

Application Number: 08/01534/FUL

Decision Due by: 10th October 2008

Proposal: Change of use from retail (class A1) to a mixed use as retail and cafe (A1/A3). (Amended description)

Site Address: 71 London Road Headington (**site plan: appendix 1**)

Ward: Headington Ward

Agent: Mr Jonathon Rainey

Applicant: Starbucks Coffee Co (UK)
Ltd

Recommendation:

The North East Area Committee is recommended to refuse planning permission for the following reason:

- 1 The proposal would reduce the proportion of retail units at ground floor level within Headington District Shopping Centre below the threshold specified in the Local Plan, and create a greater imbalance between the retail premises and other uses within the shopping centre, and as a result would undermine the long term vitality and viability of the District Centres. This would be considered contrary to Policy RC4 of the adopted Oxford Local Plan 2001-2016.

Main Local Plan Policies:

Oxford Local Plan 2001-2016

CP1 - Development Proposals
CP9 - Creating Successful New Places
CP19 - Nuisance
RC1 - Oxford's Retail Hierarchy
RC2 - Retail Hierarchy District Centre
RC4 - District Shopping Frontage
RC12 - Food & Drinks Outlets

Oxford Core Strategy 2026 Proposed Submission Document (September 2008)

CS2 – District centres
CS33 – Retail hierarchy

Other Material Considerations:

Oxfordshire Structure Plan 2016
PPS1: Delivering Sustainable Development
PPS6: Planning for Town Centres

Relevant Site History:

75/00991/A H: Demolition of existing buildings at rear and extension to existing shop: Approved

85/00652/NF: Change of use and conversion of part of first floor flat to rented office accommodation. Demolition of existing first floor bay windows, first floor extension and provision of separate access to first floor (Amended Plans): Refused

01/01021/A: Internally illuminated fascia sign: Approved

07/01876/FUL: Alteration to entrance forecourt to provide level access ramp (Amended plans): Approved

08/01535/FUL: Installation of 4 no. air condensing units at high level on the single storey rear elevation. (Retrospective): Approved

Representations Received:Occupant, 39 Kennett Road

- Starbucks is quite patently operating as a café and so it is right and proper that it has sought retrospective permission for a change of use.
- It would appear that 25% is retail (A1) use and 75% would be a café (A3 use)
- There have been a number of changes of use planning applications refused because of the retail threshold in Policy RC4.
- The comments in the applicant's planning statement that Starbucks brings trade into the centre are not entirely relevant in Headington, which has few retail units left.
- Headington centre is about to get its eighth charity shop, which does not suggest that Starbucks has brought vibrancy to the area.
- The proposed tables and chairs could cause problems for pedestrian safety

Occupant, 21 New Cross Road

- Starbucks has become an important meeting place for local people, such as new parents
- I support this retrospective application

Statutory and Internal Consultees:Oxford City Council Environmental Health:

There would be concerns in relation to the change the use of the premises from retail (A1) to mixed use as retail and café (A1/A3). Whilst the existing business is unlikely to generate any complaints about cooking smells, problems could occur if the food operation was ever expanded. In view of this a condition should be attached which recommends a condition be attached for a scheme to treat cooking fumes and odours.

A further condition should be attached which controls noise emissions from the premises.

Oxfordshire County Council Highways Authority:

The application seeks permission for the change of use of 71 London Road from use class A1 to a mixed class A1/A3 coffee shop. The proposal involves the erection of 2

no. tables and 6. no chairs to the front of the premises providing the coffee shop with an outdoor seating area.

Whilst the tables and chairs will be erected on land under the control of the applicant the Highway Authority is concerned that the erection of table and chairs in this location will obstruct the adjacent footway.

The Highway Authority also has aspirations for changing the footway in the area as part of the Phase 2 works for London Road improvement works. Local businesses will be consulted on any proposals in due course and it is hoped that they will support any proposals to improve the street scene.

Oxford Civic Society:

The positioning of the café tables and chair is important in the restricted space available, but is not shown clearly enough on the drawings.

Thames Water Utilities Limited: No objection

Issues:

- Change of Use
- Impact upon residential amenity
- Impact upon highway safety

Sustainability:

The site is in the Headington District Centre, which is an accessible location with good public transport links, and access to other shops and services.

Officers Assessment:

Site Location and Description:

1. The application site is situated on the northern side of the London Road and forms part of the Headington District Centre (**appendix 1**).
2. The site comprises a ground floor commercial premises that is currently occupied by Starbucks Coffee Co (UK) Ltd. The existing lawful use of the premises is retail (Class A1). The unit has previously been increased in size, via a large single storey extension. To the rear of the site there is a small service area, which is accessed from the Osler Road.

