales for responding to complaints and the importance of keeping the complainant updated if there is to be a delay in responding to a complaint; and
- (vii) apologise to Mr and Ms C for the failings identified in this report.

The Council have accepted the recommendations and will act on them accordingly.

## **Main Investigation Report**

### **Introduction**

1. Mr and Ms C are owners of a mobile food unit (the Unit) which they operate in an area (the Area). In the past, they were granted annual street trader's licences by The City of Edinburgh Council (the Council) for the Unit to be located on a particular section of pavement on a street in the Area (known as Stance 2).

2. Mr and Ms C had an annual street trader's licence which covered the period 1 July 2007 to 30 June 2008. In September 2007, the Council began improvement work in the Area and Mr and Ms C moved their Unit from Stance 2 to various locations within the Area to accommodate the work. In June 2008, when Mr and Ms C applied to renew their annual street trader's licence, they were informed that the street trading policy for the Area had changed and that the Council were now only issuing temporary six-week licences. The Council also explained to Mr and Ms C that, because they were paying non-domestic rates for Stance 2, under the relevant street trading legislation, the Council could not accept an application for any street trader's licence for Stance 2. Nevertheless, Mr and Ms C were told that they still required a temporary street trader's licence to operate the Unit.

3. Mr and Ms C were unhappy because they felt they had not been properly consulted about the change in policy; that they should not have been required to have a street trader's licence (permanent or temporary) for Stance 2 because they paid non-domestic rates; and that various aspects of the Council's handling of their temporary licence applications were inadequate. They also raised concerns about the time taken by the Council to deal with their complaint. Following completion of the Council's complaints procedure, on 28 November 2008, Mr and Ms C raised a complaint with the Ombudsman.

4. The complaints from Mr and Ms C which I have investigated are that:

- (a) the Council changed their policy regarding street traders' licensing in the Area without consulting them;
- (b) Mr and Ms C were inappropriately charged for both non-domestic rates and street trader's licences;
- (c) the handling of the temporary licence applications was inadequate; and
- (d) the Council delayed unreasonably in dealing with the complaint.

## **Investigation**

5. In investigating the complaint, a member of my staff reviewed the correspondence, made written enquiries of the Council and interviewed relevant Council officers: two senior solicitors (Solicitor 1 and Solicitor 2) who were involved in the licensing aspects of the complaint and a project manager (the Project Manager) who oversaw the redevelopment work in the Area. A member of my staff met with Ms C. I have also considered any relevant legislation and contacted Lothian Valuation Joint Board (LVJB) for further information on non-domestic rates.

6. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr and Ms C and the Council were given an opportunity to comment on a draft of this report. Abbreviations are set out in Annex 1. A chronology of significant events and details of relevant legislation can be found at Annex 2 and 3 respectively.

### **(a) The Council changed their policy regarding street traders' licensing in the Area without consulting them**

7. On 7 November 2007, a report regarding the impact of the redevelopment of the Area on the Council's street trading policy was put to the Licensing Sub-Committee of the Council's Regulatory Committee (the Sub-Committee). Mr and Ms C were aware of this report and raised concerns with Solicitor 1 that the report would be used by the Sub-Committee to decide whether or not to renew their licences. The report stated:

'[The Sub-Committee] will require to address the question of future street trading in [the Area] following redevelopment. In particular, [the Sub-Committee] will require to determine whether or not this type of activity is compatible with other projected activities for this area. This matter will be the subject of a future report and in the meantime, officers will continue to liaise and discuss with existing traders and local residents and businesses the recommendations to be made on future policy.'

8. The Sub-Committee noted the contents of the report. As a result of the report, Mr and Ms C felt reassured that they would be consulted regarding any recommendations on future policy.

9. On 6 June 2008, a report (the Report) about changes to street trading policy in the Area was put to the Council's Regulatory Committee (the Committee). The purpose of the Report was to update the Committee on the

possible impact of the improvement works and future plans for the Area and to seek the Committee's instructions in relation to the appropriate way forward regarding street trading in the Area. The Report referred to an events calendar and business plan (the Plan) which had been prepared by a third party. I have had sight of the Plan and have noted that it included a section on street trading in the Area and recommended to the Council that an Events Arena should be created within the Area which would 'mark the end of regular or annual licensing and that any Street Trader licences should be issued on a temporary basis only'. The Plan also referred to various stakeholder consultation exercises which had taken place as part of the primary research into the Plan. The Council have explained to my staff that it was not clear whether the consultation referred to in the Plan included consultation with Mr and Ms C.

