



---

# Appeal Decision

Inquiry opened and site visit made on 15 January 2013

**by Phil Grainger BA(Hons) MRTPI**

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

**Decision date: 28 February 2013**

---

**Appeal Ref: APP/Y3940/C/12/2183497**

**land at 21-22 High Street, Marlborough, Wiltshire SN8 1LW**

- 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 Wiltshire Council.
- The Council's reference is E/2012/00077/ENF.
- The notice was issued on 8 August 2012.
- The breach of planning control as alleged in the notice is:  
*the change of use of the ground floor and first floor of the building on the land from Class A1 (retail) use to a mixed Class A1/A3 (retail/café) use.*
- The requirements of the notice are: *to cease permanently the use of the ground floor and first floor of the building on the land for mixed A1/A3 (retail/café) use.*
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) and (f) of the Town and Country Planning Act 1990 as amended.

**Summary of Decision:** the appeal is allowed subject to the enforcement notice being corrected in the terms set out below in the Decision.

---

## Main Issue

1. This is the effect on the vitality, viability and individuality of Marlborough town centre.

## Inspector's Reasoning

Preliminary Matters

2. The Inquiry opened on 15 January 2013. On that date I heard evidence and made an accompanied site visit. The remainder of the evidence and closing submissions were heard on 7 February 2013.
3. There is no dispute between the main parties that the appellants' use includes a retail element (the sale of drink and cold food for consumption off the premises) that is on a scale beyond that which, for planning purposes, could properly be regarded as ancillary. On the evidence presented I see no reason to disagree and I have dealt with the appeal on the basis that what exists is a mixed use containing elements of both retail use (class A1) and restaurant/café use (class A3).
4. That said, whilst 'mixed Class A1/A3' may sometimes be a useful shorthand, and has been used elsewhere, such a description has no standing in planning terms and can lead to wrong thinking. The use would be more properly described as a sui generis mixed use for retail and coffee shop purposes. As I advised the Inquiry I have considered the appeal on that basis. Moreover, as I am satisfied that no injustice would be caused, I shall exercise my powers under s176 of the Act and correct the enforcement notice accordingly.

### Policy Background

5. The Council have produced a Core Strategy but this has yet to be tested by independent examination and this limits the weight I can give it. In addition, the Marlborough Area Plan is not, and was not intended to be, part of the development plan. Although I have taken it into account, so far as it is relevant, for the purposes of this appeal the development plan consists primarily of the saved policies from the Kennet Local Plan.
6. That Plan was adopted in 2004, shortly before the Planning and Compulsory Purchase Act 2004 became law. I have taken into account that it did not pre-date the Planning and Compulsory Purchase Act by much and that the current intention seems to be to continue the thrust of the retail policies into the Core Strategy. Whether that intention survives the examination remains to be seen. In any event, the weight that I can give these saved policies depends on the degree to which they comply with national policy as now set out in the National Planning Policy Framework (the Framework).
7. The appellants drew my attention to a variety of documents which they feel show how national retail policy has changed since the Kennet Local Plan was produced and adopted. Not all of the documents have any formal planning status, nor do their recommendations always seem to have been fully reflected in the Framework. In my view, it may be more sensible simply to compare what the Framework says with the wording of the relevant policies.
8. The Framework advises that planning policies for town centres should be positive and that local planning authorities should (amongst other things):
  - pursue policies to support the viability and vitality of town centres;
  - define the extent of primary shopping frontages and set policies which make clear which uses will be permitted in them; and
  - promote competitive town centres that provide customer choice and a diverse retail offer and which reflect the individuality of centres.
9. The Kennet Local Plan does not define primary and secondary frontages in Marlborough, only a primary shopping area, which covers a large part of the centre of the town. In this respect the Local Plan clearly does not comply with the Framework and is out of date.
10. In addition, looked at as a whole the Framework encourages a positive, permissive and proactive approach. There is a presumption in favour of sustainable development. Moreover, policies should be flexible enough to accommodate needs not anticipated in the plan. All this indicates a move towards policies that are not unduly restrictive and I see no reason why that should not apply in town centres as elsewhere. That is so whether or not the reference in Annex 2 of the Framework to primary frontages including food and drink uses extends to Use Classes A3-A5 or is limited to Class A1.
11. Against that background I consider that, if it is relevant, Policy ED17 can be accorded little weight. If it can be applied to changes of use, and the Council's planning witness suggested that that was not the intention, then it would be a very restrictive policy apparently precluding all changes to non-A1 uses within the whole of the Primary Shopping Area (which is widely drawn here). Indeed, it is hard to see how it could be reconciled with Policy ED18 which permits such changes where a benefit would arise. In any event, whilst Policy ED17 was referred to by Cllr Gamble, who was appearing as a witness for the Council, it did not form part of the Council's case proper and was not mentioned in the reasons for issuing the notice.