Proposal

3. The proposal would seek retrospective planning permission for the change of use of the premises from a retail (Class A1) use to mixed-use (Class A1/A3) development.
4. The application was originally described as including the 'change of use of the pavement to seating'. This was an error and following notification from the applicant on the 14th August 2008 the description was amended and re-advertised. The change of use of the pavement area forms no part of this application.

Background

5. The Town and Country Planning (Use Classes) Order 2005 classifies certain types of land uses, with those uses generally found within shopping areas covered under 'Class A' of the order.
6. The first part of this class (A1) covers shops and would include such premises that are involved in the sale of goods other than hot food, or the sale of sandwiches or other food for consumption off the premises.
7. The introduction of the 'coffee shop concept' has created a particular problem in recent years, whereby in a similar fashion to a sandwich bar the use does not cease to be included within the retail class (A1) merely because it sells hot drinks or food that is prepared elsewhere but reheated on the premises, or if a few customers eat or drink on the premises. The guide to the Use Classes Order 2005 (Circular 03/2005) makes clear that the use of coffee shops needs to be considered on a case-by-case basis and an assessment made as to whether the primary purpose is a retail (Class A1) use, i.e. premises for the sale of food and beverages to be taken away, or whether it has changed to a café (Class A3), where the primary purpose is the consumption of food and beverages on the premises, or whether it would be a mixed-use and therefore a use in its own right.
8. Although Starbucks Coffee originally occupied the premises on the basis that they typically trade as a retail outlet (Class A1). The Council raised concerns that it was no longer operating within the authorised retail (class A1) use, and as a result a retrospective application for a mixed-use coffee shop (Class A1/A3) has been submitted.
9. The planning statement submitted as part of the application indicates that the internal layout of the store would provide a total of 58 seats, covering approx 42% of the ground floor area of the premises, with the remainder of the space given over to service areas, circulation space, staff areas and customer amenities. In terms of trade, the coffee shop provides a range of merchandise for general sale (coffee beans, chocolates, coffee machines etc). It does not sell hot food, but does provide a level of warmed food, which is reheated on the premises. The sales figures from 31st March 2008 to 29th June 2008 indicate that the average split of trade as 65% 'eat-in' and approx 35% 'eat-out'.
10. Having regard to the level of seating within the premises and the amount of trade consumed on the premises (65%), the current use of the premises would appear more comparable to a café (Class A3) use. However this would not be the sole use, given the range of products sold and high level of trade consumed off the premises (35%), the premises would retain a reasonable level of retail (Class A1) usage. Therefore it is considered that a more accurate description of the premises would be as a mixed-use coffee shop, with both retail (Class A1) and café (Class A3) components.

Change of Use

11. The site is located within the Headington District Shopping Centre. The Local

Plan identifies District Centres as the second tier of the retail hierarchy, fulfilling a complimentary role to the City centre in providing convenience and specialist goods for the local population. Policy RC2 of the adopted Oxford Local Plan 2001-2016 states that permission will only be granted for proposals that seek to maintain and enhance the role of the District centre within the retail hierarchy.

12. Policy R4 of the Local Plan relates specifically to District Shopping Frontages and states that within these frontages, permission will only be granted for:
 - a) Class (A1) shops
 - b) Other Class A uses only where the proportion of units at ground level in A1 use does not fall below 65% of the total ground level of units in the centre; and
 - c) Other uses only where the proportion of units at ground level in Class A use does not fall below 95% of the total ground level units in the centre.
13. The Council carries out surveys on the mix of uses throughout the retail hierarchy on a six-monthly basis. The most recent survey was carried out in August 2008, and indicated that the percentage of Class A1 uses within the centre was 65.79%, while the total number of Class A uses was 94.73%
14. At the same time, the Council has been conducting an investigation into unauthorised Class A3 uses operating from retail (Class A1) premises within the Headington District Shopping Centre. The investigation identified a number of unauthorised units, although it was established that one of these had become lawful, as it had been operating as an A1/A3 use for over 10 years. Taking this into account, the survey would need to be adjusted to show the proportion of retail units (Class A1) within the centre at 64.9%, and the total number of Class 'A' uses at 94.73%.
15. The current number of retail (Class A1) uses within the District Centre, has therefore already fallen below the 65% threshold desired for the District Centre, and the change of use of this premises from a retail unit (Class A1) to a mixed use unit (Class A1/A3) would reduce the threshold further to 64%. As a result the proposal would be considered contrary to part (b) of Policy RC4 of the adopted Oxford Local Plan 2001-2016.
16. The applicant has pointed to appeal decisions where it had been viewed that similar mixed-uses have not had a detrimental impact upon the vitality and viability of the shopping centre in which they are located. The Council would point to a recent appeal decision for the change of use from Class A1 to Class A3 at 123 London Road (APP/G3110/A/07/2054032) where the Inspector supported the view that breaching the retail threshold would make it difficult to resist further proposals that may seek to increase the proportion of non-A1 uses and over the course of time would undermine the attractiveness of the centre. Therefore the longer view for the centre established in Policy RC4 deserved support. A copy of the Inspectors decision can be found in **appendix 2** of this report.

