

Rother District Council
DECISION NO: WK/202013294

GENERAL LICENSING PANEL DECISION NOTICE

Date of General Licensing Panel Meeting: 25 March 2021

Venue: Remote, via Microsoft Teams

Date of Decision: 25 March 2021

NAME AND ADDRESS OF PREMISES:

The Fig, 2 High Street
Rye, East Sussex, TN31 7JE

NAME(S) OF APPLICANT:

The Fig Rye Ltd

REASON(S) FOR REPORT:

The report had been subject to 12 representations on the grounds of prevention of public nuisance.

DECISION MADE AND REASONS FOR IT:

Reasons for the Decision

1. The Panel were asked to consider an application for a premises licence in respect of The Fig, 2 High St. Rye under S.16 Licensing Act 2003. During the consultation period, there were a number of representations made by Interested Parties, both in support of, and in objection to, the granting of the licence. Therefore, the matter had been placed before the Panel to determine the application. In considering the matter, the Panel had a report detailing the application together with photographs and plans and all the representations. In addition, the Panel also had regard to the Council's Statement of Licensing Policy and the Secretary of State's S.182 Guidance.
2. The meeting was held remotely, facilitated by use of Teams software. In attendance to support the Panel, there were a number of Council officers. Additionally, the applicant was represented by Mr Wallsgrove, Solicitor, and there were three of the Interested Parties, Mr Taylor, Mrs Taylor and Mr Nunn. The Panel also had regard to all the formal representations made in respect of the application.
3. The Chair of the Panel, Councillor Mier, explained the procedure to be followed for the hearing, emphasising that there would be a full opportunity for parties to engage in the discussion led process. The Panel then heard from the Licensing Officer, who outlined the report before the Panel, with details of the existing premises licence for the premises and the licensing history at the premises since May 2019 leading to the hearing. It was stated there had been 12 representations made by Interested Parties, four in support and eight against. Additionally, observations had been made by the Environmental Health Officer in respect of the need for ventilation at the premises given the venue was a food premises. The officer's email stated only one complaint had been made in respect of noise from the premises, in December 2019. It was stated in his email

that no evidence had been found to substantiate the complaint and the matter had been resolved informally.

4. Mr Wallsgrove, the Solicitor for the applicant, then addressed the Panel. In his submissions he outlined a number of key points that demonstrated why the licence should be granted as requested. He stated that many of the previous conditions on the existing licence would be appropriate for the new licence with the exception of a specific few, of which he would detail to the Panel.
5. New measures were being offered to control customers outside the premises, by offering a condition to prevent customer use of the outside space; to restrict any alcohol from any off-sale, other than in a sealed container; and most importantly by only permitting on-sales to customers as part of a table meal. There would be no prospect of customers being allowed to just simply buy alcohol.
6. He stated that the Panel could only apply their mind to the licensable activity, and the implications of the licensable activity on neighbours within the scope of the licensing objectives, particularly Prevention of Public Nuisance. They could not direct themselves on matters already considered in the Planning process, or those connected to the food premises regime. Nuisance from food odour and from food activities had to be considered under the relevant environmental law, not the Licensing Act.
7. In recognising the concerns raised by the Interested Parties in respect of waste, and the collection of waste, again, he stated, only the waste resulting from the licensable activity was relevant to this decision. Similarly with deliveries. The Panel could only condition deliveries of alcohol, and not food deliveries. It was stated that alcohol deliveries would be around midday, not at anti-social hours. He stated they were happy for the existing condition in relation to waste collections to be replicated in this new licence, in order to support local residents and to prevent unreasonable disturbance.
8. Mr Wallsgrove stated, in his opinion, the only issue in relation to noise was the practice of leaving the windows open during opening hours. He believed this was the central issue for residents. He stated that the S.182 guidance at paragraph 9.12 made it clear to decision makers that Responsible Authorities are experts in their field, and so had the Pollution Team held concerns over potential breaches of the licensing objective of prevention of public nuisance, they would have stated so. In this case the relevant expert was stating that the windows should remain open for ventilation purposes. Mr Wallsgrove submitted that the officer would have stated his concerns in a formal representation had he been concerned that a noise nuisance would have been noticeable. Furthermore, there had been no recorded complaints about noise, other than one single complaint about delivery noise that was now captured by the proposed condition. It was stated that in the experience of the licence holder the noise levels were no different at 21:45 hours than they were at 17:00 hours. Given it was not a drinking venue, noise levels would never be such to constitute a nuisance as depicted in the letters of representation. Indeed some of those letters from people who lived above the venue, and worked opposite the venue, stated they were not disturbed by the activities at the premises.
9. It was said that around the corner from The Fig was another venue which had more tables outside the venue than the capacity of The Fig itself. Only 30 people