12. Instead the Council's case relies on Policy ED18 which they regard as positively worded and compliant with the Framework. However, I have some difficulty in finding a policy that states that within the Primary Shopping Area *permission will not be given for the change of use of ground floor premises to uses other than Class A1 ..... unless (i) the development makes a positive contribution to the vitality and viability of the centre*<sup>1</sup> [my emphasis] to be positive. Even if this is seen as a semantic point capable of being overcome by different wording, the wording that was chosen still implies a negative intent.
13. Requiring a positive benefit is not, in my view, the same as being positively worded. Even if the words were changed around Policy ED18 would still permit a change of use only if there is a benefit to the centre. That rules out all cases, possibly numerous, where the effect is neutral or any benefits cannot be clearly shown in advance. Moreover, it is a more stringent test than, in my experience, is normally applied to development proposals (or seems to be recommended in the Framework). Usually an absence of harm (indeed often an absence of material harm) is sufficient to obtain planning permission. Although ED18 is less restrictive than some policies I have met, and may be capable of some flexibility, it is difficult to see how a policy that imposes a test stricter than the norm can properly be regarded as encouraging flexibility. Nor does it seem readily to accommodate new uses, like coffee shops, that may not have been envisaged when it was first adopted.
14. Accordingly I consider that not only is Policy ED18 inconsistent with the Framework in not identifying a primary shopping frontage it is also somewhat at odds with its overall thrust. Moreover, whatever database was used in the preparation of the policy it cannot have taken into account the changes in town centres and retailing that have occurred since 2004, especially the growth in internet sales. The Framework makes clear that where relevant development plan policies are out of date planning permission should be granted unless any adverse impacts would significantly and demonstrably outweigh the benefits when assessed against the policies of the Framework.

#### Marlborough and its individuality

15. Marlborough is a small market town with a relatively prosperous hinterland. This together with the College, a public school, at the western end of the town centre and the range of attractive buildings along the unusually wide High Street, may help to explain the distinctive character of the centre, which has a reputation, locally, greater than might be expected of a town this size. In particular there is a high proportion of 'high end' ladies fashion shops. Moreover, whilst the number of independent retailers may not be as high as at first seems, several of the national chains represented are relatively uncommon and not often found in centres of this size. All this helps to give the centre an unusual character and may help explain its apparent relative prosperity.
16. Although frequent reference was made during the Inquiry to other local towns such as Chippenham and, especially, Devizes, where Caffè Nero have also opened branches in recent years, Marlborough has a different nature to those towns. Despite the appellants' comments I consider that this is apparent from the evidence given at the Inquiry. It also accords with my own knowledge of those towns. Moreover, whilst the number of other towns that the appellants felt were comparable to Marlborough had grown by the end of the Inquiry it remained small and the examples were widely spread.

---

<sup>1</sup> It is agreed that none of the other criteria are directly relevant, though it may be worth noting that where they do apply the policy requires only an absence of harm to vitality and viability, not a positive benefit.

