Renfrewshire Council

To: **Regulatory Functions Board**

On: **19 November 2020**

Report by: **Director of Finance and Resources**

Heading: **Travelling Funfairs (Licensing) (Scotland) Bill: Call for Views**

1. **Summary**

1.1 The purpose of this report is to advise the Board of a Member's Bill which has been introduced in the Scottish Parliament in relation to the licensing of travelling funfairs and to seek approval of a proposed response to a call for views on the Bill.

2. **Recommendations**

2.1 It is recommended that the Board:-

2.1.1 Agree the terms of the proposed response to the call for views attached at Appendix 1; and

2.1.2 Otherwise note the contents of the report.

3. **Background**

3.1 The Council currently has a policy, similar to all other local authorities in Scotland, which requires funfairs in its area to be licensed as a type of public entertainment under the licensing provisions of the Civic Government (Scotland) Act 1982 ("the 1982 Act").

3.2 On 1st February 2018, the Board considered a report in relation to a consultation on a proposal for a Member's Bill by Mr. Richard Lyle MSP concerning the licensing of travelling funfairs. The Board agreed the terms of a response to that consultation at the meeting. In the response, the Council expressed concerns over some aspects of the proposal, particularly the likely impact on local communities whose ability to object to applications for licences appeared likely to reduce should the proposal for a Bill proceed and become law.

3.3 Following the previous consultation, Mr. Lyle obtained sufficient support to proceed with his proposal and a Bill, the Travelling Funfairs (Licensing) (Scotland) Bill, was introduced in the Scottish Parliament earlier this year. The Bill and its associated documents are published at https://beta.parliament.scot/bills/travelling-funfairs-licensing-scotland-bill#target1

The Bill aims to make the licensing of travelling funfairs quicker, simpler, cheaper and more uniform across council areas.

3.4 The Local Government and Communities Committee of the Parliament has recently launched a call for views on the Bill. The closing date for responses is 7th December 2020.

3.5 Officers have considered the terms of the proposed Bill and have a number of concerns, as detailed in a proposed response to the call for views attached at Appendix 1 to this report. The proposed response questions whether the Bill sufficiently balances the interests of funfair operators, on the one hand, with those of local communities, on the other. The response also questions the restricted grounds set out in the Bill upon which the Council would be able to refuse future funfair licence applications, the timescales within which applications would require to be considered, the proposed licence application fees and some of the procedural provisions in the Bill.

3.6 The Board is asked to approve the terms of the proposed response at Appendix 1, as recommended at Paragraph 2.1.1 above.

Implications of the Report

1. **Financial** – Nil.
2. **HR & Organisational Development** - Nil
3. **Community/Council Planning –** Nil
4. **Legal** – None at present. Should the Bill become law, there will be legal implications as detailed in the proposed response to the call for views, which is attached at Appendix 1.
5. **Property/Assets –** Nil

6. **Information Technology** – Nil

7. **Equality & Human Rights** -The Recommendations contained within this report have been assessed in relation to their impact on equalities and human rights. No negative impacts on equality groups or potential for infringement of individuals' human rights have been identified arising from the recommendations contained in the report because the recommendation in the report is simply to agree a response to the Bill. If required following implementation, the actual impact of the recommendations and the mitigating actions will be reviewed and monitored, and the results of the assessment will be published on the Council's website.

8. **Health & Safety** – Nil

9. **Procurement** – Nil

10. **Risk** – Nil

11. **Privacy Impact** – Nil

12. **Cosla Policy Position** – Nil

13. **Climate Risk** – Nil

List of Background Papers

None

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APPENDIX 1

Response to Call for Views

1. **The main aim of the Bill is to make the licensing system for travelling funfairs less restrictive and less expensive for applicants. Do you agree with this aim? Do you agree that the Bill will achieve this aim?**

A key way in which the Bill seeks to achieve this overall aim is to create a uniform approach, meaning that councils must all follow the same rules. (The current law allows councils to take different approaches to licensing travelling funfairs.) In answering question 1, you may wish to express a view on whether you agree that this is the best approach or that it is necessary to achieve the aims of the Bill.

Answer 1: While the aims of making any licensing system less restrictive and less expensive for applicants will appear attractive, we are concerned that the proposed Bill will not achieve a fair balance between the rights of funfair operators, on the one hand, and the interests of local communities on the other.

We are of the view that any licensing system designed to replace the existing procedures under the terms of the Civic Government (Scotland) Act 1982 ("the 1982 Act") should be sufficiently robust to allow concerns to continue to be raised by local residents and that they should in particular be able to question the suitability of a proposed location as well as issues in relation to the fitness and properness of applicants and health and safety. The Bill does not allow for refusal of a licence based on the unsuitability of a proposed fairground site, leaving any issues in this regard to be determined by way of licence conditions. The Bill appears in our view to overlook the potential interests of local communities in this regard in favour of fairground operators.