could fit into the premises. It was said that given the residential/commercial mix of that part of the High Street, there were at least 10 other alcohol venues within a short distance from The Fig. In respect of potential ventilation systems, Mr Wallsgrove stated that the licence holder had been told by a neighbouring venue that it had installed a very expensive ventilation/extraction system, which eventually had to be removed as the condenser units were causing a noise nuisance. Additionally, any such works would require planning permission, all of which suggested it would be an unreasonable condition to impose given the lack of substantiated complaints about noise. It was stated they had used a number of Temporary Event Notices (TENs) over the year, which had not resulted in any complaints to either the Council or the licence holder, which evidenced that they were capable of operating later hours responsibly. Mr Wallsgrove emphasised the important power of Review under the Licensing Act, which allowed neighbours to formally ask a Panel to re-visit licensing decisions based on empirical evidence they had gathered of the licensing objectives being undermined. That power of review allowed Councils to apply a light touch to initial decisions when licence holders had demonstrated their responsible management of premises. In his final submissions, Mr Wallsgrove addressed the Panel on the issue of the reported blockage in the drain, as set out in the letters of representation. It was said that, whilst not a licensing issue, the licence holder had engaged the services of a drain company who had identified a bend in the main foul pipe underneath the neighbour's garden. In order to prevent future problems it had been agreed that every six months the pipe would be cleaned to prevent a build-up of waste and ensure there would be no flooding after the episode in the summer of 2020.

10. The Panel then asked a series of questions following the submissions, as did several of the Interested Parties. In particular, clarification on the number of TENs that had been utilised, as some of the dates cited were in the National Lockdown. It was clarified that the last TEN over New Year had not been used. The Interested Parties sought to correct a number of the submissions, in particular that other venues in the area did not leave windows open, and the venue mentioned around the corner did not adjoin houses and faced open fields. Of particular concern to one resident, it was argued that a wheelie bin was being dragged by staff up a flight of stairs that adjoined the neighbour's house, and that measures ought to be in place to prevent that process from causing nuisance to the neighbour.
11. The Chair then invited the Interested Parties to address the Panel in regard to their letters. The immediate neighbour, Mr Taylor, stated that when they had bought their house four years ago, the Fig was a tea-room. That had changed to allow alcohol and now again it was being changed to a restaurant. He accepted the planning process had allowed the extended hours, but felt the process was not protecting the lives of those who lived close to the venue. His garden had been flooded with sewerage in July 2020 and had to be disinfected by Southern Water. He did not accept it was the bend in the pipe, but that it was the material being put into the pipe by The Fig.
12. Mrs Taylor said the licence holder had not complied with conditions or respected the hours they have been already been granted. She stated they had breached planning controls by utilising the basement for commercial purposes. She stated she had complained about noise nuisance to the Council, but had heard nothing. She stated doors and windows were left open causing food odour at all times of the day and evenings. She stated she was disturbed by the wheelie bin that was

being dragged through the property. She urged the Panel to refuse the licence and leave the existing licence in place.