17. In these circumstances I do not find it unreasonable for the Council to have dealt with Caffè Nero's applications differently in the three towns, even though the policy background in Devizes seems essentially the same as here. It may be unfortunate that the supporting statements in Devizes and Marlborough were so similar and I can understand how Councillors might have felt that insufficient consideration had been given to Marlborough's individuality. However, the differences referred to by Cllr Gamble pull in different directions. It is not inconceivable that they would cancel each other out. The statements might have explained this better and dealt more clearly with Marlborough's particular character, but I see nothing obviously contrived in the conclusions.
18. Turning to the specifics of this case, what has happened is that a ladies fashion shop that, although not an independent, seems to have been represented in relatively few centres has been replaced by a national coffee shop chain that is commonly found in a wide variety of centres throughout the country. Looked at in this way, and against the specific character of Marlborough, this change can only have reduced the individuality of the centre and made it more like others. I can understand that this has caused concern, especially given the reference to individuality now included in the Framework.
19. That said, whilst individuality is a factor to take into account, there are no planning policies in place to protect it directly and insofar as it relates to the type and nature of the retail offer it is not easy to see how this could be done. The planning regime is not intended to restrict competition between businesses or protect local traders and there is no control over changes of use within broad categories. Most shops fall within Class A1 and a change from one to another does not require planning permission unless it goes outside that Class. The deemed application here is for a change of use from class A1 (retail) to a mixed use, still including a significant retail element. Looked at in these terms the effect on individuality is much reduced. Indeed in some circumstances such a change could arguably be positive, if for example Bow Belles replaced Boots.
20. I have taken into account that the reasons for issuing the notice refer to conflict with the Framework's promotion of individuality, which in the case of Marlborough was felt to centre on the broad range of independent operators. Moreover, although I have noted, and accept, that the appellants' figures show that the proportion of independent retailers is in fact below the national average, that is not, for the reasons I have already set out, necessarily the impression given. I have also noted that this was a concern maintained by many (though not all) of the local residents who spoke and by Cllr Gamble. Nevertheless, whilst Caffè Nero are the current operators, if planning permission were granted, it would be for a non-specific coffee shop, not one limited to them or any other national coffee shop chain.
21. In addition, the Council confirmed that their case does not rely on the possibility that, if the appeal is dismissed, the premises would return to being a ladies fashion shop or any other type of shop that would directly promote Marlborough's individuality. They accept that it could be used as any kind of shop but maintain that that would be preferable to the present use. However, that seems to be based not so much on any implications for individuality, but simply that they feel it is better for the centre for people to be out shopping than drinking coffee. In fact, the main thrust of the Council's argument as put forward at the Inquiry itself focussed on effects on the vitality and viability of the centre. It is to those matters that I now turn.

Effect on vitality and viability

22. The Council consider that the particular nature of Marlborough town centre and the way that they have sought to apply planning policy to protect and enhance it have resulted in a vibrant centre. The vacancy rate appears to be well below the national average. However, the Council's retail study suggests that the centre has fallen in the national rankings and although there was an increase in annual prime retail rents between 2005 and 2009 (the last year for which data is available), this disguises a decline from 2008 to 2009. It is not clear whether that has continued. Moreover, whilst the agreed position between the main parties is that the centre is broadly healthy, and for the most part the High Street itself looks vibrant, the same cannot be said for some of the shopping areas off it, including, in particular, Hughenden Yard.
23. Accordingly I consider that it would be unwise to conclude that Marlborough has succeeded in isolating itself completely from recent economic conditions and trends in retailing such as increased internet sales. I found the Council's suggestion that there was no need here to be flexible and adapt to be surprisingly optimistic and at odds with current national policy. Marlborough may have been less affected than many centres. Moreover, despite the boom in clothes shopping on the internet I am less convinced than the appellants' witness that top end ladies fashions are as susceptible to internet sales as some other areas. Nevertheless, I consider that the future prosperity of the shopping centre should not be taken for granted.
24. Against this background, the appellants argue that their coffee shop provides a facility that shoppers increasingly expect and that the significant level of custom that they attract has spin off benefits for other traders and the centre generally. The Council stress that (despite the views of some local residents) there is no in principle objection to coffee shops, including national chains, but that the appeal one is in the wrong place and the wrong premises. They doubt that it benefits the centre overall and feel that it has resulted in a harmful redistribution of activity within the centre.
25. For my part, it seems logical that if a new business attracts significant numbers of people who would not otherwise have come to a centre then it will enhance that centre's vitality and viability. However, the suggestion that a coffee shop would have this effect seems a little surprising and I can understand why many people were not fully convinced. That is especially so as the surveys that the appellants had had carried out, although by a firm experienced in such matters and apparently following a standard format, did not always seem particularly well-designed to demonstrate such an effect.
26. In any event, looking first at the total number of customers attracted, different figures appear in different places and this led to some confusion. However, I have taken Mr Price's figure of about 3,000 per week to be the most reliable, based as it appeared to be on till receipts. Other figures seeking to compare Caffe Nero with other businesses relied on counts of people entering over 5 minute periods that were then grossed up. There is clearly scope for error in this process and despite the appellants' claims it seems to me that the smaller the figure the greater the potential for error may be. Moreover, the figures for Caffe Nero itself are not consistent with those from other sources. That said, it seems likely that Caffe Nero attract more customers than many shops, including, probably, that which formerly occupied these premises.
27. The appellants imply that many of these customers would not otherwise be in the town centre, but that is not altogether clear from the customer surveys