10. The Report explained that the Plan had been prepared 'after extensive consultation with local residents, businesses and all interested parties'. The Report recommended that the Committee note its terms and the possible use of the Area in future and determine whether it wished annual licence applications to be accepted and processed for the Area or whether it would be appropriate to accept only temporary licence applications in the interim period (until the Council had reached a decision on an appropriate way forward for the Area). The minute of the Committee meeting of 6 June 2008 (the Minute) detailed that the Committee noted the Report and decided that only temporary licences should be granted for the Area. This represented a change in the Council's previous street trading policy for the Area, which had been that annual street trader's licence applications would be accepted.

11. The Council wrote to Mr and Ms C on 16 June 2008 to inform them of the change in street trading policy in the Area. As a result, Mr and Ms C's legal representative wrote to the Council raising concerns about the lack of consultation with Mr and Ms C regarding the change. The Council's initial response dated 2 July 2009 stated:

'I understand that your client [Mr and Ms C] has been party to the many consultations and discussions which have been ongoing during the year in relation to the future use of [the Area].'

12. In the Council's further response dated 25 July 2009, it was stated:  
'The Council Solicitor is disappointed that [Mr C] has not appreciated this [that it may not be possible for the future street trading in the Area to

continue in the manner which was previously enjoyed], despite the extensive consultation which has been on-going over the last year.'

13. As part of my investigation, my staff spoke with Solicitor 1 at the Council, who provided some general information about whether the Council had a duty to consult when there were changes in street trading policy. He explained that the Council had previously received legal advice on the requirement for consultation which referred to the case, *London Borough of Tower Hamlets & Anr v Sherwood & Anr*<sup>1</sup>. This English court case indicated that, if the Council were making changes to street trading policy in an area, consultation with affected street traders was required and alternative locations should be offered. The Council had employed this reasoning in the past when they made changes to street trading policy in other areas. As part of that consultation, they had written to affected street traders explaining the changes and asking for written representations. I have had sight of documents relating to this previous consultation exercise, which took place in 2003 to 2004.

14. In their written responses to my enquiries and at interview, the Council maintained that they did consult with Mr and Ms C and that, on numerous occasions, Mr and Ms C were made aware of the proposed policy change, prior to the decision of 6 June 2008.

15. The Council explained that Mr and Ms C, in common with all other licensed traders, had been involved in meetings and had discussions with Council officers, including the Project Manager. The Project Manager explained to my staff that numerous consultation meetings regarding the design plans for the Area had been held between June 2005 and throughout 2006. However, I have not seen evidence to suggest that this included any specific indication that there were going to be changes in street trading policy once the redevelopment work was complete.

16. The Project Manager also explained that he held a meeting with traders in the Area, including Mr and Ms C, in August 2007, before the improvement

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<sup>1</sup> [2002] EWCA Civ 229

works started, to inform them of the intended construction programme<sup>2</sup>. At that meeting, the Project Manager maintained that Mr and Ms C were informed that, following the redevelopment work, the old stances (including Stance 2) would no longer exist. He explained that, as a gesture of goodwill, they (the Council and the developers) undertook, where practical, to maintain a business opportunity for the street traders during the work, allowing twelve months for businesses to make alternative trading arrangements. The Project Manager confirmed that there is no written record of these meetings/discussions.

17. Mr and Ms C were also asked, in summer 2008, to take part in a three-month pilot project to assess the potential benefits of a semi-permanent kiosk in the Area. They also gave a presentation to a group of Council representatives on 14 February 2008 regarding the concept of a semi-permanent kiosk. The Project Manager suggested to my staff that this showed that Mr and Ms C were aware that there were going to be changes to street trading policy in the Area.

18. Mr and Ms C were also part of the Area Forum which the Project Manager attended. The Area Forum is a group of local representatives including the Area's Traders Association, the Community Council, residents, local traders and licensed traders. My staff understand from the Project Manager that Mr and Ms C represented street traders at the Area Forum, although their attendance was not regular. The Chair (a local Councillor) noted attendance but there was no formal minute of the meetings. Solicitor 2 explained to my staff at interview that it was the Area Forum that kept residents and traders informed of what was happening in the Area.

19. Solicitor 2 also explained that, in the past, the Council had undertaken extensive consultation when there had been a major review of street trading policy (I understand this to be the same consultation exercise referred to by Solicitor 1 – see paragraph 13). However, in this case, a similar level of consultation was not required because the policy change (see paragraph 10) was minor.

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<sup>2</sup> Following sight of email correspondence between Ms C and the Project Manager (which Ms C copied to me), there was reference to a meeting of September 2007, which could be either the meeting referred to here or a further meeting between Mr and Ms C and the Project Manager. Although the email correspondence did not given an indication of what was discussed, Ms C stated in one email that, following the meeting, they now felt 'very positive about the future'.