13. Mr Nunn repeated that the other immediate neighbour, Mrs Tucker, had been disturbed by the wheelie bin being dragged through the property, which he stated was not acceptable. He stated he had his own ventilation system in one of his properties that caused no noise emission at all, and that a system should be installed to prevent windows from being left open. He stated he was not a 'Nimby' and that he lived with other venues in the area, and that the issue with The Fig was their lack of integration in the community.
14. Mr Wallsgrove was given the opportunity to sum up his submissions. He repeated that it was important for the Panel to focus on the likely impact of the licensable activity, that being the sale of alcohol, as opposed to the operation of a restaurant. He urged the Panel to place weight upon the lack of representation from the noise experts, that being the Environmental Health Officer. He suggested had they had real concerns, then they would have made a representation. He stated he had spoken to the officer directly and he had confirmed that only one complaint had been received, as outlined earlier, in respect of waste collections.
15. At the point of closing the meeting, Mr Nunn stated he wanted the Panel to view video evidence he held showing the noise. It was made clear to him that all such evidence should have been disclosed in advance of the hearing, as directed in the notices sent with the invitations to attend. The Panel considered it unhelpful that he had failed to mention such footage until this point in the procedure. It was stated that the Panel did not dis-believe the evidence of the Interested Parties, and their views, submissions and letters would all be taken into consideration during the Panel's deliberations.
16. The Panel considered all the evidence provided by the parties, and all the letters of representation from those who had not attended or appointed a spokesperson. The Panel had to be guided by the licensing objectives and, in particular, how would the applicant manage licensable activity at the premises, and uphold the licensing objectives, particularly in relation to the Prevention of Public Nuisance.
17. It was accepted by the Panel that their consideration was limited to licensable activity. Issues related to the operation of a food premises that resulted in complaints must be resolved through the environmental protection regime. Neighbours should be encouraged to pursue those avenues should they suffer nuisance from that source. The S.82 Guidance at 1.16 made this point clear. A number of conditions had been offered by the applicant which dealt with complaints related to the blocked drains, and waste collections, and the Panel accepted that these should be added to any grant of a licence. On balance, the Panel accepted the limited scope of the proposed licence and the modest hours, particularly the closing time. It was made clear by the applicant that alcohol was an ancillary aspect of the operation, and the Panel was re-assured there would be no prospect for people to just drink at the premises. The premises had a very limited capacity, and the Panel accepted the submission that as the evenings progressed, few customers were staying until closing time. In that respect the Panel accepted, on balance, that noise from the open windows was unlikely to disturb local residents. In using their local knowledge of the High Street, the

Panel was satisfied, on balance, that noise from the premises would not rise above the ambient street levels.

18. The S.182 Guidance at paragraph 9.44 required the Panel to consider the potential financial burden imposed by any condition that seeks to offer any potential benefit. The Panel did consider the imposition of a ventilation system, but were satisfied, on balance, that given the noise levels were unlikely to cause any nuisance, such a condition would not be proportionate at this stage. Should matters prove otherwise and should complaints be evidenced in future, that proportionality may be a matter for a future hearing to consider.
19. The Panel had concerns at the evidence provided by neighbours about the noise caused by the removal of the wheelie bin at the premises, and accordingly they considered it appropriate to add a condition that requires the bin to be carried through the premises by two members of staff, so that the bin was not dragged or bumped up or down stairs. That would offer neighbours an enforceable condition that could be monitored for potential breaches.
20. The Panel had to find a balance between the aspirations of commercial operators wanting to extend their businesses, whilst at the same time protecting the lives of those who live around the venue. The Panel was satisfied, on balance, that the modest hours included within the licence, together with the conditions imposed upon the grant of the licence, would ensure that neighbours were protected from any potential noise nuisance. Notwithstanding the assurances made by the applicant to the Panel, the Licensing Act did include the power to review licences under S.51 of the Act. That gave residents an opportunity to gather evidence of breaches of conditions should the premises not be managed as set out at the hearing, and this would allow a Panel to hear empirical evidence of failures to uphold the licensing objectives at a future hearing.