- that had been carried out. By the time of the second survey, when any novelty value may have worn off, only 4% of Caffè Nero customers said that they visited the locality more often than they had before it opened. (96% said they visited about as often.) Against a total customer base of about 3,000 per week, this does not suggest that Caffè Nero has boosted town centre activity by a substantial amount, even if all the 4% are new to the centre. The spin-off effects also seem likely to be modest, especially as a significant number seem to do nothing other than visit Caffè Nero. Moreover, any survey carried out in Caffè Nero and limited to its customers (as this one seems to have been) can only exaggerate its effect, as this ignores those who do not use it (and whose habits are therefore unlikely to have been altered, at least positively).
28. In my views these surveys do not provide clear and compelling proof that Caffè Nero has had a major beneficial effect on the vitality and viability of the town centre. Notwithstanding the local resident who told the Inquiry that he now came more often, it seems likely that any such effect has been relatively modest. Moreover that appears broadly consistent with the thrust of the national surveys that have been drawn to my attention. These suggest coffee shops may boost the local economy by 3-5%.
29. Of course, even a small increase will be beneficial, especially in poor trading conditions, unless it is offset by some harm. In this case, the number of customers indicates that the appellants' use has not resulted in a 'dead' unit<sup>2</sup>. On the contrary the Council suggest that Caffè Nero has led to an unacceptable concentration of activity in this part of the centre to the detriment of more peripheral areas. They point out that the appeal premises are close to Waitrose (the largest and probably busiest store in the centre) and at a point where shoppers coming from the main town centre car park(s) emerge onto High Street. There is no dispute that when a prime shopping frontage is defined the appeal premises will be in it and the Council, and others, are concerned that, if Caffè Nero remain, shoppers will not stray beyond this core.
30. I accept that, if a business attracts a high footfall without generating significant levels of completely new trade, so that it merely redistributes activity within a centre, then the potential exists for the effect to be harmful rather than beneficial. Moreover, on its face, the Council's argument has an air of plausibility to it. What is lacking is any firm evidence of harm.
31. Although I do not condone breaches of planning control, the fact that the coffee shop has now been open for about 9 months means that there has been the opportunity for harmful effects to have occurred and been noticed. Even if this period is too short for shops to have closed and vacancy rates gone up on the periphery of the centre (or elsewhere), I would have expected businesses to have noticed a reduction in customers or trade if there had been a serious effect. Furthermore, if they did not wish to make their individual position known in a public forum it would have been open to them to put forward views through the local Chamber of Commerce or similar body.
32. Despite this no trader or body representing shopkeepers has come forward with any evidence of trade or activity having fallen off on the extremities of High Street since Caffè Nero opened. (For the avoidance of doubt I am not suggesting that the protection of trade would be a legitimate planning concern, simply that changes could have been an indication of harmful effects on the

---

<sup>2</sup> In addition, whilst there is no window display for passers by to stop and look at there may be some interest in looking into the premises and seeing what is going on. The frontage is arguably no more 'dead' in this sense than that of Waitrose and it seems to be agreed that this is not an issue.

