



## Appeal Decision

Inquiry held and site visit made on 30 November 2004

by David C Pinner BSc DipTP MRTP1

an Inspector appointed by the First Secretary of State

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Date 18 DEC 2004

Appeal Ref: APP/L1765/C/04/1147130  
107 High Street, Winchester, SO23 9AH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Caffè Nero Group PLC against an enforcement notice issued by Winchester City Council.
- The Council's reference is 03/00179.
- The notice was issued on 3 March 2004.
- The breach of planning control as alleged in the notice is without planning permission, the change of use of the land from use for the retail sale of goods other than hot food (falling with Class A1 of Part B of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended) to use for the sale of food and drink for consumption on the premises (falling within Class A3 of Part B above).
- The requirements of the notice are:
  - i) Cease the use of the land for the sale of food and drink for consumption on the premises [Class A3 of Part B of the Schedule to the Town and Country Planning (Use Classes) Order 1987 as amended], and
  - ii) Remove all fixtures, fittings and furnishings necessary for the preparation, presentation and consumption of food and drink on the premises.
- The period for compliance with the requirements is 3 months after the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (f) and (g) of the Town and Country Planning Act 1990 as amended.
- an application for planning permission is deemed to have been made under section 177(5) of the Act as amended.

**Summary of Decision:** The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

### Preamble

1. Normally in a case where ground (b) is pleaded, I would deal with that matter first because success on that ground would often lead to the enforcement notice being quashed. In this case, the ground (b) appeal is made on the basis that the alleged change of use has not taken place but that a different change of use has. This is claimed to be a mixed use comprising elements of uses that would individually fall within classes A1 and A3 described in the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended) (the Use Classes Order). For convenience, I will refer to this as A1/A3 use, this being the convention adopted at the inquiry. The parties accepted that, if I agree that the use is A1/A3, the enforcement notice could be corrected without prejudice to either party, and that planning permission would be required for change of use to the mixed A1/A3 use. Therefore, whatever my conclusions on the ground (b) appeal, I have to consider the

planning merits of the case. I have therefore decided to deal with the appeal on ground (a) first.

#### Background

2. The appellant company operates nearly 200 speciality coffee shops throughout the country and is one of the three main companies involved in this business. The other two are Costa Coffee and Starbucks. Between them, they operate 900 coffee shops in all parts of the country. In 1997 Caffe Nero had only 5 establishments, Costa had about 30 and Starbucks had yet to enter the UK market.
3. The greatest part of Caffe Nero's business is selling speciality coffee both for consumption on and off the premises. This accounts for some 60% of the Company's turnover. Other hot and cold drinks account for 10% of turnover, sandwiches account for 15% and other cold food accounts for the remaining 15%. A small proportion of the food sold is reheated on the premises but none of it is cooked there. Tables and chairs are provided for those who wish to consume their purchases on the premises but there is no waiter service, cutlery is not provided and the tables are small. The average cost of a purchase is £2.80, usually including a hot drink costing around £1.80. There is a discount for customers wishing to consume their purchases elsewhere.
4. One of the main characteristics of the coffee shops operated by the appellant is that the range of products and the type of operation is basically the same in all of its establishments wherever in the country they are located. They operate primarily during the daytime to coincide with the times that other shops and businesses are open. They require a location with high pedestrian flows, thus many of their shops are in core shopping areas. The nature of the use is such that some planning authorities have accepted that it is an A1 retail use since shops selling sandwiches and hot drinks to take away are included in that Use Class. The existence of a few tables and chairs to allow customers to consume their purchases on the premises and some incidental sales of reheated food has been held not to take the use out of Class A1. In other cases, it has been held that the use is a mixed use comprising elements of Class A3 food and drink use and elements of Class A1 retail shop use – it is a matter of fact and degree, having regard to the circumstances of the particular case.
5. The rapid growth in the number of coffee shops since 1997 post-dates the Use Classes Order and the advice contained in Planning Policy Guidance Note 6 *Town Centres and Retail Developments* (PPG6). Many local plan shopping and town centre policies are based on the advice in PPG6 and so the niche market exploited by the coffee shop chains and their special requirements for prime retail locations and other places where there are high pedestrian flows have rarely been specifically addressed in local planning policies.

#### Main issue

6. The main issue is the effect of the coffee shop use on the viability and vitality of Winchester's Primary Shopping Area, having regard to relevant policy for the protection of its primary retail function.

#### Planning Policy

7. The site lies within the part of Winchester town centre which is identified as the Primary Shopping Area (PSA) in the Winchester District Local Plan. Policy W12 of the Local Plan aims to protect the retail function of the PSA and says that proposals that would result in a

net loss of retail floorspace will not normally be permitted. The use of the ground floor of a building in the PSA for a use falling within Use Class A3 will not normally be permitted unless the scheme would benefit, or at least maintain, the vitality, viability and retail attractiveness of the PSA. The explanatory text identifies factors such as pedestrian flows, customer draw and opening hours as being relevant to the assessment of the impact of a proposed use. Account will also be taken of the generally exceptional need for such a location. There is a further proviso that retail use would remain the predominant use within the immediate retail frontages. The explanatory text says that the retail frontages 25 metres either side of the site will be taken into account. Proposals that would result in more than 20% of the frontage being in non-retail use would not normally be permitted.

#### Reasons

8. The Council's only objection to the scheme is that they consider it to conflict with policy W12. At the inquiry, the Council's planning witness conceded that, if I were to conclude that the operation constituted a mixed A1/A3 use, it would be acceptable. It seems strange to me that the acceptability of the use as currently operating is dependant only on how I label it. Nevertheless, for the sake of argument, I have considered the use as being one to which policy W12 applies.
9. Evidence provided by the appellant demonstrates that the use attracts a significant flow of customers throughout the day. That is consistent with my own observations of the premises before and after the inquiry and during the lunchtime adjournment. Although there is no baseline figure to establish the number of customers drawn by the previous use of the premises as a fashion shop, in absolute terms there is no denying that the present use generates a lot of customer activity. I would be very surprised if any wholly A1 use occupying the same floorspace would attract so many more customers that it would be in a different league to the appealed use. Indeed, I consider it to be very likely that many A1 uses would attract significantly fewer customers. Pedestrian activity in this part of High Street may or may not be increased as a result of the presence of the coffee shop, but there is certainly no evidence to suggest that it has been reduced. I very much doubt that that would be the case. Survey evidence reveals that a significant number of customers have been attracted to the town centre by the presence of the coffee shop, so it has proved to be a draw in its own right.
10. The 25 metre either side assessment referred to in the explanation to policy W12 is not part of the policy itself. The Council's witness could not say whether this means of assessing the impact on the retail frontage has any scientific basis. I doubt that it has and I therefore regard it as being of limited value. Taken literally, it would preclude the use of any premises for non-A1 purposes if they happened to be towards the end of a run of shops. In my view, such a restriction would be difficult to justify simply as a matter of principle.
11. In this case, the Council has included the National Westminster Bank within the retail frontage. However, from its design, I would suggest that this particular building has never been part of the retail frontage and it should not, therefore, be taken into account in applying provision (a) of the policy, which relates specifically to the immediate retail frontage.
12. Without getting too bogged down in maths, only this property and the adjoining Alliance and Leicester Bank are not wholly in A1 use at ground floor level in a long run of buildings lying between the National Westminster Bank and the Abbey National Bank at

119-120 High Street. In my view, even if I were to conclude that the appeal premises no longer have a retail frontage, retail use remains the predominant use of the immediate retail frontage.

