



Appeal Decisions

Inquiry held on 2 September 2008

by **Michael Hurley BA DipTP MRTPI**

an Inspector appointed by the Secretary of State
for Communities and Local Government

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Decision date:
9 September 2008

Appeal Ref: APP/E3715/C/07/2062333

No 7 Royal George Buildings, Market Place, Rugby, CV21 3EA

- 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 Nero Holdings Ltd against an enforcement notice issued by the Rugby Borough Council.
- The Council's reference is MEA/AG/5/3/542.
- The notice was issued on 12 November 2007.
- The breach of planning control as alleged in the notice is:
The change of use, without planning permission, of the land as defined by the Town and Country (Use Classes) Order 1987 from a Class A1 (retail) to mixed uses within Class A1 (retail) and A3 (café).
- The requirements of the notice are:
Cease the mixed use of the premises within Class A1 (retail) and A3 (café) and reinstate the former Class A1 use.
- The period for compliance with the requirements is 28 days.
- The appeal is proceeding on the grounds set out in section 174(2)(a) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed; the enforcement notice is quashed; and planning permission is granted subject to the conditions set out in the Formal Decision below.

The appeal on ground (a) and the deemed planning application

Main issue

1. I consider the main issue to be whether the present (unauthorised) use of the appeal premises is beneficial to the vitality and viability of Rugby's Primary Shopping Area, to the extent that this should override the presumption against such development set out in Policy TCR1 of the Rugby Borough Local Plan 2006.

The appeal premises and the Local Plan

2. The appeal premises consist of a ground-floor shop unit in a 3-storey terraced building within the town centre of Rugby. Since February 2007 this unit has been occupied as a coffee bar by Caffé Nero. Caffé Nero is a national chain, which sells coffee and other beverages, sandwiches, cakes and pastries. At the appeal premises, about 82% of the produce sold is consumed on the premises, the remainder being taken away by customers for consumption elsewhere. It is common ground between the parties that the existing use is a mixed use, having both Class A1 (retail) and Class A3 (café) components. I concur with that view.
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3. The appeal premises fall within Rugby's Primary Shopping Area as defined in the Local Plan. Policy TCR1 of the Local Plan provides that, within the Primary Shopping Area, development will be permitted only where the ground-floor use is to be exclusively for retail purposes falling within Use Class A1. It is common ground between the parties that the current mixed use of the appeal premises is contrary to this policy. I also concur with that view.

The effect of the unauthorised use

4. The reasoned justification for Policy TCR1 explains that it is essential that retail uses should remain concentrated, as this will assist the vitality and viability of the town centre. It points out that there is a risk that the introduction of other uses into the Primary Shopping Area will weaken the attraction of Rugby as a retail centre.
5. However, there is no firm evidence that the introduction of Caffé Nero has had such an effect. This coffee bar is open for business from 08:00 hours to 18:00 hours on weekdays and Saturdays, with slightly reduced trading hours on Sundays. It is therefore open during normal shopping hours. A survey commissioned by the appellants reveals that it attracted some 598 customers during the 2-day survey period (Wednesday 18 June and Saturday 21 June 2008). This was substantially higher than the inflow of customers to any of the neighbouring shops that were surveyed.
6. In a questionnaire survey commissioned by the appellants, 280 customers using the Rugby Caffé Nero were asked the main purpose of their visit to the town centre. "Shopping" was the most common answer, given by 39% of respondents. A further 24% indicated that they would be shopping while in the town centre, although this was not the main purpose of their visit. This suggests that well over 60% of the respondents would be visiting shops in the town centre on their present trip. Other reasons for customers' visits to the town centre included for work purposes; to meet friends; and to use various non-retail services. Some 17% of those surveyed indicated that the main purpose of their trip to the town centre was to visit Caffé Nero itself.
7. This suggests to me that Caffé Nero contributes to the commercial success of Rugby's central shopping area. It attracts substantial numbers of customers during normal shopping hours, and most of those customers spend money in other town centre shops. It is clearly a popular facility. Over 1,200 people have signed a petition to the effect that it is an asset to the town centre. It appears that, for many people, Caffé Nero enhances the quality of the town centre.
8. I have no reason to doubt the appellants' evidence that, were the present appeal to be dismissed, Caffé Nero would close. The notion that this business might continue solely as a retail outlet (without the café component) seems to me to be fanciful, since this would entail a potential reduction in turnover of more than 80%. It would be possible for the café component of the business to be housed on the upper floors of the appeal premises, which are now partly used for storage and partly vacant. But this would require substantial investment; it would offer no apparent advantage to the appellants; and it would considerably detract from the convenience of their customers. Understandably, the appellants indicated that they would be unwilling to adopt

such a course. They would also be unwilling to occupy premises outside Rugby's Primary Shopping Area.