- centre as a whole.) Nor have the Local Planning Authority, the Town Council or the Chamber of Commerce undertaken any survey of shoppers or pedestrians in peripheral areas to see whether they do now go there less often. At least none have been submitted and all the evidence is anecdotal and speculative. Even in respect of cafes there is no firm evidence of any effect<sup>3</sup>. On the contrary the appellants' own surveys, though apparently intended for a quite different purpose, suggest that any redistribution of activity has been modest.
33. Moreover, major changes seem less likely when the compact nature of the town centre is taken into account. It does not take long to walk from one end to the other and someone standing outside Caffè Nero can see a high proportion of the shops in the centre. Taking this into account it seems unlikely that someone who has gone to Marlborough on a shopping trip will be put off visiting the main shops simply because a coffee shop has opened in the appeal premises. Indeed, there is no evidence of such an effect occurring elsewhere where coffee shops have opened at the entrance to shopping centres. In fact I have seen no evidence of harm of any sort in other centres where coffee shops have been open for much longer than this one, although I accept that the specific circumstances of this case may not be repeated often.
34. In addition, whilst Hilliers Yard may be the main pedestrian access point onto High Street, there are other car parking areas. In particular except on market days it is possible to park for 2 hours on High Street itself and it would seem logical if some shoppers did so, with the more remote car park off Hilliers Yard being used more by long stay visitors. Moreover, High Street is where the bus stops are.
35. Of course, if Caffè Nero is as big an attraction as they claim to be there could be benefits if they were located in, for example, Hughenden Yard so that they would attract more footfall into what at present seems a rather out of the way and fragile location. In my experience it is not uncommon for main attractors to be distributed around centres so as to encourage more shoppers to pass other shops thus increasing the potential for opportunity purchases. Indeed, Mr Green's proof suggests that Costa Coffee, who operate from premises close to one end of Marlborough High Street, may have encouraged ladies fashion shops to open in that area. However, the possibility that Caffè Nero would be of more benefit to the centre if it were located in a different part of it is not the same as saying that it causes harm where it is.
36. Furthermore, the national surveys that the appellants have referred to suggest that shoppers increasingly expect centres to include facilities for taking a break and refreshing themselves. It seems entirely credible that shoppers will be more likely to visit centres where such facilities exist; also that they will stay longer and spend more money in such centres, if only by modest amounts. Certainly no evidence to the contrary has been provided.
37. Despite this, I see limited significance in the fact that the proportion of food and drink premises in Marlborough is a little below the national average. There is no evidence that the national figure is of any special merit. Furthermore, the proportion of food and drink floorspace is actually above the average, suggesting capacity is unlikely to be an issue. Moreover, whilst choice may be more important than capacity, it is not clear that the shortfall in the number of units relative to the national average is immediately noticeable (as Mr Green

---

<sup>3</sup> On the first day of the Inquiry it was suggested that a café on the edge of the town centre had closed with the opening of Caffè Nero being 'the last straw.' However, that evidence was anecdotal and in any event before the Inquiry resumed the premises had been reopened by another café operator.

- accepted) or significant. Marlborough does not give the impression of being seriously deficient in places to eat and drink. Even looking specifically at coffee shops there would, without Caffe Nero, still be one national branded chain. All this suggests that whilst the appellants may have added modestly to the choice available to shoppers, the benefits are again relatively limited.
38. The figures do however suggest that the centre is not overwhelmed by coffee shops or similar uses. A1 units form a clear (if modest) majority in the centre even though it is drawn widely. The argument that 'one more cannot be harmful' can be repeated many times and it does not seem to me that the Framework indicates that the number of coffee shops should be left entirely to market forces. However, I have seen nothing to suggest that, in principle, the retail provision in Marlborough has reached a point where replacement of a retail unit by a coffee shop would dilute the core offer in a critical way.
39. I conclude that there is no evidence that the appeal development causes harm to the vitality and viability of this centre. If anything the evidence available suggests that any effect is beneficial, albeit modestly so.
40. In forming that view I have taken into account that the appeal premises are double fronted with scope for retail floorspace on two floors and are in a very central location. However, whilst that might make them attractive to other retailers I do not consider that this in itself is sufficient to make a coffee shop unacceptable in the absence of any other harm and without the backing of a clearly up to date policy.