We would observe that the Bill, if enacted, will mean funfair operators being subject to less regulation than other licence holders regulated under the terms of the Civic Government (Scotland) Act 1982. In our experience, funfairs can generate more adverse interest from local communities than many other licensing activities under that Act and, as such, we are not persuaded that this area of licensing should be less regulated.

While we note the terms of the Financial Memorandum refer to an expectation of a reduction in administration as a result of a simplified funfair licensing system, we do not anticipate that lessened scrutiny of these applications will meet the expectations of local communities. Similarly, our Council has in the past received communications from other agencies, in particular the Health and Safety Executive, questioning why a fairground licence was issued at a particular site. We do not anticipate the expectations of residents or other such bodies, in relation to the licensing service we provide, to change following the introduction of a less robust, and less resourced (through reduced fees), licensing service.

We are also concerned that, in seeking to achieve its aims, the Bill provides for procedures and timescales which we think unrealistic and unworkable, as set out in the further responses to questions below. We are of the view that the procedures in the Bill will not allow for effective scrutiny of applications and that the timescales in the Bill will not allow for decision making in contentious cases by local Elected Members who are accountable to their constituents.

2. **Section 1 of the Bill sets out a definition of "travelling fairground". Amongst other things, this provides that it cannot go on in one location for more than 6 weeks. (If the plan is for it to go on for longer than this, the current licensing law will apply.) Do you think the definition used in section 1 is a good one?**

Answer 2: We have little comment to make in relation to the definition, other than to observe that, in confining the definition to funfairs of up to six weeks, a two tier system of local authority licensing is likely to apply to funfairs, with travelling fairgrounds being regulated under the proposed new legislation and other, static or longer term, funfairs continuing to be regulated under the terms of the Civic Government (Scotland) Act 1982.

3. **The Bill imposes a flat fee of £50 for a license application. This may be increased but only in line with "changes in the value of money" (section 5(2)(d) and (6)) In the vast majority of cases, this will be less than applicants are paying under the current law. Do you agree with this?**

Answer 3: We consider that the proposed fee, which is less than what applicants are currently paying in Renfrewshire, is unlikely to be sufficient to meet the expenses of local authorities in processing applications.

In relation to fees under the 1982 Act, these require to be set to ensure that the fees recovered are sufficient to meet the expenses of the local licensing authority, as acknowledged in the documentation accompanying the Bill. This should include the staffing and other associated costs relating to the licensing process. We do not see that this position should change.

We are not persuaded that the charging of a £50 fee by a small number of local authorities is a reliable basis upon which to conclude that such a fee represents a reasonable charge for processing and determining these applications in the manner envisaged in the Bill.

Should the consultation currently proposed in the Bill be extended to ensure the licensing process is inclusive of local communities, as we suggest in our further responses below, the fee should be adequate to ensure that local licensing authorities can also cover these costs.

4. Key provisions concerning a council's decision-making role are that—

a. The council must decide on an application within 21 days, otherwise it will be granted by default,

Answer 4a: We do not think this timescale in the Bill is workable. Having regard to the terms of the Policy Memorandum accompanying the Bill, this appears to have been based at least in part on two local authorities "usually" processing applications within 21 days. This in itself suggests that these local authorities may be unable to deal with some, perhaps contentious, applications within that period. In this regard, the Bill provides no flexibility to local authorities on its 21 day timescale, particularly with its deemed grant provision taking effect at the end of the period.

In Renfrewshire, applications for licences which have resulted in objections are currently referred to meetings of the Regulatory Functions Board, comprising Councillors. These meetings require to be arranged having regard to statutory periods provided for under the terms of the Local Government (Scotland) Act 1973. The timescale proposed by the current Bill is unlikely to be attainable in relation to these applications while maintaining the current level of transparency and local accountability.

We also consider that the timescale has no regard to the volume of other licensing matters dealt with by local authorities. While the number of funfair applications is likely to be low, the Bill will have the effect of prioritising funfair operators over other businesses who require a licence.

We also have the following matters to raise in relation to this timescale, and related, timescales under the provisions of the Bill.

We would suggest that, should the Bill proceed, it sets out a clearer procedural framework: currently, a 21 day determination period appears in the Bill, but there is no (shorter) timeline provided within that period by which police and fire authorities require to respond, should they wish to do so. This could result in responses from consultees arriving very late in the application process, with the deemed grant provision taking effect very shortly thereafter if it is not possible to decide the application in accordance with appropriate governance arrangements.