*(a) Conclusion*

20. A report to the Licensing Sub-Committee on 7 November 2007 gave an assurance that there would be continued liaison and discussion with existing traders regarding the recommendations to be made on future policy on street trading in the Area. Understandably, Mr and Ms C took from this that they would be informed about any proposals for changes to the policy.

21. Subsequently the Report to the Committee (see paragraph 10) also gave assurances that the Plan (which referred to the future of street trading in the Area), was prepared '... after extensive consultation with local residents, businesses and all interested parties'. Given that the Report was about the changes to street trading policy in the Area and that the Plan had referred to street trading, I consider that it is reasonable to assume that the Committee members would have taken this to mean that the affected street traders (including Mr and Ms C) had been consulted.

22. In response to Mr and Ms C's legal representative, the Council suggested that Mr and Ms C had been consulted about the proposed changes and were, therefore, aware of the changes prior to the Council's letter to them of 16 June 2008.

23. The Council have suggested to my staff that consultation took place with Mr and Ms C on a number of occasions (see paragraphs 15 to 18). Unfortunately, there is no evidence to support the Project Manager's account of his meeting with Mr and Ms C in August 2007 or any of the meetings or discussions prior to that. I do not consider that Mr and Ms C being asked to take part in a pilot project or presenting to a group of Council representatives amounts to consultation, as it is not clear whether the proposed changes were actually discussed with Mr and Ms C on these occasions. I also do not consider that the Council should have relied on the Area Forum to keep Mr and Ms C informed, when it is clear that this is a group of local representatives and not part of the Council.

24. It is clear that Solicitor 1 considered that the Council had a duty to consult Mr and Ms C prior to the changes in street trading policy for the Area. Also, the Council had undertaken formal consultation with street traders in the past when making changes to street trading policy (see paragraph 13). I am concerned that Mr and Ms C received nothing in writing from the Council prior to the decision of 6 June 2008, regarding the proposed change in street trading policy



in the Area. I consider that full written consultation should have been undertaken with Mr and Ms C, prior to the decision of 6 June 2008, which should have included clear information about the proposed changes.

25. There is no evidence to support the Council's position that Mr and Ms C were consulted about the change in street traders policy in the Area. I also consider that the Council officers provided inaccurate assurances to two Council committees that consultation would take and had taken place with existing traders/interested parties.

26. Therefore, I uphold this complaint.

*(a) Recommendations*

27. The Ombudsman recommends that the Council:

- (i) ensure that full written consultation is undertaken with those directly affected by any proposed change to street trading policy in future; and
- (ii) remind staff involved in drafting reports to Council committees of the importance of ensuring that accurate information is presented.

**(b) Mr and Ms C were inappropriately charged for both non-domestic rates and street trader's licences**

28. Mr and Ms C had occupied Stance 2 for many years. Their annual licence designated the location of the licence as Stance 2 and gave a description of that location. Mr and Ms C had an annual licence covering the period 1 July 2007 to 30 June 2008. In September 2007, they received notification from Lothian Valuation Joint Board (LVJB) that, with effect from 1 April 2007, the location of their Unit was entered on the valuation roll (ie, Stance 2) and they were, therefore, liable to pay non-domestic rates. The address on the valuation roll was altered at Mr and Ms C's request at that time to Stance 2, to reflect the description of the location on their street trader's licence.

29. To accommodate the improvement work in the Area, the Unit was not always positioned at Stance 2 during the period of the 2007 to 2008 annual licence (see paragraph 2). The Council had agreed with Mr and Ms C not to suspend their annual licence or require them to apply for new licences to cover each change of location. Mr and Ms C's annual licence was due to expire on 30 June 2008. The Council informed Mr and Ms C by letter (dated 16 June 2008) that the policy for street trading in the Area had changed (see paragraph 10). Mr and Ms C's legal representative wrote to the Council on

25 June 2008 raising concerns that, in line with street trading licence legislation (section 39 of the Civic Government (Scotland) Act 1982) (the 1982 Act) (see Annex 3), Mr and Ms C should not have been required to have a street trader's licence because they were paying non-domestic rates on Stance 2.

