The NPPG confirms that both uses classes A3 (restaurant and cafés) and A5 (hot food takeaways) exist as individual uses in their own right. However, it goes on to state that;

'Not all uses of land or buildings fit within the use classes order. When no use classes order category fits, the use of the land or buildings is described as sui generis, which means 'of its own kind'. Examples of sui generis uses include: scrap yards, petrol stations, taxi businesses, casinos (these examples are not exhaustive).

Where land is or buildings are being used for different uses which fall into more than one class, then overall use of the land or buildings is regarded as a mixed use, which will normally be sui generis. The exception to this is where there is a primary overall use of the site, to which the other uses are ancillary. For example, in a factory with an office and a staff canteen, the office and staff canteen would normally be regarded as ancillary to the factory.'

Accordingly, current national planning guidance recognises that if there is no primary overall use of a site, then the uses taking place on this site will be regarded as a mixed use.

Such mixed use has becoming increasingly common on Britain's high streets over the last 10 years or so with regard to the major coffee shop chains, such as Starbucks and Café Nero, and major fast food operators, such as Kentucky Fried Chicken and McDonalds.

In the case of the major coffee shop chains, many of their premises operate, with the benefit of planning permission, under mixed A1/A3 usage, on the basis that there is no primary overall use of the site. To illustrate this, I attach for your reference an appeal decision (ref. APP/F5540/C/02/1087789), dating back to December 2002 and relating to a Café Nero premises at 192 Chiswick High Road, which provided seating for 29 customers.

In that particular case, whilst the enforcement notice that was the subject of that appeal was quashed, the Inspector concluded that there was no primary overall use of the premises, due to the similar proportions of customers purchasing food and drink for consumption on the premises and those customers purchasing food and drink for consumption off the premises. Therefore, the Inspector concluded, the use taking place at the premises fell within mixed A1/A3 use, and a subsequent planning application to the LPA for the continuation of that use was approved.

Similarly, I attach a decision (planning application ref. 08/3036/COU) by the London Borough of Richmond upon Thames, dated 4th November 2008, relating to the premises at 70 High Street, Teddington, where the LPA granted planning permission to Starbucks for a mixed A1/A3 use incorporating seating for up to 51 customers.

In respect of mixed A3/A5 uses, the principle remains the same, and, as quite frankly I find it entirely unnecessary to cite further individual appeal decisions, I enclose the results of a simple search of all planning appeals within the UK over the 15 years relating to Kentucky Fried Chicken premises, and in almost all of those cases you will note the reference to mixed A3/A5 use.

I have experienced solicitors in the past draw attention to paragraphs 48 of now withdrawn Circular 03/2005, which stated that;

'Takeaways are differentiated from restaurants because they raise different environmental issues, such as litter, longer opening hours, and extra traffic and pedestrian activity, from those generally raised by A3: Restaurant and Café uses. With A3 uses, any takeaway food sold on an ancillary basis is usually taken home for consumption.'

Solicitors have suggested that the above paragraph *'distinguishes A5 takeaway food from A3 restaurant food in that food taken away from an A3 establishment is generally being taken home for consumption.'*

I have included the entire content of paragraph 48 for the sake of completeness, and in particular to emphasise the crucial words within the final sentence of paragraph 48, namely, *'any takeaway food **sold on an ancillary basis**'.*

Solicitors have also previously quoted the final sentence of paragraph 49 of withdrawn Circular 03/2005, which states that;

'the existence of tables and chairs within a hot food outlet does not, in itself, make the premises a restaurant where the takeaway element is predominant.'

Again, the crucial words within the above sentence are the final ones, i.e. *'where the takeaway element is **predominant**'.*

Although Circular 03/2005 has now been withdrawn, the thrust of its advice emphasised the need for each site to be assessed based on the relevant individual circumstances.

This is amplified by paragraphs 39 to 41 of the same Circular, which state that;

39. The new A3: Restaurants and Cafes class is one of three new classes, created from the disaggregation of the former A3: Food and Drink use class formed in the 1987 Order. This new class is designed specifically for restaurants and cafés, i.e. places where the primary purpose is the sale and consumption of food and light refreshments on the premises.

40. Many premises have a service area in which meals are served as well as a bar area for the serving or consumption of drinks. Nevertheless, the serving of drink in a restaurant is often ancillary to the purchase and consumption of a meal. The primary purpose is what needs to be considered in determining whether a particular premises is classified in the A3 use class, or is a mixed use.

*41. A restaurant whose trade is primarily in-house dining but which has ancillary bar use will be in Class A3. Where the pub or bar activity is a minor component of the business and will not affect environmental amenity, it will treated as ancillary to the primary (restaurant) use of the premises. **Such matters will be decided on the basis of fact and degree in each case.**'*

Furthermore, the Government's own web page where this now withdrawn Circular can be found advises that *'although this Circular gives guidance amounting to an interpretation of the order, only the courts can interpret the law authoritatively.'*

Looking at the specific site which is the subject of this correspondence, it is capable of providing seating for at least 50 customers to consume their purchases within the premises, although of course, it is equally recognised that many customers will consume their purchase off-site. Hence the proportion of both sets of customers is similar and significant,

Quite simply, the circumstances when a fast food premises falls solely within Use Class A5 is when the take-away element is predominant, and it is not disputed that the existence of tables and chairs does not automatically means such a premises falls within A3 use.

However, it is a question of whether the takeaway element is predominant, and clearly in the case of premises which might provide seating for less than 15 customers to consume their purchases on-site there is a compelling argument that the predominant use of that premises is A5. However, as the cited Café Nero appeal case demonstrates, when the proportions of takeaway and eat-in trade are similar, a premises incorporating seating for 29 people was concluded to constitute a mixed A1/A3 use.

Hence taking into account the above and the other related decisions I have cited, given the premises which is the subject of this correspondence provides seating for approximately 50 customers, it is entirely proper and accurate to conclude that the proposed use will fall within mixed A3/A5, as neither the restaurant use nor the takeaway use will constitute the primary overall use of the site.