Decision Made

Premises Licence be granted:

Monday to Sunday 10:00 to 21:45hrs (on and off the premises)

Conditions offered by the applicant

a) General – all four licensing objectives

Alcohol will not be sold or supplied on the premises other than to persons who are partaking of a table meal and for consumption by such a person as ancillary to their meal. Suitable beverages other than alcohol shall be available at all times the premises are open.

b) The prevention of crime and disorder

- All members of staff will receive training on the law and their responsibilities in selling alcohol before being authorised to sell alcohol by a personal licence holder. Refresher training will be provided every 4 months. All training of staff must be recorded and the record of training signed by both

the employee and the DPS. Those records must be kept for a minimum of 12 months and made available for inspection upon request by the Police or an officer of the Local Authority.

- A list of staff members who have been authorised to sell alcohol shall be maintained. The list must be signed by the DPS and dated as to when the authorisation commenced for each employee.
- An incident log will be maintained containing a detailed record of every alleged crime committed on the premises. The log shall be inspected and signed by the DPS, or other person authorised by the DPS, at a minimum of 4 weekly intervals. The log shall be made available for inspection upon request by the Police or an officer of the Local Authority.
- A log (electronic or written) will be maintained to record each occasion a sale of alcohol is refused.
- The premises licence holder or the DPS will provide regular feedback to staff regarding the entries in both the incident log and the refusal log.

c) Public Safety

All indoor and outdoor areas will be well lit and maintained to a high standard.

d) Prevention of public nuisance

- No outdoor space connected to the premises shall be used by customers.
- A notice will be displayed in a prominent position in the premises advising customers to leave the premises quietly and respect the neighbours.
- Customers must leave the premises by 22.00 subject to an early time specified by the planning permission.
- Electrical hand drying facilities within the premises shall not be affixed to any party wall.
- A grease trap shall be fitted to the foul water drainage system.

e) The protection of children from harm

- The premises will operate a Challenge 25 policy whereby any person appearing to be under the age of 25 when purchasing alcohol will be asked for photographic ID to prove they are over the age of 18. The recommended forms of ID are: passports; official photographic ID cards issued by EU states with either a hologram or ultraviolet feature; driving licences with a photograph; photographic military ID cards or Proof of Age ID cards with the PASS hologram. This list of recommended forms of ID may be amended or revised with the prior written consent of the Police or local authority without the need to amend this condition.
- Signage advertising the Challenge 25 policy will be displayed prominently within the premises.

Additional Conditions Imposed After a Hearing

1. No waste shall be left outside the premises unless within a solid container, or in a gull-proof bag. There shall no collection of the waste from the premises before 7:00 or after 20:00 hours.
2. Any waste collected inside the premises which is transported to the outside by use of a wheelie bin, or any other large container, shall be carried by two members of staff so as not to be dragged, pushed or bumped up or down any internal staircase.
3. The sale or supply of alcohol for consumption off the premises must be in a sealed container.

Rights of Appeal

Under the provisions of Section 181 and schedule 5 of the Licensing Act 2003 there is a right of appeal against the decision of the Licensing Committee if you are aggrieved at the outcome. This right of appeal extends to the applicant in the case of a refusal or restrictions on the licence, or the imposition of conditions to the licence. The right of appeal also extends to persons who have made representations where the licence has been granted, or that relevant conditions have not been imposed upon the licence. Full details of all the rights of appeal can be found within Schedule 5 of the Act.

Any appeal should be made to the Magistrates Court, Edward Street, Brighton, within 21 days from the date of notification of the decision. You must contact the Magistrates Court to establish the formal procedure for the appeal.

A written or electronic copy of this Notice will be publicly available to all parties, and published on the Council's website.