30. In their response to Mr and Ms C's legal representative dated 25 July 2008, the Council acknowledged that the 1982 Act applied to Mr and Ms C and that the Council could not license stances where commercial rates were paid. Therefore, the Council withdrew the renewal application for Stance 2 and refunded the licence fee. However, in an email from the Project Manager on 19 August 2008, Mr and Ms C were informed that 'Without temporary licences, you will not be able to trade in [the Area]'. Mr and Ms C emailed various officers at the Council regarding their situation. The Project Manager responded on 27 August 2008 explaining that the situation was clear and that temporary licences were required. This was followed up by a letter from the Council on 28 August 2008 which explained that temporary licences were required because the previously identified stances within the Area no longer existed. At interview, the Project Manager showed my staff a diagram of the Area with details of where the Unit was located from July 2008 until December 2008. From early September 2008<sup>3</sup> until late December 2008, it is clear to me that the Unit was in a position which could fall within the Council's description of Stance 2, although I am aware it was not on the exact spot that the Unit had originally occupied prior to the redevelopment works.

31. Mr and Ms C raised their concerns as part of their formal complaint to the Council, dated 28 August 2008. They were unhappy that the Council were using the fact that they paid non-domestic rates for Stance 2 to refuse to accept the annual licence application, yet required them to have a temporary licence by suggesting that the old stances no longer existed. The Council's response, dated 24 September 2008, explained that the payment of non-domestic rates precluded the requirement to hold a street trader's licence<sup>4</sup> and for that reason, Mr and Ms C no longer required a street trader's licence. However, the response also explained that the Council would accept temporary street trader's

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<sup>3</sup> The Project Manager has indicated that the Unit moved in early September 2008 but I understand, from some of the correspondence copied to me from Ms C, that the Unit could have actually have moved in early August 2008. In the absence of any definitive evidence to support either date, I have used the later date of early September 2008 as being the point when the Unit moved.

<sup>4</sup> It is my understanding that this is any licence, temporary or permanent.

licence applications, provided the dates and location had been approved by the developers. Mr and Ms C remained unhappy following this response and progressed their complaint to the next level of the Council's complaints procedure. The Council's response of 24 November 2008 stated:

'... it is an offence to trade in [the Area] without a valid street trading licence. Any attempt to do so could lead to appropriate enforcement action being taken.'

32. Acting on the Council's advice, Mr and Ms C applied for two temporary street trader's licences covering the periods 1 September 2008 to 12 October 2008 and 29 October 2008 to 10 December 2008. The first licence application was granted and the second was refused<sup>5</sup>. In both applications Mr and Ms C defined the area on which their Unit was to be located as Stance 2 (the same location they had operated from for many years prior to the redevelopment work in the Area). The first temporary licence, which was granted by the Council, also defined the location of the licence as Stance 2.

33. In response to my written enquiries, the Council explained that there was no refund once the licence had been issued and a licence could not be surrendered for part of a year in order to get part of the fee back. When Mr and Ms C applied for renewal of their annual licence in June 2008, the application fee was returned to them. The Council explained that the temporary licences did not relate to the stances on the valuation roll and, therefore, fees were due for the temporary licences. At interview, Solicitor 1 explained to my staff that Mr and Ms C had been on and off the valuation roll over the period in question (see paragraph 34). However, for any complete licensing period that Mr and Ms C were on the valuation roll for Stance 2 and the Unit was located at Stance 2, they should not have required or been charged for a street trader's licence for Stance 2.

34. As part of the Ombudsman's office enquiries, my staff contacted LVJB, firstly, to confirm the dates when Mr and Ms C were on the valuation roll and, secondly, to enquire about their policy for entering mobile units on the valuation roll. LVJB checked their records and confirmed that Mr and Ms C were on the valuation roll at Stance 2 with effect from 1 April 2007 and were removed with effect from 1 September 2007. Mr and Ms C were entered on the valuation roll

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<sup>5</sup> There is no requirement on the Council to refund a fee when a licence is refused, which is made clear in the guidance notes accompanying the licence application forms.

at Stance 2 again on 1 August 2008 following a telephone call from Mr C informing LVJB that Stance 2 was again in use.

35. LVJB also explained that, even if a unit has a street trader's licence, this does not prevent it from being entered on the valuation roll, provided that the permanency rules are met. If a kiosk or unit does not remove from site and it has a degree of permanency (normally three months or more), then it will be entered on the valuation roll. This is reflected in the LVJB practice note 'Valuation of Roadside Snack Bars (& Similar)', which I have had sight of. Whether the permanency conditions are met is decided by LVJB (not by the Council or the traders themselves) and is done by observation. This was how Mr and Ms C came to be entered on the valuation roll. More recently, LVJB have asked the Council to provide them with a list of street trader's licence holders and LVJB will then make a decision regarding permanency.

36. As part of the Council's standard conditions of a street trader's licence, the licence holder normally has to remove their unit at the end of trading hours. Mr and Ms C had taken legal advice in the past which had resulted in the Council altering this condition for them so that they only had to remove the Unit every month, rather than every day. At interview, Solicitor 1 explained to my staff that the Council took the word of the licence holder that the removal conditions would be complied with and that any contravention of the conditions would be discovered through complaints by members of the public. He explained that there are no Council officers currently ensuring that the removing condition of the street trader's licence is adhered to.

