

BEFORE THE CITY OF YORK LICENSING SUB-COMMITEE

IN THE MATTER OF AN APPLICATION FOR A NEW PREMISES LICENCE

FAWKES & THE TIGER 32 STONEGATE YORK YO1 8AS ('The premises')

SUBMISSION ON BEHALF OF THE APPLICANT

INTRODUCTION

1. The Applicant (T'Bridge Café Limited) is part of a group of companies and licensed premises run by a professional and well-regarded operator that has traded successfully in central York (4 premises), Leeds, Newcastle, Harrogate, Birmingham and Sheffield for a number of years. The brand is smart, up-market and has been free from any material problems of crime and disorder or public-nuisance since opening their first premises, Pivni, in York in 2007. That is so for three principal reasons:
 - a. It has a largely older and discerning customer base
 - b. They have experience trading bars and hybrid restaurant/bar offers
 - c. The management take the responsibility for ensuring that their premises know their customer-base and cater specifically to them, rather than widening their offer and risking a successful trading model.
2. It has acquired the premises of what was a Cath Kidston shop on Stonegate. However, prior to taking it on, the premises has been vacant since March 2020
3. The new licence application is designed to allow for the sale of alcohol (and late night refreshment from 23:00) from 08:00 to midnight every day, with the premises closing 30 minutes thereafter. Also, for an extension on New Year's Eve until the start of trade the following morning. A substantial suite of 27 conditions can be found at pages 43 and 44 of the hearing bundle.
4. The Applicant has engaged in constructive dialogue with the Police following submission of the application, albeit there has not been agreement on the 2 conditions requested by the police to amend those proposed in the application. Details of these conditions are set out in the police representation at pages 64 and 65 of the hearing papers and the dialogue between the parties is set out (in part) in the supplemental bundle provided by North Yorkshire Police.
5. It is to be noted that no other party has made representations.

POLICY

6. The premises are in York's Cumulative Impact Assessment Area- although outside of the red and amber zones. Accordingly, the relevant parts of the Statement of Licensing Policy are as set out below.

PROFILE OF YORK

7. Tourism and leisure are important industries for York, attracting over eight million visitors a year, who spend £765 million in the city. Over £125 million a year is spent on eating out and evening entertainment. Over 24,000 jobs in the tourism sector are dependent on these visitors...
8. This level of tourism can, however, present challenges to the city in balancing the requirements of residents against the economic benefits that tourism can bring.
9. Amongst the ambitions for tourism is the development of partnerships with businesses, stakeholders and residents, increasing York's position as a leading European cultural centre (combining a unique heritage with a modern outlook) and enhancing York's public realm so it becomes the most special in England. The policy specifically notes that licensed establishments, entertainment and cultural venues all have a vital role to play in achieving these goals.
10. One of the specific goals set out in the policy (at para 4.4) is the vision of York having: *'thriving businesses and no empty buildings.'*
11. The Policy states at 6.1:

'In determining a licence application the overriding principle will be that each application will be determined on its own merits, having regard to the promotion of the licensing objectives and taking into account this licensing policy and the guidance issued under Section 182. Where it is necessary to depart from the guidance or this policy the Council will give clear and cogent reasons for doing so.'

CUMULATIVE IMPACT

12. The Premises falls within the cumulative impact area but outside of the red and amber zones and therefore outside of the presumption for refusals set out in paragraphs 9.13 to 9.15 of the Policy.
13. Whilst the Cumulative Impact Assessment that informs the CIA policy takes into account the devastation to hospitality caused by Covid in reducing the size of the 'Red Zone' and introducing 'Amber Zones', the policy does not take into account the perfect storm of rising costs, shortages of staff and crippling increases in energy costs currently affecting the sector. Given the high overheads involved in running kitchens, including the additional staffing, councils will need to be mindful that operators are going to struggle to offer a full food offer at all times of opening without taking a significant risk that it will cripple a business. This is even more relevant to fledgling independent operations willing to invest in York and facing a huge rise the costs of fitting out premises in the first place.

14. Furthermore, this special policy is not absolute. Upon receipt of a relevant representation, the licensing authority must consider the circumstances of each case and whether there are exceptional circumstances to justify departing from its special policy in the light of the individual circumstances of the case. If an application is unlikely to add to the cumulative impact of the area, it may be granted.
15. In summary therefore, the relevant policy considerations are:
- The cultural and tourism offer in York is crucial to the ongoing economic success of the city; it brings both money and jobs.
 - The cumulative impact area policy is not absolute
 - Whether there are exceptional circumstances to justify departing from its special policy in the light of the individual circumstances of the case. If an application is unlikely to add to the cumulative impact of the area, it may be granted.