Further, there is an apparent conflict between the provision set out in clause 5(5)(b) of the Bill and clause 8 thereof. An application lodged later than 28 days before the start of the funfair, but at least 14 days before it, must be accepted unless the local authority is of the view that it is impracticable to consider and decide the application. However, the 21 day period for determination in terms of section 8 still appears to apply from the date a valid application is received (which could be only 14 days before the start of the funfair), as no other timescale for determination of such applications appears to be set out in the Bill.

We must take issue with information published in the Financial Memorandum accompanying the Bill which suggests that the processing time in Renfrewshire for

funfair applications is three months. We clarified our position in relation to this matter in response to the previous consultation on the proposal for a Member's Bill and in subsequent correspondence last year with Mr. Lyle's office. As we have indicated, while we request applicants to apply three months before their funfair, we will process- and have, frequently, processed over the years- applications for licences made thereafter. We have previously advised of an average processing time for temporary funfair licence applications of forty days.

b. It must allow a validly made application unless (a) the applicant is not a "fit and proper person" or (b) there are safety or health concerns about the funfair that would not be reasonably mitigated by attaching conditions to the licence,

Answer 4b: While we appreciate that the current temporary licence provisions under Paragraph 7 of Schedule 1 to the 1982 Act leave decision making to the broad discretion of licensing authorities without stipulating specific refusal grounds, this is not an unfettered discretion as case law over the years has made clear. We consider that any tightening of this discretion should be similar to the grounds for refusal set out in Paragraph 5(3)(a) to (d) of that Schedule. We do not understand why local authorities, whose Councillors best know their own areas and constituents, should not, in particular, be able to rely on a ground similar to that set out in section 5(3)(c) of that Paragraph- relating to the character/suitability of a proposed site, the extent of the proposed activity and public order and public nuisance considerations.

This ground of refusal currently applies to all licensed activities under Part II of the 1982 Act: from taxi drivers to street traders; from market operators to late hours caterers. It is unclear to us why such safeguards to protect the public should not apply in relation to funfairs, as this ground of refusal is the most likely ground of objection to be raised by a member of the public.

We note that conditions of licence could be attached under the terms of the Bill, having regard to public order and nuisance considerations. However, this would not deal with perceived concerns as to the fundamental unsuitability of a location: for example, due to proximity to neighbouring dwellings, the local Cenotaph, etc. The Bill, as drafted, would preclude refusal of an application based on such considerations, even where the event had previously been held and had given rise to public order and nuisance issues. Licensing authorities would be required to grant licences unless objections were received relating to either the character of the applicant or health and safety risks, irrespective of the views of residents in their area.

c. It may grant a licence subject to conditions (section 11 lists the type of conditions that may be imposed),

Answer 4c: We are of the view that any power to attach conditions to licences in a new licensing regime should replicate the scheme of the 1982 Act and should not be restricted. The 1982 Act allows "reasonable" conditions to be attached to a licence.

This is not an unfettered discretion, as the courts have made clear in case law decided under the 1982 Act.

d. It can only revoke a licence if (a) it becomes aware of a fact not previously shared that would have led it to decide the application differently or (b) if a condition or other provision of the licence is not met.

Answer 4d: We are not sure why the proposed grounds to revoke a licence in the Bill do not reflect the wider grounds set out in Paragraph 11 of Schedule 1 to the 1982 Act.

In addition to taking into account new information relating to the fitness and properness of the licence holder and information that licence conditions may have been breached, the grounds of suspension in our view should, like Paragraph 11, allow public nuisance and public order/ safety concerns to be taken into account when the possible suspension of a licence is being considered. It is our view that local licensing authorities should have power to suspend on such grounds. Otherwise, there will be no process by which urgent and serious public concerns of this nature may be addressed.

Are you satisfied that these provisions give councils the right level of control and choice over the licensing process?

Answer: No. We refer to our responses at Answer 4(a) to 4(d) and our general comments in Answer 1.

5. **We welcome views on any other aspect of the licensing system set out in the Bill that you consider important, for example, provisions on—**

a. What persons a council must consult before deciding any application (the Bill mentions two: the police, and the fire and rescue service),

Answer 5a: While we note the content of the Policy Memorandum, which states that only police and fire authorities are currently statutory consultees in relation to temporary licence applications, nonetheless the existing temporary licence provisions give Councils a discretion: they “may” grant a licence.

In exercising this discretion, there is nothing in Paragraph 7 of Schedule 1 to the 1982 Act to preclude Councils from having regard to concerns raised by members of the public. Renfrewshire Council has a long-standing policy that public entertainment licence applications involving live amplified music, circuses, funfairs and other outdoor events likely to cause public concern will be advertised in the press. This enables concerned members of the public to raise concerns in relation to an application.

It is our view that members of the public should not be excluded from the licensing process. In Renfrewshire, albeit we advertise these applications, the complaint which we receive periodically is that members of the public were not made aware of the funfair licence application. There is no neighbour notification process in the 1982 Act.

We are therefore of the view that there ought to be flexibility to allow relevant Council services and local Councillors and community councillors to be consulted on applications. We also think it is reasonable to give local licensing authorities the power to advertise applications for travelling funfair licences, as we do now, to allow members of the public to respond with any concerns they may have.

Should the Bill proceed, it could be amended to allow for advertising on Councils' web pages, which is not a procedure recognised under the terms of the 1982 Act (except at present, due to emergency and temporary amendments to the Act). This would avoid the inevitable lapse of time between an advert being placed and appearing in a newspaper, as well as the outlay incurred. The cost of advertisement in a newspaper accounts for a very substantial proportion, indeed most, of the licence fee for Renfrewshire set out in the Financial Memorandum accompanying the Bill.

Should there be two sites applied for as alternatives, relevant parties (as above) should be able to comment in relation to both sites. This would mean potentially double the consultation where two sites are involved.

The proposed £50 fee and proposed timescale for determining applications should be revisited, particularly to reflect the cost of the above processes. Reference is made to the earlier comments at Answer 3, above.

b. The matters that an applicant has to address in their application; for instance, whether you think anything important is missing,

Answer 5b: We would question the requirement for an application to be signed. This is not a requirement of liquor licensing legislation and the 1982 Act itself contains recently introduced provisions, in Paragraph 16A of Schedule 1, to allow other means of authenticating an application in place of signature.

c. The right of an applicant to appeal a council's decision to the Sheriff Principal,

Answer 5c: We are not sure why the appeal route would be to the sheriff principal.

With the exception of certain liquor licensing appeals, the procedure in other licensing legislation is usually to appeal to the sheriff.

Decisions on licensing applications, including those under the 1982 Act, currently fall within the discretion of local authorities and appeals are by way of statutory application to the courts to review a Council's decision, as in other areas of administrative law. Appeals are not by way of a rehearing into the facts. It is unclear why an appeal in relation to a funfair licence application should, in contrast, be permitted on matters of either fact or law.

We also note that the appeal provisions do not appear to provide any right of appeal for objectors.

We would add that we find the provisions in clauses 9(6), 11(6) and 13(4) of the Bill concerning. This requires Councils to provide a statement of reasons for an adverse decision, even when not requested by the applicant/ licence holder. We suggest this is resource-intensive for local authorities. A statement of reasons in relation to a decision is an important document and will be critical in any subsequent appeal against the decision on an application. We would suggest this should require to be prepared only where requested by parties, similar to the procedures set out in Paragraph 17 of Schedule 1 to the 1982 Act.

d. The criminal penalties set out in the Bill, for instance, where a person operates a travelling funfair without a licence or makes false statements in support of an application;

Answer 5d: We have no comment to make on this.

e. powers to enter and inspect a travelling fairground: who may do so and for what reasons.

Answer 5e: We have no comment to make in relation to these provisions of the Bill.

6. **The MSP who introduced the Bill thinks it will help protect the way of life of Scotland's showpeople, a distinct community associated with putting on travelling fairgrounds. Do you agree the Bill will make a difference in this way?**

Any other comments on the Bill's impact (positive or negative) on equalities, human rights and quality of life issues for local communities are also welcome as part of any response to question 6.

Answer 6: We have no comment to make in this regard, other than to repeat our view that local residents should not be excluded from the licensing process.

7. **What financial impact do you think the Bill will have – on operators of travelling fairgrounds, on councils, on local economies, or on others.**

Answer 7: Our primary concern is that the Bill proposes a licensing regime that will not safeguard the interests of local communities and indeed local businesses who may be opposed to a funfair licence application.

The proposed fee of £50 is in our view however also inadequate.

We are of the view that any change to funfair licensing requires to allow for effective scrutiny of applications and proper accountability in decision-making. A reasonable fee should be set to reflect this.

We would add that the loss of fee income stated in the Financial Memorandum, based on the difference between current licensing fees in Renfrewshire and the set fee proposed in the Bill, is misleading. As advised previously, the reason for the level of the fee in Renfrewshire is that the Council has an established policy that these

applications are advertised. The cost of the advertisement accounts for most of the fee charged, as stated at Answer 5(a).