*(b) Conclusion*

37. Mr and Ms C paid non-domestic rates for Stance 2 between 1 April 2007 and 1 September 2007. During that time, Mr and Ms C were granted the renewal of their annual street trader's licence which ran 1 July 2007 to 30 June 2008. It is clear to me that the annual licence was properly required in July 2007 because Mr and Ms C were only informed of their entry on the valuation roll in September 2007. Although it is evident from the 1982 Act that Mr and Ms C should not have required a street trader's licence while they were on the valuation roll<sup>6</sup>, they did require one for the period they were not on the

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<sup>6</sup> It is notable that it is not clear whether, during the time that Mr and Ms C were on the valuation roll, this conferred occupancy rights for Stance 2. The Council have indicated that Mr and Ms C

valuation roll. It is also clear to me that, over the time covered by the annual licence, Mr and Ms C were moving around the Area and, therefore, away from the location entered on the valuation roll – Stance 2. Therefore, in light of this, I do not consider that Mr and Ms C are entitled to any refund of the annual licence fee.

38. The Council have argued that the previous stances in the Area (including Stance 2) no longer existed and this was why Mr and Ms C required temporary licences. However, I am satisfied that the description of the location of Stance 2, as well as the reference to Stance 2 in Mr and Ms C's temporary licence application forms and the temporary licence which was granted, makes it clear that the temporary licences were for the same location as had previously been occupied by Mr and Ms C as Stance 2. It is clear to me from the information provided to my staff at interview from Solicitor 1 (see paragraph 33) that, while the Unit was positioned on Stance 2 and Mr and Ms C were on the valuation roll for Stance 2 (which they were for both periods of the temporary licences), they should not have required or been charged for temporary street trader's licences. Therefore, I consider Mr and Ms C were inappropriately charged for two temporary licences and are entitled to a refund for the cost of the temporary licence fees.

39. I therefore uphold this complaint, given that Mr and Ms C were inappropriately charged for two temporary licences.

40. I also consider that the information provided by the Council to Mr and Ms C regarding the requirement for them to have a temporary licence was contradictory and unhelpful. On one hand, they were being told that they could not have an annual licence for Stance 2 because they were paying non-domestic rates. On the other hand, they were told that if they did not get a temporary licence, they could not continue to operate and could face enforcement action. Understandably, this left Mr and Ms C in a very confusing and uncertain situation.

41. It appears to me that this situation arose as a result of LVJB entering Mr and Ms C on the valuation roll because they deemed the Unit to have the required degree of permanency (see paragraph 35). The Council do not

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should have had a lease for the site during the time they were on the valuation roll. It has not been necessary to explore this point further to reach a conclusion on this head of complaint.

proactively enforce the removal condition (whether standard or amended) and it is my understanding that, by not removing the Unit regularly, this created the degree of permanency required for Mr and Ms C to be entered onto the valuation roll.

*(b) Recommendation*

42. The Ombudsman recommends that the Council reimburse Mr and Ms C for the cost of the two temporary licence applications and take steps to ensure that information provided to applicants is clear and accurate.

**(c) The handling of the temporary licence applications was inadequate**

43. Aside from the complaint that Mr and Ms C should not have required a temporary licence (see head of complaint (b) above), Mr and Ms C also raised concerns about the handling of their applications for temporary street trader's licences. In particular, they felt that temporary licences were not appropriate for their business because the normal conditions for temporary licences were altered or ignored in their case and that temporary licences were more suitable for short term traders, for example, during the Edinburgh Festival. They also considered that there was an unreasonable delay in the Council reaching a decision regarding the temporary licence applications. They felt that the Council had behaved in an arbitrary way in refusing their second temporary licence application because the same objections were put forward for both the first and second applications, yet the first application was granted and the second was refused.

44. Prior to their first temporary licence application, Mr and Ms C raised various concerns with the Council about the requirement for them to have a temporary licence. They explained that, because the temporary licence fee was per person, the cost of the licence would be considerably higher than they were paying for their annual licence (which is per unit, rather than per person). The time of year (September) was a traditionally quiet time of year for them and, therefore, they would be unlikely to be able to cover the cost of the licence. Following discussion between the Project Manager and Solicitor 2, the requirement for each individual person to have a temporary licence was altered for Mr and Ms C so that the fee was per day and not per person<sup>7</sup>.

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<sup>7</sup> It appeared that the requirement to have a break in the period between applications was also agreed to be ignored, however, in reality, there was a period of approximately two weeks between the first and second application.

45. Mr and Ms C made their first application for a temporary licence on 28 August 2008 to cover the period 1 September 2008 to 12 October 2008. On 23 September 2008, the City Development Department of the Council raised two objections to the granting of the licence due to:

- '1. The ongoing streetscape works, and
2. The ongoing programme of events for [the Area] which this application may or may not interfere with.'

46. The Council contacted Mr and Ms C on 23 September 2008, requesting their comments within 14 days. The letter enclosed details of the objection from the City Development Department. On 9 October 2008, Mr C replied with their comments explaining that the application was made with the consent of the Project Manager. The application was granted on 14 October 2008.

47. Mr and Ms C made their second application for a temporary licence on 26 October 2008 to cover the period 28 October 2008 to 10 December 2008. On 27 November, the City Development Department raised two objections to the granting of the licence due to:

- '1. The ongoing streetscape works, and
2. The ongoing programme of events for [the Area] which this application may or may not interfere with.'

48. I have also had sight of a further objection to this application from the Roads Services Department of the Council which stated that:

'I have an objection to the granting of any permanent licence as the area is currently being redeveloped. A decision is yet to be made where stances for temporary street traders may be located. I recommend that no permanent street trader's applications be considered in [the Area] until after the construction work is completed, however any temporary licence should only be granted so as not to conflict with the ongoing works in [the Area].'

49. The Council contacted Mr and Ms C on 27 November 2008, requesting their comments within 14 days. The letter enclosed details of the objections from the City Development Department. It is not clear why Mr and Ms C were not sent the objection from the Roads Services Department.

50. On 6 December 2008, Mr C replied on behalf of himself and Ms C with their comments, explaining that this temporary application followed their previous temporary application and that exactly the same objections were raised and, therefore, their previous comments (see paragraph 46) held true. Mr and Ms C had contacted the Council's events team who had no objections to their presence and they were willing to move around to accommodate any special events. The application was refused and Mr and Ms C were informed of this by letter on 15 December 2008. The letter explained that the application had been refused in terms of paragraph 5(3)(d) of Schedule 1 of the 1982 Act, which is that 'A licensing authority shall refuse an application to grant or renew a licence if, in their opinion ... there is other good reason for refusing the application.'

51. In response to my staff's enquiries regarding the suitability of a temporary licence for Mr and Ms C's business, the Council explained that a temporary licence suggested that there was some question mark over either the viability of the trading stance or its long term future, or was only required for a short time or specific event. The Council explained that there was no right of appeal against the refusal of a temporary licence which was supported by the terms of the 1982 Act.

52. In response to my enquiries regarding the delay in processing the temporary applications, the Council explained that these applications normally take four to six weeks to process and that, therefore, they did not take an unreasonable length of time to consider the applications. At interview, Solicitor 2 explained that the Council normally advise applicants to allow four weeks to process the application and that before the application can be decided, it has to be circulated to various departments in the Council and to the Chief Constable. The guidance notes accompanying the application form state that, to ensure timeous processing of applications, they should be submitted a minimum of six weeks before the required commencement date.

53. Solicitor 2 explained to me that both applications were decided by the Sub-Committee. In reality, this is two Councillors on a rota system who are members of the Sub-Committee. I have had sight of the document relating to the second temporary licence application which was passed to the rota



members of the Sub Committee<sup>8</sup>. The document explained that, under the Council's Scheme of Delegation to Officers, the Director of Corporate Services can grant, attach conditions to or refuse applications for licences under the 1982 Act, subject to the agreement of two members of the Sub-Committee and there being no objection or representation from a member of the public or Chief Constable. In the first application, the officers recommended that the application be accepted and two members agreed to this. In the second application, the officers recommended refusal 'on the basis of adopted policy' and two members agreed to this.

54. My staff made enquiries to Solicitor 2 regarding the reference to 'adopted policy'. Solicitor 2 explained that the adopted policy was the Report and Minute of the Committee meeting of 6 June 2008, where it was decided that only temporary licences would be considered for the Area (see paragraph 10).

*(c) Conclusion*

55. In considering this aspect of Mr and Ms C's complaint, I have borne in mind that Council officers had to work within the terms of the policy that had been agreed by the Committee (ie, that only temporary licences would be issued for the Area). Therefore, I consider that whether or not this type of licence was appropriate for Mr and Ms C's specific business is irrelevant. The fact is that it was the only type of licence that Council officers were able to accept applications for, given the Committee's decision. I consider that the alterations that the Council made to the normal conditions of the temporary licence application (see paragraph 44) were made to ensure that the conditions did not, in effect, prevent them from applying for a licence.

56. In relation to the time taken to process the application, I can understand the Council's position that the pre-decision process takes time. The difficulty in this case was that Mr and Ms C did not lodge their application early enough to allow the application to be processed in time for the start date of the application. However, I do understand this was through no fault of their own, as it is clear that they were being strongly encouraged to have a temporary licence in place immediately (see paragraph 30). Although it appears strange that an application could be decided after the application period has expired, I can understand why this happened in the particular circumstances of this case.

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<sup>8</sup> The Council have been unable to locate the corresponding document for the first application, however, I understand that the format would have been the same.

57. Turning to the decision to grant the first application and refuse the second application, given that, as far as Mr and Ms C were aware, the same objections were raised in both applications, there is an apparent inconsistency in the decision making process. The recommendation for refusal of the second application was on the basis of adopted policy which was the Report and Minute. The Report and Minute changed the Council's street trading policy to the effect that that only temporary licences would be issued in the Area. Mr and Ms C were making a temporary licence application, therefore, I find it difficult to understand how the recommendation to refuse could be justified purely by reference to the Report and Minute. It does not appear to me that enough consideration was given to the reasons for recommending refusal of the temporary licence application to ensure that they were clear and consistent, given the previous decision to grant an application despite the same objections being raised. Understandably, this led Mr and Ms C believing that the temporary licence applications were decided in an arbitrary manner.

58. From the information I have been provided, I have not seen any evidence to suggest that Mr and Ms C were given an adequate explanation regarding the reason for the refusal; in particular, why the second application had been refused when the first had been granted. I do not consider that reference to paragraph 5(3)(d) of Schedule 1 of the 1982 Act (see paragraph 50 and Annex 3) in the letter informing Mr and Ms C of the decision is satisfactory because it does not adequately explain the 'good reason' which justified the refusal, particularly given that their first application was successful despite the same objections being raised (as far as Mr and Ms C were aware). There was no opportunity for Mr and Ms C to challenge this, given that there is no right of appeal to the refusal of a temporary application (see paragraph 51).

59. Therefore, I uphold this complaint.

(c) *Recommendations*

60. The Ombudsman recommends that the Council:

- (i) ensure that when officers are making a recommendation to the Sub-Committee to refuse a temporary licence application, the reasons for recommending refusal are clear and consistent; and
- (ii) ensure that, when a decision is made to refuse a temporary licence application under paragraph 5(3)(d) of Schedule 1 of the 1982 Act, the

Council provides an adequate explanation for the 'good reason' which justified the refusal to the applicants.

**(d) The Council delayed unreasonably in dealing with the complaint**

61. The Council's complaints procedure (the Complaints Procedure) states that they aim to respond to complaints within ten working days and that, if the Council are unable to meet this timescale, they will let the complainant know why and what they are doing to progress the complaint. Mr and Ms C complained that the Council had failed to respond to their complaint within the required timescale.

62. Mr and Ms C raised a formal complaint at stage one of the Complaints Procedure on 28 August 2008. This complaint was responded to on 24 September 2008. As Mr and Ms C remained unhappy, they raised a complaint at stage two of the complaints procedure on 9 October 2008. On 6 November 2008, they had received no response and contacted the Council's Customer Services Department. As a result of this contact, Mr and Ms C were informed that their complaint had been escalated to stage three of the Complaints Procedure and that they should receive a response by 20 November 2008. The Council responded on 24 November 2008.

63. In response to my enquiries, the Council explained that the complexity of the issue meant that the complaints were not dealt with within an appropriate timescale and that this was due to the ongoing and developing situation in the Area and the continued involvement of Mr and Ms C.

64. When my staff spoke with Solicitor 2, who responded to Mr and Ms C's complaint at stage one of the Complaints Procedure, she explained it was her recollection that she was on annual leave in September 2008 and this may have caused the delay in responding at stage one.

65. At interview, Solicitor 1, who had responded to the complaint at stage two/three of the Complaints Procedure, explained to my staff that, because of resources, the complaint had not been looked at immediately when it had been received. It had not been actively investigated until the complaint had been progressed to stage three of the Complaints Procedure.

*(d) Conclusion*

66. It is clear to me that there was a delay in replying to both letters lodged by Mr and Ms C. Following the stage one complaint, the response was issued within 20 working days which, considering this was a complex complaint, was not unreasonable. I have concerns, however, that there does not appear to have been any update sent to Mr and Ms C from the department during this period to explain why there was going to be a delay in responding.