13. With regard to the reference in the explanatory text to the exceptional need for such a location (i.e. within the PSA) the Council interpreted this as meaning that there has to be an exceptional need for the use in such a location rather than that the use has an exceptional need to be in the PSA. They argue that there is no need for the use because there are already several A3 uses within the PSA, including some not at ground floor level.
14. My interpretation of the explanatory text is that it is the use that must have an exceptional need to be within the PSA. In that regard, I accept that, with a low spend per customer, a use such as this has to operate in a high turnover environment. It is not an evening or night time use and needs to be located within an area of high daytime activity, such as the PSA. It needs to be highly visible to potential customers and I think that a ground floor location is therefore essential to the success of the business.
15. Drawing these considerations together, it is my conclusion on the main issue that the current use of the appeal premises has no adverse effect on the vitality or viability of the PSA; it maintains pedestrian flows, it is a use which needs to be located at ground floor level within the PSA; it complements the retail function of the PSA and draws people into it, thereby increasing its attractiveness. The retail frontage remains predominantly retail. In all of these respects, irrespective of whether the use is categorised as A3 or a mixed A1/A3 use, I conclude that the present use of the premises accords with the provisions of Local Plan Policy W12 and is therefore acceptable.
16. In view of my conclusion on the appeal on ground (a), there is no need for me to consider the other grounds of appeal. For the record, however, I take the view that the 20% retail sales element of the use is significant in its own right and, had I considered it necessary to address the point in detail in this decision, I would have concluded that, as a matter of fact and degree, the premises are in mixed use. As the A1 element occupies the front of the premises, I would also have concluded that they retain a retail frontage. Although these matters are academic and are not part of my formal decision, they reinforce my conclusion that the appeal should succeed.

#### Conditions

17. In applying Policy W12, I have considered the particular circumstances of the appellant's use of the premises, irrespective of whether or not that use fits into any Use Class. The effects of the use on the retail function, vitality and viability of the PSA are likely to be unique to the current operator and for that reason I consider that the conditions suggested by the appellant are essential. In effect, these conditions restrict the use to the present use and make the permission personal to the appellant company. Thus, if they were to vacate the premises, the authorised use would revert to the previous A1 use. I have adapted suggested condition 2 to allow for cold food to be served within the premises and I have described the development as a reflection of the way the use is currently undertaken. As I have not found it necessary to reach a formal conclusion on the nature of the use, I have included a condition limiting the use to that for which I have granted planning permission.

Conclusions

18. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should succeed on ground (a) and planning permission will be granted.

Formal Decision

19. I allow the appeal, and direct that the enforcement notice be quashed. I grant planning permission on the application deemed to have been made under section 177(5) of the Act as amended for the development already carried out, namely the use of 107 High Street, Winchester as a coffee bar serving coffee, other hot and cold drinks, sandwiches and similar light refreshments for consumption on or off the premises as shown on the plan attached to the notice, subject to the following conditions:

- 1) the permission hereby granted shall enure only for the benefit of Caffe Nero PLC and its wholly owned subsidiaries;
- 2) the premises shall not be used other than as a coffee bar serving coffee, other hot and cold drinks, sandwiches and similar light refreshments for consumption on or off the premises;
- 3) no primary cooking of unprepared food shall be carried on within the premises. Only re-heated or cold food that has been prepared elsewhere shall be served within the premises;
- 4) the premises shall remain closed from 20:00hrs to 07:00hrs and no alcoholic drinks shall be displayed or served on the premises.



INSPECTOR

**APPEARANCES**

**FOR THE APPELLANT:**

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He called:

Ben Price MICA

Finance Director, Caffè Nero PLC (Appellant)

Steven Arnold MA MRTPI MRICS

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**FOR THE LOCAL PLANNING AUTHORITY:**

Trevor Ward of Counsel

17 Carlton Crescent, Southampton

He called:

Brian Crooks BA MCD MRTPI

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**DOCUMENTS**

- Document 1 List of persons present at the inquiry
- Document 2 Council's letter of notification of the inquiry and list of those notified
- Document 3 Annexes BP 1, 2 and 4 to Mr Price's proof of evidence
- Document 4 Petition in support of the appellant (Mr Price's Annex BP3)
- Document 5 Appendices A1 to A16 to Mr Arnold's proof of evidence
- Document 6 Statement of Common Ground
- Document 7 Planning application, correspondence and decision ref: 04/02305/FUL
- Document 8 Appendices 1 to d to Mr Crook's proof of evidence
- Document 9 Copy of planning permission W01541/54, 11/12 The Brooks, Winchester