17. In addition, a recent appeal decision at 271 High Street, Epping would also be considered relevant to this case. A copy of this decision can be found in **appendix 3** of this report. The Inspector clearly highlights the importance of acknowledging the bigger picture set by local plan policy, which seeks to maintain the vitality and viability of a retail centre. In Epping's cases the local plan sought to achieve a 70/30 split between retail and non-retail. The appellant's argument in this case was that 'one breach of the policy will not cause much harm'. However the Inspector argued that 'once an upper limit policy had been breached, particularly without adequate justification, the status and impact of the policy is devalued'. The Inspector also went on to say that 'the critical tipping point in the retail / non-retail balance and function of any frontage or town centre can only be identified retrospectively, possibly not for several years, but once that point is passed it is very difficult to redress the balance as the harm has been done.'
18. These appeal decisions highlight the importance of Policy RC4 in maintaining the long term vitality and viability of the District Centre, and therefore provides further justification why change of use of existing retail (Class A1) premises within the centre should be resisted.

Impact upon Residential Amenity

19. Policy RC12 of the Local Plan states that permission will only be granted for food and drink uses where the Council is satisfied that they will not give rise to unacceptable environmental problems of nuisance from noise, smell or visual disturbance.
20. The Council consider that any impact upon and adjoining residential properties arising from the change of use could be mitigated by the conditions suggested by the Environmental Health department in terms of noise and odour control.

Impact upon Highway Safety

21. While the proposal was initially advertised as including the change of use of part of the pavement for external seating. This was included in error and has subsequently withdrawn.
22. The Local Highways Authority raised no objection to the change of use in terms of highway safety.

Conclusion:

23. The proposal is not in accordance with local plan policies and the officer's recommendation to Members is that this planning permission should be refused for the reasons listed above.

Human Rights Act 1998

Officers have considered the implications of the Human Rights Act 1998 in reaching a recommendation to refuse this application. They consider that the interference with the human rights of the applicant under Article 8/Article 1 of Protocol 1 is justifiable and proportionate for the protection of the rights and

freedom of others or the control of his/her property in this way is in accordance with the general interest.

Section 17 of the Crime and Disorder Act 1998

Officers have considered, with due regard, the likely effect of the proposal on the need to reduce crime and disorder as part of the determination of this application, in accordance with section 17 of the Crime and Disorder Act 1998. In reaching a recommendation to refuse permission, officers consider that the proposal will not undermine crime prevention or the promotion of community safety.

Contact Officer: Andrew Murdoch

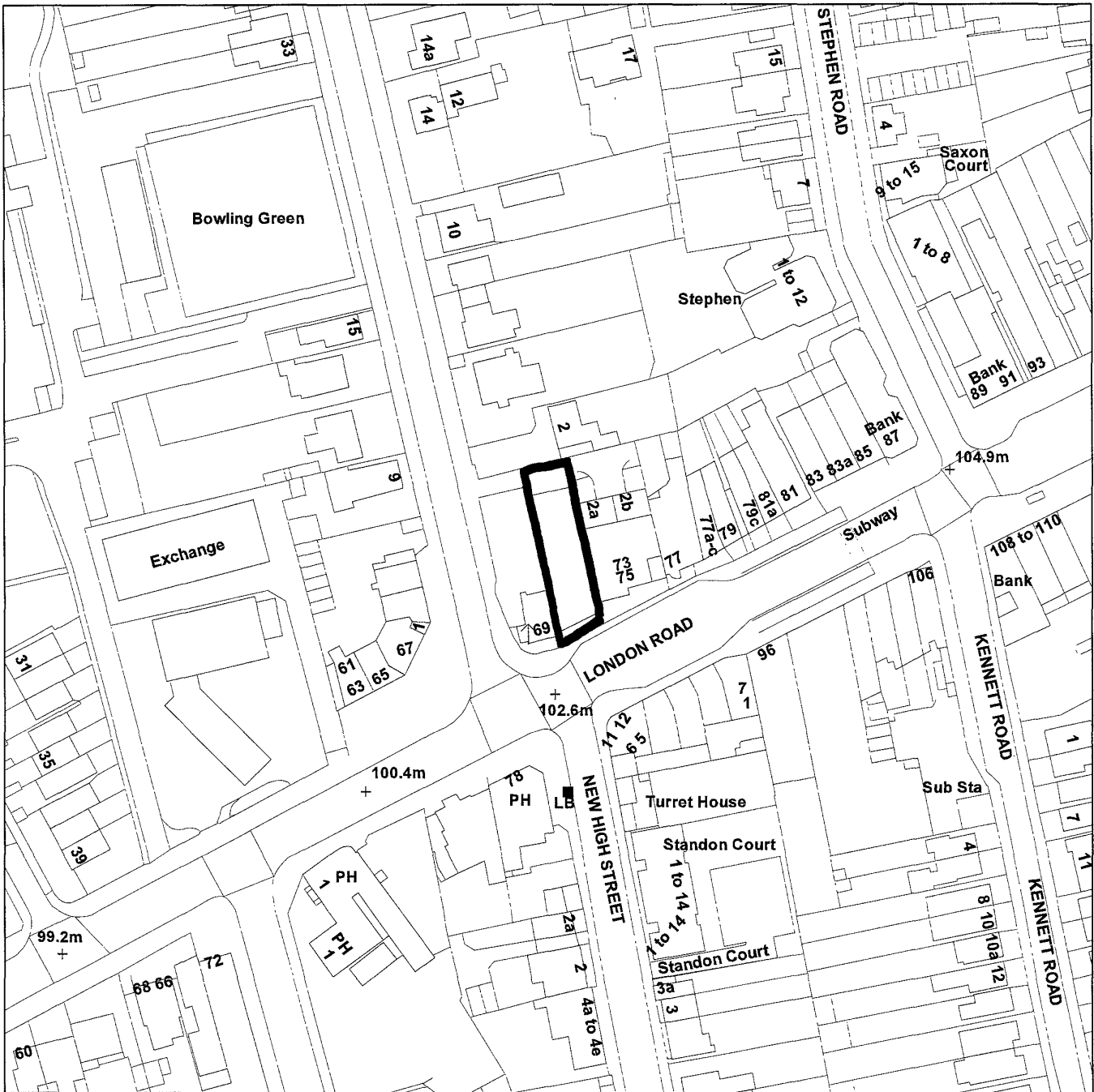
Extension: 2228

Date: 3rd November 2008

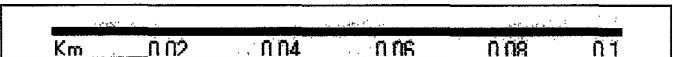


Appendix 1

71 London Road (08/01534/FUL)



Scale : 1:1250



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Organisation	Oxford City Councilq
Department	Planning Control
Comments	
Date	27 November 2008
SLA Number	100019348



Appeal Decision

Site visit made on 17 December 2007

by **B J Juniper** BSc, DipTP, MRTPI

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

The Planning Inspectorate
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Decision date:
17 January 2008

Appeal Ref: APP/G3110/A/07/2054032
123 London Road, Headington, Oxford, OX3 9HZ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr Mohamed Garni against the decision of Oxford City Council.
- The application Ref 07/01302/FUL, dated 1 June 2007, was refused by notice dated 31 July 2007.
- The development proposed is the change of use of premises from retail (Class A1) to a hot food takeaway (Class A5).

Decision

1. I dismiss the appeal.

Main Issue

2. I consider that the main issue is the effect of the proposal on the vitality and viability of the Headington District Shopping Centre.

Reasons

3. A sandwich bar business operates from the premises. Although there are tables and chairs set out at the rear of the shop unit for customers to eat food bought on the premises, this appears to me to be ancillary to the principal retail operation. Having regard to the advice in paragraph 34 of Circular 03/2005 – *Changes of Use of Buildings and Land* I am satisfied that the present business is within Class A1. The appellant now wishes to offer hot food dishes to take away in addition to the existing menu which would result in the business falling within Class A5. No changes would be made to the façade of the building.
4. The Headington District Shopping Centre is acknowledged by the Council to be one of four suburban shopping areas providing a complementary offer to the city centre. It has a diverse range of businesses and the Council has been concerned in the past that its attractiveness would be reduced if the proportion of non-retail units became excessive. Oxford Local Plan (LP) Policy RC.4 precludes proposals which would result in the percentage of units within defined shopping frontages not in Class A1 use at ground level falling below 65%. The Council's most recent survey information, from August 2007, shows that at that time 65.49% of the frontages at Headington were in A1 use and it is calculated that granting permission for the appeal proposal would reduce the

proportion below 65%. The appellant does not dispute these calculations and, based on my examination of the centre, I see no reason to doubt their accuracy.

5. I acknowledge that the proposal in itself would be modest in scale and effect and that the effect of applying Policy RC.4 might appear somewhat arbitrary. However, the means by which the Council has sought to retain the vitality and viability of the district centre are set out in a relatively recently adopted Local Plan and I have not been advised of any material considerations which would be sufficient to justify an exception being made in this case.
6. The Council referred to two appeal decisions where Inspectors had upheld similar policies in Epping (Ref: APP/J1535/C/06/2031060) and Norwich (Ref: APP/G2625/A/06/2025131). Whilst I accept that these decisions were made against somewhat different policy backgrounds, they support the general principle that breaching a set limit would make it more difficult to resist further proposals which would increase the proportion of non A1 uses. Over time this would tend to undermine the retail function and therefore attractiveness of the centre. This longer term view is established in Policy RC.4 and deserves support. I conclude that the proposal would be contrary to the Policy and harmful to the vitality and viability of the Headington District Shopping Centre.
7. The appellant considered that it might have been more appropriate to have applied for change of use to Class A3. This proposal was not before me but, in any event, would also be contrary to Policy RC.4.

B J Juniper

INSPECTOR



Appeal Decision

Inquiry held on 24 July 2007
Site visit made on 24 July 2007

by **Lucy Drake BSc MSc MRTPI**

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

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Decision date:
6th August 2007

Appeal Ref: APP/J1535/C/06/2031060 271 High Street, Epping, CM16 4DA

- 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 Epping Forest District Council.
- The Council's reference is LAE/GAO/TP/7/1/1985.
- The notice was issued on 12 October 2006.
- The breach of planning control as alleged in the notice is the material change of use of the property at ground floor level to a mixed use for purposes within Use Class A1 (Shops) and use Class A3 (Restaurants and Cafes).
- The requirements of the notice are:
 - (a) Cease using the property for mixed use purposes within Use Class A1 (Shops) and use Class A3 (Restaurants and Cafes) and revert to solely Use Class A1 use.
 - (b) Remove all furniture and equipment brought onto the property used solely to facilitate that element of the use for purposes within Use Class A3.
- The period for compliance with the requirements is 3 months.
- The appeal was made on the grounds set out in section 174(2)(a),(f) & (g) of the Town and Country Planning Act 1990 as amended. The appellants withdrew their appeal on ground (g) at the opening of the inquiry.

Summary of Decision: The appeal succeeds in part and the enforcement notice is upheld as corrected and varied in the terms set out below in the Formal Decision. The application for deemed planning permission is refused.

The Notice

1. It was agreed by both principal parties at the inquiry that the requirements of the notice should refer solely to the ground floor of the property in both parts (a) and (b). I have the power to correct the notice and shall do so as set out in the Formal Decision below.

The appeal on ground (a) that planning permission ought to be granted for what is alleged in the notice

The main issue

2. The main issue in this case is the effect of the use on the retail function, vitality and viability of Epping town centre, taking into account the provisions of the development plan.



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Policy

3. The development plan for the area includes the Essex and Southend-on-Sea Replacement Structure Plan adopted in 2001 and the Epping Forest District Local Plan Alterations adopted in July 2006. The most relevant Structure Plan policy is TCR1 which defines Epping as one of 21 Principal Town Centres, second only to Sub-Regional Town Centres within the strategic hierarchy of urban centres. These are generally main convenience shopping centres but also contain a good range of comparison goods shops as well as service trades, public and community facilities. Development is expected to be appropriate to the function, size and character of the centre concerned and Local Plans should provide guidance on such development.
4. In the Local Plan Epping is one of the three Principal Town Centres in the District. The Policies of the Local Plan seek to safeguard the retail function of the town centres. Policy TC1 defines the District hierarchy and says that the Council will permit proposals which should sustain or improve the vitality and viability of any of the centres and which will maintain their position in the hierarchy.
5. Local Plan Policy TC3 is prefaced by the comment that while the principal, smaller and district centres should continue to offer a range of services and facilities, it is important for their long term vitality and viability that their main function continues to be retailing. The Policy itself says, amongst other things, that the Council will permit new retail and other town centre uses that make the centres attractive and useful places to shop, work and visit throughout the day and evening, and refuse any proposal that could have a detrimental impact upon the vitality and viability of these centres.
6. The Local Plan recognises the role that appropriate complementary non-retail uses can make to the attractiveness, function, vitality and viability of town centres. But in order to establish to optimum effect considers it necessary to control their extent and location. To safeguard their primary retail function the Local Plan Proposals Map defines 'key frontages' within the main centres. These have at least 70% of their frontage in retail use and no more than two adjoining non-retail uses anywhere in their length. Key retail frontages are defined as the minimum amount of frontage that the local planning authority considers needs to be maintained to ensure that the town centre retains its position in the hierarchy. As a means of achieving a reasonable balance of uses within town centres, Policy TC4 encourages non-retail uses within key frontages, provided (i) the total non-retail frontage length does not exceed 30% and (ii) it would not result in more than two adjacent non-retail uses. The lower case text at 11.50a says that the Council will refuse planning permission for any applications that would result in the 30% non-retail limit being exceeded. Proposals for new uses in non-key frontages are not subject to numerical limits, but will be assessed in accordance with other policies, including TC1 and TC3.
7. These development plan policies very much reflect the guidance in PPS6 (2005): the Government's planning policies for town centres whose objective is to promote their vitality and viability by, amongst other things, adopting a proactive, plan-led approach (paragraph 2.1); defining the extent of primary shopping areas (2.16), primary frontages which should contain a high proportion of retail uses and secondary frontages providing greater

opportunities for flexibility and a diversity of uses (2.17). Paragraph 2.22 notes that a diversity of uses in centres makes an important contribution to their vitality and viability. Local planning authorities should encourage diversification of uses within the town centre as a whole and ensure such activities are dispersed throughout the centre.

Reasons for the decision

8. Within Epping town centre as a whole 57.8% of the linear frontage is in retail use and 42.2% in non retail. Just under half of the town centre is defined as key frontage. At the date of the Local Plan adoption, as at the date of the inquiry, 29.9% of the key frontage length was in authorised non-retail use. A proportionately higher percentage exists in the non-key frontages.
9. 271 High Street lies towards the northern end of the defined key frontage. The ground floor is in a mixed A1/A3 use and has been operated by Caffé Nero in this form since March 2006. The authorised use of the premises is as an A1 retail unit. The premises are flanked by two units in A2 use: outlets of Abbey Bank to the north, and the Halifax Building Society to the south. The Halifax occupy around half of the former 271 High Street, which was sub-divided following the Council's grant of planning permission to the Halifax in 2001. But the sub-division did not split the frontage equally: the appeal site retained its own frontage of about 7m and an extended 'display area' of about 3m overlapping the Halifax's unit. Part of the justification for permitting the application was that it would not result in the loss of an A1 retail unit and would only use a third of the retail frontage.
10. Were the current mixed use at No.271 to become authorised, the percentage of non-retail within Epping's key frontages would rise to 31.3% and there would be three adjoining non-retail units with a combined frontage length of 24m. Authorisation of the development which has occurred would thus breach both elements of Local Plan Policy TC4 and would be contrary to development plan policy.
11. The current use is described by the appellants as a coffee shop, with coffee accounting for 57% of sales by, value and food (none of which are cooked on the premises) some 27%. The front part of the unit contains customer seating (at the date of the inquiry about 15 chairs around 6 small tables), a servery for the purchase of hot and cold drinks and other food items including cakes and hot sandwiches, and a chiller cabinet containing pre-packed cold food and drink (mainly sandwiches, wraps, salads and soft drinks). The rear part of the premises contains more small tables and seating for a further 38 customers (i.e. 53 in total) and customer toilets. It was said that 73% of purchases from the premises were for eat-in and 27% as takeaway.
12. The predominate eat-in sales and the extent of the floor area made available to eat-in customers (I estimate about three quarters assuming take-away customers would only need to use the area immediately around the servery/chiller cabinet and leading to and from the door) all indicate the predominant purpose of the unit as an A3-type activity, with A1 as a subsidiary, albeit more than ancillary, element. The mixed nature of the use means that it has to be regarded as non-retail for planning policy purposes.

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13. From the street the customer tables and chairs just inside the front windows (occupying the display area of the former A1 unit) are the dominant feature, with the servery beyond only just visible. The fairly small chiller cabinet is not easily seen until entering the premises as it is screened by a large panel from the street frontage and its side-on position also tends to hide its contents to the casual passer-by. While items are available for retail sales and there is a slight price reduction for these compared to that charged to eat in, the character and appearance of the business is very much as café within Use Class A3, i.e. for the sale of food and drink for consumption on the premises .
 14. The evidence submitted by the appellants, and not disputed by the Council, indicates that in the year or so that Caffé Nero has been operating from the premises it has proved a profitable addition to the town centre, attracting a significant number of both loyal and regular customers (some 2200 visits a week). According to the survey undertaken by the appellants, over a third of customers visit 3 or more times a week; 18% see it as the main purpose of their visit to the town centre and 42% as an 'other purpose'. The managers of 8 nearby frontage units (none of which are in A3 or mixed A1/A3 use) are supportive of its presence, all reportedly 'very' or 'quite' happy at Caffé Nero being nearby on the High Street.
 15. Studies undertaken by the Council and the appellants indicate that Epping town centre primarily caters for the daily needs of the surrounding population and is generally 'healthy' as measured by a number of economic and other indicators such as the range of goods, services and facilities on offer, pedestrian flows, environmental quality and vacancy rates. The recently adopted Local Plan Policies are intended to maintain, or improve this healthy condition, and the vitality and viability of the town centre, by a careful balance and mix of uses, with the core element being the retention of a predominant retail character and function within the key frontages.
 16. I have no doubt that the Caffé Nero outlet has proved a popular addition to the town centre for quite a number of customers and nearby business operators. It seems likely that it has attracted additional customers to the town centre, and/or this part of the High Street. The Council does not dispute that it is an appropriate and complementary town centre use that adds to an active street frontage during the daytime. The A1 element of the sales (estimated as representing 600-800 customers a week) is higher than might be generated many other solely A1 (or non-retail) uses. The appellants say that were the ground (a) appeal to be unsuccessful they would continue to operate from the premises as a primary A1 business, with ancillary A3 eat-in facilities and the external appearance of the premises would be unchanged. No evidence of harm to the vitality and viability of Epping town centre arising directly from the unauthorised change of use was put forward by any party.
 17. However, it is necessary to look at the bigger picture and the Council's aims and objectives for their town centres, and Epping in particular, as expressed through their development plan policies. I have no reason to doubt that the operation of development plan policies, in the past has been a major contributor to the health, vitality and viability of the town centre and its position within the local and county hierarchy, underpinned by the retail function of the town centre. The protection of the retail function of those key frontages is expressed
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most recently and explicitly through Local Plan Policy TC4, which complements and supports Policies TC1 and TC3. It sets an upper limit to non-retail uses as a clear statement of policy to maintain the predominant retail character and function of the town centre in general and the key frontages in particular.