67. Following the stage two complaint, the response was not issued for over six weeks after receipt, despite the fact that the complaint had been escalated to stage three of the Complaints Procedure because of the delay in responding to the complaint. I have concerns that, again, there does not appear to have been any updates sent to Mr and Ms C from the department during this period. I consider that the length of time which Mr and Ms C had to wait for a response to their stage two complaint was unreasonable. However, it is clear to me from the information given to my staff by Solicitor 1 at interview (see paragraph 65) that the length of time taken to respond when the complaint was escalated through the Council's complaints procedure was because the complaint had not been actively investigated when it was received and not because of the complexity of the case or the continued involvement with Mr and Ms C, as was suggested by the Council (see paragraph 63).

68. Therefore, I uphold this complaint.

*(d) Recommendation*

69. The Ombudsman recommends that the Council remind staff within the licensing department of the Council's stated timescales for responding to complaints and the importance of keeping the complainant updated if there is to be a delay in responding to a complaint.

*General recommendation*

70. The Ombudsman recommends that the Council apologise to Mr and Ms C for the failings identified in this report.

71. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify him when the recommendations have been implemented.

**Explanation of abbreviations used**

Mr and Ms C	The complainants
The Unit	The moveable food unit operated by Mr and Ms C
The Area	The area of Edinburgh where Mr and Ms C operate the Unit
The Council	The City of Edinburgh Council
Stance 2	A particular section of pavement in a street in the Area defined and described by the Council as 'Stance 2'
Solicitor 1	A solicitor within the Licensing department of the Council
Solicitor 2	A solicitor within the Licensing department of the Council
The Project Manager	A project manager who oversaw the redevelopment works in the Area
LVJB	Lothian Valuation Joint Board
The Sub-Committee	The Licensing Sub-Committee of the Council's Regulatory Committee
The Report	The report to the Committee of 6 June 2008
The Committee	The Council's Regulatory Committee
The Plan	The events calendar and business plan for the Area prepared by a third party

The Minute	The minute of the Committee meeting of 6 June 2008
The 1982 Act	The Civic Government (Scotland) Act 1982
The Complaints Procedure	The Council's corporate complaints procedure

**Chronology of Significant Events**

1 April 2007	Mr and Ms C entered on the valuation roll at Stance 2
1 July 2007	Mr and Ms C's annual street trader's licence starts
1 September 2007	Mr and Ms C removed from the valuation roll at Stance 2
September 2007	Redevelopment works begin in the Area
June 2008	Mr and Ms C apply to renew their annual street trader's licence
30 June 2008	Mr and Ms C's annual street trader's licence expires
1 August 2008	Mr and Ms C re-entered on the valuation roll at Stance 2
28 August 2008	Mr and Ms C apply for first temporary licence at Stance 2 to run 1 September to 12 October 2008
August/September 2008	Mr and Ms C return to the location of Stance 2
14 October 2008	Mr and Ms C granted first temporary licence
26 October 2008	Mr and Ms C apply for second temporary licence at Stance 2 to run 28 October to 10 December 2008
15 December 2008	Mr and Ms C refused second temporary licence

## List of legislation and policies considered

### *The Civic Government (Scotland) Act 1982*

39. (1) Subject to subsection (3) below, a licence, to be known as a “street trader’s licence”, shall be required for street trading by a person, whether on his own account or as an employee.

(2) In this section “street trading” means doing any of the following things in a public place-

- (a) hawking, selling or offering or exposing for sale any article;
- (b) offering to carry out or carrying out for money or money’s worth any service,

to any person in the public place and includes doing any of these things there in or from a vehicle or in or from a kiosk or moveable stall not entered in the valuation roll except where it is done in conjunction with or as part of a retail business being carried on in premises abutting the public place.

### Schedule 1

5. (3) A licensing authority shall refuse an application to grant or renew a licence if, in their opinion-

(a) the applicant or, where the applicant is not a natural person, any director of it or partner in it or any other person responsible for its management, is either-

- (i) for the time being disqualified under section 7(6) of this Act, or
- (ii) not a fit and proper person to be the holder of the licence;

(b) the activity to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant or renewal of such a licence if he made the application himself;

(c) where the licence applied for relates to an activity consisting of or including the use of premises or a vehicle or vessel, those premises are not or, as the case may be, that vehicle or vessel is not suitable or convenient for the conduct of the activity having regard to-

- (i) the location, character or condition of the premises or the character or condition of the vehicle or vessel;
- (ii) the nature and extent of the proposed activity;
- (iii) the kind of persons likely to be in the premises, vehicle or vessel;
- (iv) the possibility of undue public nuisance; or



(v) public order or public safety; or  
(d) there is other good reason for refusing the application;  
and otherwise shall grant the application.

7. — (1) A licensing authority may grant a licence to have effect for such period not exceeding 6 weeks from its being granted as they may determine, and such a licence shall be known as a “temporary licence”.