SUBMISSIONS

16. As is well established, “exceptional circumstances” (the high water mark for judging applications within cumulative impact areas) means circumstances which allow for “an exception” to be made to the general rule: use of the words should not and does not set the bar artificially high. Likewise, where there is a stepped approach to cumulative impact, there must be a genuine difference between each ‘tier’. In this case, the premises is outside of Red and Amber zones and therefore under this tiered approach the bar must be measurably lower than for premises in either of these enhanced zones.
17. By reference to relevant policy considerations set out above, the circumstances which the Applicant asks the sub-committee to consider are as follows:
- a. First, it is relevant to consider that owing to the pandemic, the war in Ukraine and policy on migrant workers and inflation, the world has changed since the CIZ policy was revised in 2021. Whilst at the time of revising the policy the ‘worst’ of the pandemic was over in terms of rates of death and severe illness caused by the disease, the economic effects were only just beginning. These have been compounded by the other factors mentioned above.
 - b. In July 2022 it was widely reported in the press that the number of restaurants falling into insolvency had increased by more than 60% in the past year amid worker shortages and the cost of living crisis, which had forced customers to cut back on spending. Data from the accountancy firm UHY Hacker Young showed that 1,406 restaurants in the UK closed their doors in the 12 months to May, up 64% on the

previous year. In proportional terms, that is an even larger increase in closures than for the wider hospitality industry, which saw a 56% rise in insolvencies over the same period.

- c. The reasons why restaurants are more likely to be affected is clear: overheads for kitchens are significantly higher than for wet-led premises. Further, conditions on premises licences that prevent businesses from being able to flex during such extreme events are one of a number of reasons why premises are shutting simply to reduce outgoings.
- d. In York, high profile closures have included The Gillygate, York Arms, Café Rouge, Thomas's of York and Piccollino. Therefore:
 - i. There are fewer premises, and so a lower number overall spaces to eat and drink within York.
 - ii. The trend is not likely to reverse any time soon (with the main effects of the cost of living crisis ahead of us)
 - iii. It follows that a responsibly run premises is simply not, at present, likely to add to a problem of "cumulative impact". To pursue the Local Authority's ambition of creating money and jobs good operators are needed; there is now a positive shortfall.
- e. Secondly, the applicants are well known operators of high quality premises within York itself without any history of problems such as crime and disorder or public nuisance. The track record of operators within the immediate vicinity is one of the best indicators of likelihood of issues with a new application.
- f. Thirdly, the Applicant is prepared to offer substantial food for the majority of the trading day. It has carefully considered both the council policy and weighed it against projections of income and overheads, based on extensive experience of operating food led premises and bars in the City. The Applicant has deliberately designed an application to minimise costs at times it is not profitable to incur them. This is not an academic matter. The optimum shift pattern for a kitchen team (minimum Chef and Kitchen Porter) is based around a midday to 21:00 menu. It is only right that the commercial expertise of the Applicant is given significant weight in any debate about what is or is not feasible in terms of operating a premises.
- g. Fourthly, the application is directed at, and answers the central concern of the CIA policy:
 - i. The Applicant understands (as is well known in the industry) that 'pure' restaurant premises are failing because they cannot not retain custom. People eat, then leave to attend other venues. This means that the spend per head is too low; more significantly for the licensing objectives it means that customers

exit on to the street, to attend at and drink in other premises- thereby adding to cumulative impact.

ii. Retention of custom means:

1. Most customer will leave to go home
2. A lower footfall on streets in the vicinity
3. Far fewer going on to another premises
4. An overall reduction in cumulative impact.

h. Whilst there have been representations by the Police, the concerns raised can be addressed by appropriate conditions. In this case, the applicant has put forward a robust operating schedule and the concerns of the police have been limited to 2 of those conditions as set out in their representation.

18. Caselaw on the refusal of applications for reasons of cumulative impact is illuminating. Firstly, the general principle as stated above is that each application must be considered on its merits. In this case, that includes the fact that the premises sits outside of the red and amber zones the policy sets out as being areas of particular concern. The case of Brewdog bars Limited -v- Leeds City Council (unreported 2012)- copy attached- deals with a set of circumstances that can be lifted wholesale and applied to the facts here. In that case, Brewdog were refused a licence on cumulative impact grounds. On appeal District Judge Anderson granted the licence and made the following observations:

'If I accept, as I do, that the enterprise sells expensive beers in expensive measures, then I think I can conclude that the people likely to be attracted are not "get it down your neck" drinkers but rather better heeled customers. The type of clientele a premises attracts has a material part to the play in the decision, because if I am not worried about their clientele and am impressed by the running of their bars elsewhere, it follows that it is unlikely that their clientele will have any adverse impact on the area here.

'The Police argued that customers may accidentally cause impact. Their argument that customers could get caught up in a melee caused by others is not a valid one. A simple increase in footfall isn't a rational reason to refuse entry to Leeds by Brewdog.