The fallback position

41. In any event, the appellants say that if the appeal is dismissed they would not vacate the premises but would operate purely as an A1 business, essentially selling hot drinks and sandwiches for consumption off the premises but with an ancillary A3 element.
42. They also suggest that any policy objection could be overcome by restricting the A3 element of the use to the first floor, with the downstairs limited to A1 (apart from what might be ancillary). However, whilst that is something that could come about through the granting of planning permission, and I have kept that in mind, I do not regard it as a fallback position as it does not seem possible for the appellants to achieve this unilaterally. Even if some tables and chairs were removed from the ground floor, the premises would remain a single planning unit that in its entirety was used for a mixture of retail and coffee shop purposes. There would still be a breach of planning control. By the end of the Inquiry the appellants appeared to accept this.
43. As for the feasibility of an A1 only operation throughout (with ancillary A3 type use), I note that Caffe Nero do not operate in this manner in any centre comparable to Marlborough. Indeed, it seems that there is only one example of such an operation by any of the main national coffee shop chains in any comparable centre anywhere in England.
44. Inevitably, this raises some doubts about the feasibility of such an operation. Nevertheless, it does not appear to be the appellants' stock response and I understand that elsewhere they have indicated that they would simply close down. In this case, the evidence produced by Mr Price, the appellants' finance director, suggests that an A1 only operation would be feasible. Although in closing the Council's advocate sought to throw doubt on Mr Price's figures I do not recall him being seriously challenged on them and the Council's planning witness accepted that he had no evidence to counter them. I conclude that this



is a credible outcome if the appeal is dismissed, and represents a realistic fallback position, at least in the short term.

45. In the longer term it would be no more than natural for the appellants to re-consider whether they want to operate the premises permanently on a sub-optimal basis. However, this, and what might then replace them, is no more than speculation. For the immediate future the likely outcome if the appeal is dismissed seems to be that the appellants would continue to trade there on an A1 only basis. That would attract fewer customers, with little obvious benefit. Even if, as the Council suggest, the premises would not remain vacant for long if Caffè Nero moved out that does not seem a likely scenario in the near future.

Overall summary and other matters

46. Drawing together all these matters I conclude as follows. Looked at in planning terms the change of use from a retail shop to a coffee shop with a retail element has only a limited effect on the individuality of Marlborough. Moreover, there is no policy seeking to protect individuality that might allow other considerations to be taken into account.
47. As for the vitality and viability of the centre, no real evidence of any actual harm has been provided although the coffee shop has now been operating for about 9 months. Whilst the case put by the Council (and many others) may seem common sense all the hard evidence points in a different direction. The appellants' surveys may have their faults and the results may be less clear than suggested. Nevertheless, in the absence of any contrary evidence other than anecdotes they suggest that on balance any effect of Caffè Nero is more likely to have been beneficial than harmful, albeit only modestly so.
48. On that basis, and having given due weight to Policy ED18, I consider that there can be no serious conflict with development plan policy. Moreover, even if the benefits were to be regarded as too small or uncertain to comply with Policy ED18, then in my view other considerations, in particular national policy as now set out in the Framework, would indicate that permission should still be granted.
49. In any event, if the appeal is dismissed there seems to be a credible fallback position, ie the appellants would operate the premises on a Class A1 only basis (with an ancillary A3 element). The Council appeared to accept that this would be no more beneficial than the existing operation and that their argument was that such use was not viable.
50. I therefore intend to quash the notice and grant planning permission in respect of the deemed application. I shall however, impose the conditions that appear in the statement of common ground, modified as necessary in the interests of clarity and to reflect the discussion that took place at the Inquiry. Such conditions are needed to prevent the premises being occupied by some other A3 type use that would not be as complementary to this location (by for example not opening during shopping hours) and to reduce the risk of harm to the living conditions of the occupiers of the flat(s) above.
51. In forming this view I have had regard to the precedent that the Council fear would be set. However, if, contrary to my expectations, clear evidence of any harm were to emerge, that could be taken into account in any future application for coffee shops and set against any precedent. Moreover, if the Council remain concerned about the situation even in the absence of any harm emerging it would be open to them to seek to address this in the emerging Core Strategy and supporting documents.

52. As for the precedent they feel has been set by the appeal decision at 10 High Street, I consider that the circumstances of that case were materially different. Amongst other things, it related to an unspecified A3 use that could have included a restaurant which would have been less complementary to the shopping centre than a coffee shop. It was also taken in the context of a different national policy background, before the Framework was published. Whilst I have taken that decision into account it does not alter my conclusions.

#### Conclusions

53. For the reasons set out earlier I consider that the description of the development in the enforcement notice is incorrect in referring to a mixed A1/A3 use. The appellant and the local planning authority agreed at the inquiry that it was open to me to correct the allegation in the notice and I am satisfied that no injustice will be caused by this. I will therefore correct the enforcement notice in that respect in order to clarify the terms of the deemed application under section 177(5) of the 1990 Act as amended.

54. Having done so I conclude that, for the reasons given above, the appeal should succeed on ground (a) and I will grant planning permission in accordance with the application deemed to have been made under section 177(5) of the 1990 Act as amended, which will now relate to the corrected allegation. Accordingly there is no need for me to consider the ground (f) appeal.

#### Decision

55. I direct that the enforcement notice be corrected by the deletion in section 3 of the words "to a mixed Class A1/A3 (retail/café) use" and the substitution of the words "to a mixed use of retail and the sale of food and drink for consumption on or off the premises". Subject to this correction the appeal is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the change of use of the ground floor and first floor from Class A1 (retail) use to a mixed use of retail and the sale of food and drink for consumption on or off the premises, at 21-22 High Street, Marlborough, subject to the following conditions:

- 1) The premises shall be used only for Class A1 retail purposes and/or as a coffee shop serving coffee, other hot and cold drinks, sandwiches and other light refreshments for consumption on or off the premises.
- 2) No primary cooking of unprepared food shall be carried on within the premises. Only reheated or cold food that has been prepared elsewhere shall be served within the premises.
- 3) The premises shall not be open for customers outside the hours of 0700 to 1830 Mondays to Saturdays; and 0800 to 1800 hours on Sundays.

**P Grainger**

INSPECTOR

## **APPEARANCES**

### FOR THE LOCAL PLANNING AUTHORITY:

Miss S Clover of Counsel, instructed by Ms V Roberts, Solicitor to Wiltshire Council

She called

Mr M J Muston

Director, Muston Planning

BA(Hons) MPhil MRTPI

Cllr R Gamble

Vice-Chairman, Eastern Area Planning Committee

### FOR THE APPELLANT:

Mr J Findlay QC, instructed by Mr B Madge

He called

Mr B Price

Finance Director, Caffè Nero Group

Mr C Green

Director, Town Planning Services Ltd

BA(Hons) DipTP MRTPI

### INTERESTED PERSONS:

(in speaking order)

Mr K Ellis local resident

Mrs E Rolph local resident

Mr S Dobson for Mr & Mrs Skinner – local residents

Mr R Pitts Town Councillor & founder member of Marlborough Transition

Mr M Fitzgerald local resident

Mr J Kirkman Chairman, CPRE Kennet District Group

Mrs M Rose Town Councillor & Chair of Town Council Planning Committee

Mr M Munday local resident

Mrs V Compton local resident and Town Councillor

### **DOCUMENTS** submitted at the Inquiry

- 1 Signed Statement of Common Ground
- 2 Petition in support of Caffè Nero, submitted by the appellants
- 3 The Council's opening statement
- 4 Letters from:
  - (a) Mrs R B Moore
  - (b) Ms R Pitt
- 5 The statements of:
  - (a) Mr Ellis
  - (b) Mr Skinner
  - (c) Mr Pitts
  - (d) Mr Fitzgerald
  - (e) Mr Kirkman
  - (f) Mrs Rose
- 6 Allegra Report – Project Café 12, submitted by the appellants
- 7 Wiltshire Core Strategy extract, supplied by the Council
- 8 Email relating to the vacation of the appeal premises by Dash, submitted by the Council
- 9 The Council's closing statement and attachments
- 10 The appellants' closing statement and addendum