Alternative retail use

9. In my view the closure of Caffé Nero would be likely to have an adverse effect on the vitality and viability of the town's Primary Shopping Area. That is not to say that an alternative (exclusively retail) use of the appeal premises could not offer equivalent benefits to this area, by attracting customers and contributing to the quality and commercial success of the town centre. However, I have reservations about whether this would be likely to happen, were Caffé Nero to close.
10. First, I note that a double shop unit at No 5 Royal George Buildings, next door but one to the appeal premises, was formerly occupied by H Samuel, the retail jewellers. This property has now been vacant for over 6 months. Plainly, in its present state, it makes no contribution to the town centre's vitality or viability. The fact that it has remained vacant for so long may reflect its relatively weak trading position. Counts commissioned by the appellants show that the flow of pedestrians along this eastern side of the Market Place is substantially less than that along the western side, where there is an entrance to the Clock Tower Shopping Centre. If Caffé Nero were to close, that might have a further deadening effect on this frontage, making it even less attractive to prospective occupiers.
11. Second, I understand that currently there are about 10 vacant shop units within Rugby's Primary Shopping Area. Although the proportion of vacant units in the town centre is a little below the national average, there is evidence that it is growing. Given current economic circumstances, this trend may continue. The prospects for attracting traders to occupy empty shops do not appear to be particularly propitious at present.
12. Third, a major new retail development is currently under construction in Chapel Street, at the western edge of the town centre shopping area. This will consist of an anchor store, to be occupied by Asda, and 16 smaller retail units, for which there are as yet no known tenants. The Chapel Street development will be linked to the Clock Tower Shopping Centre. In my view it is likely to re-enforce the trading position of shops on the west side of the Market Place, relative to those to the east (including the appeal premises). The prospect of additional retail accommodation becoming available in the Chapel Street development, and the potential shift in the shopping area's centre of gravity, might well give rise to a degree of uncertainty. This could also affect the speed with which the appeal premises might be reoccupied.
13. Fourth, even if the appeal premises were quickly re-occupied for an exclusively retail use, there is no guarantee that such a use would attract as many customers as Caffé Nero. In my view these considerations tell in favour of allowing the appeal, as a departure from Policy TCR1. While I fully understand the Council's concern to concentrate retail activity in the Primary Shopping Area, it seems to me that the balance of advantage rests with permitting the existing coffee bar to remain.

Precedent

14. My attention was drawn to the fact that in December 2005, the Council granted planning permission for the use of a shop unit at No 1 High Street, Rugby, by Costa Coffee. That decision authorised the use of premises (within what is now the Primary Shopping Area) for a mixed retail and café use, similar to the appellants' business. It was taken at a time when the present Local Plan was proceeding toward adoption. In their reasons for approval, the Council acknowledged that the proposed development would conflict with (then draft) Policy TCR1. However, they concluded that it "would not harm the prime shopping area, due to the increased footfall and the A1 element".
15. That decision does not establish a binding precedent. Nevertheless, Costa Coffee has now been trading for some time. There is no evidence that it has detracted from the vitality or viability of the Primary Shopping Area; or that the Council's reasons for granting permission as a departure from (then emerging) Policy TCR1 were flawed. In my view those reasons apply with equal force in the present case, since the footfall at Caffé Nero is very similar to that at Costa Coffee, and the A1 (retail) components of these two businesses appear to be much the same. It seems to me that this adds some weight to the arguments in favour of allowing the appeal.
16. However, a decision to grant planning permission in the present case would not vitiate Policy TCR1, or set a precedent to justify the introduction of further non-retail uses into the Primary Shopping Area. It would remain incumbent upon the promoters of any such schemes to demonstrate that there were material considerations which should override this policy.

Other Matters

17. The appeal premises are within the Rugby Town Centre Conservation Area. I consider that the use of this building as a coffee bar contributes positively to the commercial character and well-maintained appearance of this area.
18. I have considered the planning conditions discussed at the inquiry. I note that following successful appeals concerning Caffé Nero coffee bars in Sidcup and Sevenoaks, conditions were imposed to define the use permitted with some precision, and to preclude the cooking of raw foodstuffs on the premises. For consistency, I shall adopt the same approach. However, I see no reason to restrict the opening hours of the appeal premises on this occasion.
19. I have taken account of all the other matters raised, including the findings of the recent Retail and Leisure Study undertaken for the Council by Messrs Drivers Jonas; and the appeal decisions cited by the Council, concerning premises in Epping and Skipton. However, I do not find any of these factors to be sufficient to outweigh the considerations that have led me to conclude that the present appeal should be allowed.

The appeal on ground (g)

20. Since the appeal is to be allowed on ground (a) and planning permission is to be granted on the deemed application, the appeal on ground (g) no longer falls to be considered.

Formal decision

21. I hereby allow this appeal; I direct that the enforcement notice be quashed; and 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 No 7 Royal George Buildings, Market Place, Rugby, CV21 3EA, as shown on the plan attached to the notice, for mixed uses within Class A1 (retail) and Class A3 (café) of the Town and Country Planning (Use Classes) Order 1987, subject to the following conditions:

- 1 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.
- 2 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.

Michael Hurley

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr James Findlay QC

Instructed by Brian Madge Ltd
Chartered Town Planner
20 Westmead Road, Sutton, SM1 4JT

He called:

Mr B Price MICA

Finance Director, Caffé Nero Group

Mr S C T Arnold
MA MRTPI MRICS

Planning Consultant

FOR THE LOCAL PLANNING AUTHORITY:

Miss Sarah Clover of Counsel

Instructed by the Rugby Borough Council

She called:

Mr R Redford BSc MRTPI Senior Planning Officer, Rugby Borough Council

DOCUMENTS

- 1 Attendance list
- 2 Inquiry Notice
- 3 Petition submitted by the appellants
- 4 Caffé Nero Philosophy
- 5 Schedule of planning status of all Caffé Nero premises in UK
- 6 Note of conversation between appellants' agent and Robin Richter
- 7 Proof of evidence of Mr B Price with appendices
- 8 Proof of evidence of Mr S J T Arnold with appendices
- 9 Proof of evidence of Mr R Redford with appendices
- 10 Objection to Rugby Local Plan Review
- 11 Rugby Retail and Leisure Study, July 2008
- 12 Council's Core Strategy Options Discussion Paper, January 008
- 13 Questionnaire used in Customer Survey of Caffé Nero, Rugby
- 14 Statement of Common Ground