'I accept that the Committee and the Police did their best but their application of the Policy was too rigid. They seemed to take the view that man was made for the Policy, when the Policy should be made for man.'

19. In this case there is an additional offer of substantial food for the majority of trading. That the wording is not a 'full restaurant licence condition' is deliberate. It is a calculated and measured

approach to addressing the desire for premises to offer substantial food, with a commercial recognition that draconian conditions can and will cause premises to fail unnecessary.

20. In relation to the police point about whether a challenge 25 policy should be implemented or not, it is respectfully submitted that it is for an applicant to determine what policy works for them and propose it. Unless there is good reason to suspect that such a policy is not fit for purpose, then simply 'having a preference' is not enough. Every premises licence for the sale of alcohol has a mandatory condition that a policy must be put in place and staff trained on that policy. If central Government did not see fit to impose a 'one-size-fits-all' approach, then it must be incumbent upon the police to justify their request.

21. Lastly, it is relevant to consider, as will be well understood by the members of the licensing sub-committee, the distinction between a 'restaurant' and a 'pub' is less marked and self-evident now than at any time hitherto. For example, in order to stay commercially viable many pubs have intensified their food offer. The Applicant observes the position is therefore that a significant number of traditional wet-led pubs have all re-gearred their offers over the years to have significant food-led offers. In other words, many "bars" are now effectively running significant late night "restaurant" operations- and doing so without conditions forcing them to serve food at all times.

22. There is no reason why a responsibly run business operator, able to demonstrate that their history of operation in York does not undermine the licensing objectives, should not be allowed to put forward a hybrid offer- even within cumulative impact. This is especially so in the current climate and where the concepts of "restaurant", "pub" and "bar" may be less helpful to the licensing authority than used to be the case.

**PIERS WARNE
TLT SOLICITORS
12/10/2022**

IN THE LEEDS MAGISTRATES COURT

BETWEEN :-

BREWDOG BARS LIMITED

Appellant

- and -

LEEDS CITY COUNCIL

Respondent

NOTE OF DECISION OF
DISTRICT JUDGE ANDERSON
6th SEPTEMBER 2012

No doubt when the 2003 Licensing Act came into being, no-one foresaw the emergence of an operation such as Brewdog. They are a Scottish company specialising in craft beers with a devoted clientele. They do not operate large public houses selling cheap lager or cheap food. They have outlets in other cities including in cumulative impact areas where they operate well and without police objection. Now they seek to come to Leeds.

The company takes a didactic approach, with books on brewing, and customers invited to watch instructional videos playing at their premises. Their customers could be described as "alcohol geeks." They are not run of the mill or everyone's cup of tea, but there is a demand for outlets selling a good quality of beer.

If they had identified a site outside the City's Cumulative Impact Policy area, there is absolutely no doubt that they would already have their licence. They are an intelligent, well-run company, and in a short space of time they have shown themselves to be an effective operator.

However, this site does fall foul of the Cumulative Impact Policy which was introduced with the best possible motives to control the grant of licences to new premises. There is a presumption within it that new applications shall not be granted, unless the applicant can discharge the reverse burden in establishing that they will not add to the cumulative impact, and that is the issue in this case.

I can deal with one conclusion briefly, the issue of noise and nuisance. The Court heard evidence from Miss Ludford that she had gone to the trouble of circulating a letter to all residents in the neighbouring block of flats but received no objections. Against that was the more general evidence of Mr Kenny, which showed noise complaints to the Council. But most of those complaints were amplified music and Brewdog does not seek to be able to provide amplified music and so there is no risk of noise from regulated entertainment emanating from the premises. The capacity is small and any noise generated as people leave the premises will be very marginal indeed. It seems to me that the premises of this public house would not be a significant impact on the Cumulative Impact area regarding public nuisance and so I do not intend to mention this further.

That leaves the more important objection of the Police and the potential impact of another premises on the levels of crime in the area. There are a number of clubs around the Corn Exchange and the late

hours they trade, the marketing operations and the type of customer they attract means that there is regular disorder and violence. they run with late hours, attracting a different sort of customer. Their presence causes violence. That is a sad fact of modern life. The situation cannot be assisted by the sort of promotion I saw advertised by Chilli White with cheap vodka and free vodka, but they have their licence.

It cannot be the policy of the Cumulative Impact Policy to bring the iron curtain clanging down to allow such clubs to continue to trade while shutting out Brewdog which attracts more discerning customers who do not engage in binge drinking, though I do accept the requirement of the Cumulative Impact Policy is to ascertain specifically whether there will be impact.

If I accept, as I do, that the enterprise sells expensive beers in expensive measures, then I think I can conclude that the people likely to be attracted are not “get it down your neck” drinkers but rather better heeled customers. The type of clientele a premises attracts has a material part to the play in the decision, because if I am not worried about their clientele and am impressed by the running of their bars elsewhere, it follows that it is unlikely that their clientele will have any adverse impact on the area here.