18. To some extent the adopted 70/30 split may be an arbitrary limit or measure, reflecting as much the current situation as any detailed formula or critical figure derived through analysis. But it has been through the Local Plan process and the minimum 70% retail figure is consistent with the expected 'high proportion of retail uses' which should be in primary frontages according to paragraph 2.17 of PPS6. The allowance for up to 30% of non-retail uses in the key frontages (and implicitly a higher percentage in the non-key frontages) allows for a good mix of retail and non-retail uses throughout the town centres.
19. The appellants are keen to stress the special niche characteristics of their type of operation (albeit shared by their main national competitors) but neither the development plan nor national policy distinguishes between types of complementary non-retail uses. Numerous non-retail uses, including straight A3 and mixed A1/A3 uses, could make out a good case for being allowed to operate from a key frontage, and the 30% limit in Epping allows many of them to do so without breaching development plan policy. But the town centre is now at the point where that policy limit has been reached and any further loss of A1 frontage would breach it.
20. With any policy it is easy to say 'one little breach won't cause much harm' and in all cases it is necessary to take into account other material considerations. But once an upper limit policy has been breached, particularly without adequate justification, the status and impact of the policy is devalued. Rather than continuing to mark a firm limit it becomes harder and harder for the Council to refuse other complementary non-retail uses within the key frontages. This can progressively diminish their retail function and character with the danger that in time it becomes so undermined that there is little if anything left to protect and the qualities which made it attractive to retail operators and customers (and other complementary uses) no longer exist, to the detriment of the town centre as a whole and its place in the hierarchy. The critical tipping point in the retail/non-retail balance and function of any frontage or town centre can only be identified retrospectively, possibly not for several years, but once that point is passed it is very difficult to redress the balance. The harm has been done.
21. The Council's policies follow the long-established national approach of setting limits to non-retail uses within primary or key town centre frontages. The percentage or numerical figures chosen are a matter for local determination, but are logically set below the critical level to maintain what is perceived as a healthy retail element which underpins the vitality and viability of the centre as a whole.
22. It could be regarded as unfortunate for Caffé Nero that it is their development which would breach the limits of Policy TC4, but had they made enquiries of the Council prior to investing in the property they would have been aware of the situation. The same circumstances face all aspirant non-retail uses within the key frontages of the town centre; as evidenced by my colleague's recent decision at No.263 High Street (APP/J1535/A/07/2034573). The options for

such uses are either to occupy premises already in authorised non-retail use or seek to secure a change of use of retail premises outside the key frontages.

23. With regard to the fallback position, the appellants say that they would continue to occupy and operate the premises as a primary A1 unit, assuming only 15-20% of the trade was eat-in. Profit margins are likely to drop from the current £80-£90,000 p.a. to perhaps £10-£15,000. In their view this could be achieved by a 'modest reduction in the numbers of tables within the premises' explained as the 20-25 seats at the very rear, i.e. leaving some 30 seats in the front and middle part. The Council considers that a more realistic figure to ensure an ancillary A3 use would be to reduce the floorspace available to eat-in customers to no more than 10% of the total ground floor area or 8 seats.
24. Paragraph 34 of Circular 03/2005, albeit referring to sandwich bars, notes that it is possible for a few customers to eat on the premises, including at tables and chairs within or outside their establishments without involving a material change of use from A1, provided that this is only an ancillary part of their business. In other appeals a 20% retail element has been accepted as constituting a mixed A1/A3 use rather than a primarily A3 use which suggests a figure below 20% A3 may be necessary to constitute a genuinely ancillary use.
25. The appellants quite reasonably suggest that a single measure or criterion to assess the A1/A3 balance is unhelpful and a number of factors need to be taken into account. But for the A1 use to become the genuine primary use, and the A3 merely ancillary, considerably more than the 'modest reduction' proposed by the appellants would be necessary. The established character and operation of the unit is as an eat-in café. Even halving the number of tables and chairs is unlikely to significantly alter that character. Given the distance between the parties on this matter, the inquiry was not the appropriate forum for its resolution. The requirements of the enforcement notice set out clearly what the Council regard as the steps required to remedy the breach. How that is or could be achieved in practice would need to be the subject of further discussions.
26. If it were decided to continue to operate the business as a genuine A1 use I accept that the external appearance of the premises (and the internal layout and operation of the front part) would not materially change; also that less customers would be attracted to it. However, there is no evidence to suggest that the return to an A1 use (by Caffé Nero or any other occupier) would harm the vitality and viability of the town centre, which was judged healthy both before and after the arrival of Caffé Nero.
27. There are clearly divergent views between the parties on what the fallback position would be in this case. But I take the view that the requirement to revert solely to a Class A1 use (albeit with an ancillary A3 component) would require a significant alteration to the nature of the business and the internal layout. To accept the argument that the fallback would mean little material change to the character and appearance of the unit and that this justifies the case for allowing the use seems to me to be spurious. The authorisation of the mixed A1/A3 use, even if proscribed by conditions limiting its use to that of a coffee bar as currently operated would, in all probability, ensure its continued operation as a predominantly A3, non-retail use. Whereas its reversion to a genuine A1 use, as required by the enforcement notice, would require future occupiers to operate within those parameters.
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28. I have reviewed all of the other appeal decisions provided by the appellants but none appear to me to be so directly comparable to the circumstances in this case as to add significant weight in favour of allowing the ground (a) appeal. I have also considered the circumstances leading to the grant of planning permission for Costa Coffee at 189 High Street in 2005, which took into account the emerging Local Plan policies at a time when the retail uses in the new key retail frontages were 71.5% rather than the 70.1% of today. Furthermore, in that case the change of use did not result in more than two adjoining non-retail uses.
29. The Council's development plan policies for Epping town centre are recent and fully in accord with PPS6. Were the current use to be authorised both limbs of Local Plan Policy TC4 would be breached. In my view these factors are sufficiently significant and compelling to satisfy me that the change of use in this case would add to the proliferation and concentration of non-retail uses in such a way as to have the real potential to undermine the retail function of Epping town centre. To set this potential for harm aside lightly would substantially undermine the intent of Policy TC4 and the efforts of the Council in promoting the vitality and viability of the town centre and maintaining its position in the strategic hierarchy. I have taken into account the material considerations put forward by the appellants. But neither individually nor cumulatively do I find that they are of sufficient weight to justify the grant of planning permission contrary to the development plan and with the risk of harming the long term retail function, vitality and viability of the town centre.

The appeal on ground (f) that the steps required by the notice exceed what is necessary to remedy the breach of planning control

30. It was agreed by the main parties at the start of the inquiry that the reference to 'equipment' should be removed from 5(b). As all of the equipment used for preparing the food and drink eaten at the premises is also used for the take-away trade it would be unreasonable to require its removal. I shall therefore vary this part of the notice accordingly. The appellants sought no other variation of the requirements (accepting that compliance is likely to involve the removal of some of the tables and chairs) and the ground (f) appeal succeeds to that extent.
31. I have discussed the issues surrounding compliance with the requirements of the notice above, concluding that they will need to be the subject of more detailed discussions between the parties so that both sides are clear as to what is expected.

Conclusions

32. For the reasons given above and having regard to all other matters raised, I conclude that the appeal on ground (a) should not succeed. The minor variation to the requirements of the enforcement notice represent success on ground (f). I shall uphold the corrected and varied enforcement notice and refuse to grant planning permission on the deemed application.

Formal Decision

33. I direct that the enforcement notice be corrected by the insertion of 'ground floor of' before the word 'property' in paragraph 5(a) & (b).

34. I direct that the enforcement notice be varied by the deletion of 'and equipment' in paragraph 5(a).

35. Subject to these corrections and variation I dismiss the appeal and uphold the enforcement notice. I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

LM Drake

INSPECTOR

APPEARANCES

FOR THE APPELLANTS

James Findlay of Counsel, instructed by Brian Madge Ltd

He called:

Ben Price	Finance Director, Caffé Nero Group
Stephen Arnold MRTPI MRICS	The Development Planning Partnership, 21 The Crescent, Bedford, MK40 2RT

FOR THE LOCAL PLANNING AUTHORITY

Ruth Rose, Legal Executive with the Council

She called:

Christopher Frost MRTPI	Metropolis Planning and Design, 30 Underwood Street, London N1 7JQ
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INTERESTED PERSONS:

Robert Whittome	Town Clerk to Epping Town Council
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DOCUMENTS SUBMITTED AT THE INQUIRY

Document 1	Copy of the letter notifying local people of the inquiry and list of those notified.
Document 2	Statement of Common Ground
Document 3	Addendum Proof of Christopher Frost
Document 4	Statement read out by Mr Whittome
Document 5	Petition in favour of retaining the current use

PLANS SUBMITTED AT THE INQUIRY

Plan A	Revised internal layout plan of 271 High Street
Plan B	Internal layout in terms of functional uses.