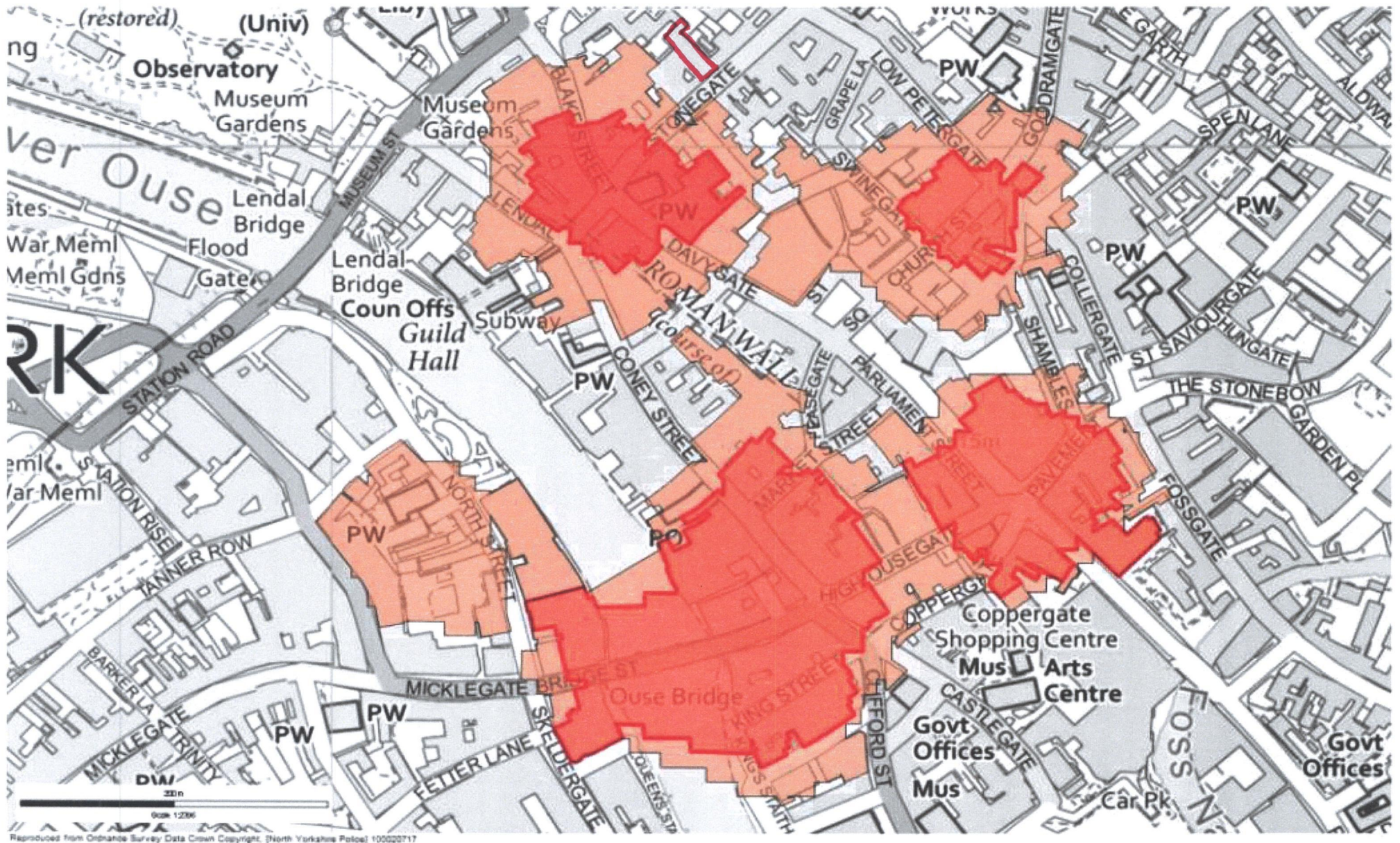
The Police argued that customers may accidentally cause impact. Their argument that customers could get caught up in a melee caused by others is not a valid one. A simple increase in footfall isn't a rational reason to refuse entry to Leeds by Brewdog.

I have listened carefully but have heard nothing which causes me to believe that the application should not be granted. I am satisfied that the appellants have discharged the burden of proof placed on them.

I accept that the Committee and the Police did their best but their application of the Policy was too rigid. They seemed to take the view that man was made for the Policy, when the Policy should be made for man.

The appeal is upheld, and the licence granted in the terms set out in the bundle served on the Court.

37. The red and amber zones are identified in the map below:



Cumulative Impact Assessment 2022 to 2025

36. The cumulative impact area and the red and amber zones area are defined in the map below:

