



Appeal Decisions

Inquiry held on 10, 11 & 12 June 2009
Associated site visits made on 9 & 12
June 2009

by **N P Freeman BA(Hons) Dip TP MRTPI
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**Decision date:
30 June 2009**

Appeal A: APP/Q1445/C/08/2092192 115 St James's Street, Brighton, BN2 1TH

- 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 Starbuck Coffee Co. (UK) Ltd against an enforcement notice issued by Brighton & Hove City Council.
- The Council's reference is BH2008/01039.
- The notice was issued on 1 December 2008.
- The breach of planning control as alleged in the notice is the "Unauthorised change of use from A1 (Retail) to A1/A3 Mixed Use following planning refusal BH2008/01039, dated 21/05/08".
- The requirements of the notice are:
 1. Remove all customer seating from the public areas;
 2. Remove all customer tables from the public areas;
 3. Completely cease the A3 operation in that there should be no sales of food and drink for consumption on the premises;
 4. Restore the use of the property back to an A1 retail use in that all sales are for consumption off the premises.
- The period for compliance with the requirements is 6 weeks after the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed in the terms set out below in the Formal Decision.

Appeal B: APP/Q1445/A/08/2090672 115 St James's Street, Brighton, BN2 1TH

- 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 Starbuck Coffee Co. (UK) Ltd against the decision of Brighton & Hove City Council.
- The application Ref. BH2008/01039, dated 18 March 2008, was refused by notice dated 21 May 2008.
- The development proposed is the change of use from Use Class A1 (retail) to mixed A1/A3 Coffee Shop (sui generis).

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

The enforcement notice

1. There is agreement between the main parties that the wording of the allegation should be varied to read "Unauthorised change of use from A1 (retail) to the A1/A3 mixed use as a coffee shop". I consider that this simplifies the

allegation in a satisfactory fashion and the variation in this respect would cause no injustice to the parties. I will vary the wording accordingly.

2. In terms of the requirements, I will address these under ground (f) should I get to that point. However, I consider that to get the notice in order the fourth requirement should be deleted. This is at odds with the authority of *Lipson v SSE [1976] 33 P & CR 95* where it was held that a notice cannot require a former use to be revived only the unauthorised use to cease and any works carried out solely to facilitate the unauthorised development to be removed. It seems to me that the first three requirements fall into the latter categories. A variation of the notice removing the fourth requirement is therefore appropriate, irrespective of any arguments on ground (f).

The appeal premises and surroundings

3. The appeal premises comprise a 2 storey building located on the corner of St James's Street and Charles Street, within the prime frontage of the St James's District Shopping Centre and the East Cliff Conservation Area. The ground floor is in use as a coffee shop/café, with a preparation area at the rear, and the upper floor is used for ancillary purposes as staff, storage and meeting rooms. The customer entrance is on the corner and there is a separate staff/trade entrance at the end of the Charles Street frontage. Advertisement consent for the existing signs was granted on appeal on 27 October 2008. Planning permission for 4 air-conditioning condensing units, which are located at roof level, was granted on 1 May 2009, subject to conditions concerning noise emissions and acoustic screening. I observed that a screen has already been erected.
4. The use by Starbucks commenced in May 2008 (following completion of a 10 year lease at the beginning of April 2008) and has continued ever since. Until early January 2008 the unit was in use as stationers and had been for a number of years. From the totality of the evidence before me, including information on itemised sales (till receipts), I have no doubt that it is presently operating as a mixed A1/A3 use, with a combination of café and take out trade. I understand that some other local planning authorities may have interpreted Starbucks's use as being solely an A1 use or solely an A3 use. However, I am dealing with the circumstances of this case based on the facts before me. Both the Council and the appellant submit that the use is a mixed A1/A3 use and I have no reason to dispute this or come to any alternative conclusion.
5. No. 115 is located towards the centre of the shopping centre, which is linear in form, and its façade projects forward of the terrace to the west (Nos. 116-121) which makes it more prominent in the street scene than some shops when viewed from Old Steine to the west. It has one of the wider frontages (10.97m¹) onto St James's Street and the floor level is below that of pavement level, particularly at the eastern end. There are also 2 windows facing onto Charles Street. The shopping centre contains a considerable variety of retail and non-retail uses, including a number of convenience goods stores. Planning permissions for the mixed use redevelopment of Nos. 24, 25/26 and 29/30 St James's Street have been granted and the likely developer/occupier of 25/26 is Tesco. Work has not yet commenced on any of these schemes.

¹ Statement of Common Ground (SoCG) – para 7.5

6. There are only a few vacant units, some of which are being marketed. At the times my visits around midday/early afternoon the street had a vibrant air with significant numbers of pedestrians on both sides of St James's Street. Levels of pedestrian activity appeared to tail off from west to east and this is consistent with the western end being closer to the town centre and other local attractions, such as The Brighton Pavilion.

S78 appeal and Ground (a) of S174 appeal

Main issue

7. I consider that the main issue, in terms of the merits arguments, is the impact on the vitality and viability of the St James's Street (SJS) District Shopping Centre and whether the proposal would materially harm its retail function. I will consider this issue in the context of the prevailing local and national planning policies of relevance.
8. I am conscious of the weight of local objection which includes a number of petitions and individual letters. These objections make reference to the claimed harm in retail terms to the shopping centre which I will address under the main issue heading. However, objections are also raised for a number of other reasons, including the multi-national nature of the appellant (not an independent local business), competitive advantage and 'fair trading' policy. Whilst I appreciate that objectors feel strongly about these matters and have a right to express their views upon them, they do not form part of the planning policy tests before me². In this case, I am dealing with the nature of the use and not the particular user or company. The arguments, apart from those bearing on the main issue defined above, are therefore not material to my decision.

Planning policy

9. The development plan includes the Regional Spatial Strategy (RSS) for the South East - the South East Plan - adopted in May 2009. This provides general support for town centres in terms of promoting their vitality and viability and encouraging a wide range of services in a good environment, accessible to all. Brighton itself is identified as a regional hub.
10. The development plan also includes the Brighton and Hove Local Plan (LP) 2005. A number of policies from this plan have been mentioned in evidence, but it was agreed by the main parties that Policy SR5, concerning Town and District Shopping Centres, is the key policy for my consideration. This policy has been 'saved' by a direction of the Secretary of State dated 4 June 2008. The aim of this policy is to maintain and enhance the defined prime frontage of a number of shopping centres, including SJS. It goes on to set out 4 criteria to be applied when considering changes of use from Class A1 (retail) to A2 and A3 uses in the prime frontage. I will examine these below.
11. Supporting text to Policy SR5 is set out in paragraphs 6.25 and 6.26 of the LP. Paragraph 6.25 indicates that Town and District Centres serve community needs in terms of shopping and a range of non-retail uses such as cafes. A

² Paragraph 1.7 of PPS6 states "It is not the role of the planning system to restrict competition, preserve existing commercial interests or to prevent innovation"

more flexible approach is advocated, due to economic downturns and increased competition from out-of-centre retailing to help maintain and enhance vitality and viability. However, there should still be a predominance of at least 50% of retail (Class A1) units retained. I take this as applying to the centres as a whole and no other figure is given for parts of centres.

12. There is no other amplification of how to apply the policy and I understand that there is no Supplementary Planning Guidance (SPG) or Document (SPD) which provides further details or explanation of how Policy SR5 should be interpreted. I can therefore only interpret the policy on the basis of its actual wording and the supporting text.
13. I have taken account of the national policy guidance of relevance especially that contained in Planning Policy Statement (PPS) 6: Planning for Town Centres. The Government's key objective for town centres is to promote their vitality and viability³ and other objectives which flow from this are to enhance consumer choice by providing a range of shopping, leisure and local services for the entire community and to support efficient, competitive and innovative uses of this type⁴. Of particular relevance is paragraph 4.4 of PPS 6 which is headed "Measuring Vitality and Viability : Health Checks" which I shall consider below.
14. I have had regard to the consultation paper PPS 4: Planning for Prosperous Economies. This is intended to replace PPS6 but is only in draft form at present and cannot therefore outweigh the current extant advice in PPS6 at this time. Nevertheless, I do not see any specific tension between these two documents as applies to this development and the advice in PPS4 is consistent with the thrust of PPS6 in advocating the definition of primary and secondary frontages in town centres with policies making clear which uses will be permitted in such locations. Primary frontages should contain a high proportion of retail uses while secondary frontages provide a greater opportunity for flexibility and diversity of uses. In my view, Policy SR5 of the LP is generally consistent with the wording of both PPS6 and draft PPS4.

Reasons

15. The approach I shall adopt is to look firstly at Policy SR5 and the criterion applying to changes of use from A1 retail. It is common ground between the main parties that this is the development plan policy against which the development needs to be judged. It is also common ground that failure to meet any one of the 4 criteria would amount to a breach of policy and that, applying the statutory test⁵, the appeal should then be dismissed unless material considerations indicate otherwise. Having considered the policy in the light of the evidence submitted, I will then move on to look at other material considerations, including the mixed nature of the use, the health check guidelines from PPS6 and the attitude of the Council towards other mixed A1/A3 uses in the District Centre.

³ Para 1.3 of PPS6

⁴ Para 1.4 of PPS6

⁵ Section 38(6) of the Planning and Compulsory Purchase Act 2004

Policy SR5

Criterion (d)

16. I will start by dealing with criterion (d) which concerns the amenities of nearby occupiers. It is no part of the Council's case that this is contravened. Some local residents, including the occupier of 5 Charles Street who spoke at the inquiry, raised concerns about noise nuisance emanating from deliveries to the premises and the air-conditioning units. On the latter, I note that planning permission has now been given for these units subject to conditions which in my opinion provide the necessary degree of control and can be enforced. As I have already said, an acoustic screen has been erected as a baffle to noise emissions. On the former, the appellant is agreeable to a condition which restricts loading and unloading to SJS to certain times. This would preclude the use of Charles Street for deliveries which I understand has been a source of significant disturbance in the early hours of the morning. I will return to the details of any condition below but I am satisfied that a conditional planning permission would ensure that the requirements of criterion (d) are met.

Criterion (a)

17. I turn then to criterion (a) which requires a clear predominance of Class A1 uses to be maintained. There were conflicting submissions on the interpretation and scope of this test. For the Council it is argued that clear predominance should be applied to the prime frontage as a whole and also in the sense of parts of that frontage, where concentrations of non-retail use may exist. This was said to be justified on the basis of the professional approach adopted by the Council's experienced policy officers. For the appellant, the submission is that nowhere in the policy or any supporting text or any SPG is the interpretation that the test applies to parts of the centre or sections of the frontage made out. The Council draw attention to a previous appeal decision at 128 SJS to support their contention. Both main parties are in agreement that the comment in paragraph 6.25 that there should still be a predominance of at least 50% of retail units retained, applies to the District Centre as a whole.
18. Helpfully Sections 7.3 and 7.4 of the SoCG provide some agreed figures on the numbers of units in the centre as a whole and the prime frontage in retail and non-retail use. These figures have then been converted into percentages. Starting with the centre as a whole the present position, on the basis that No.115 has a present lawful use for A1 purposes, is that 58%⁶ of the units are in retail use. Should this appeal be allowed the swapping of one unit from retail to a mixed use would reduce the number of units in A1 use to 57%. Both main parties accept that this equates to a predominance of over 50% in line with the supporting text at paragraph 6.25.
19. As far as the prime frontage as whole is concerned the number of units in A1 use presently stands at 64%⁷. Should the appeal be allowed the percentage figure in retail use would drop to 63%. The planning witness for the Council said that her interpretation of 'clear predominance' would be a figure ideally of

⁶ 131 units in total in SJS District Centre of which 76 are in A1(retail) use and 55 in non-retail use (vacant units included in these figures)

⁷ 91 units in total in SJS prime frontage of which 58 are in A1 (retail) use and 33 in non-retail use (vacant units included in these figures)

- over 60% or at least approaching that figure. In my view this has to be a matter of personal interpretation as there is nothing within the policy which actually sets down a numerical limit. However, the fact that the policy at criterion (a) uses the words "clear predominance" as opposed to just "predominance" suggests to me that the percentage should be more than just over 50%. In this case I consider that the figure of 63% would still show a clear predominance of A1 uses in the prime frontage as a whole – a view which is consistent with both the appellant's and the Council's submissions.
20. Turning to the final argument put forward by the Council in respect of this criterion, namely the need to examine parts of frontages, I can find no support whatsoever for this in the policy itself or the supporting text. The Council may wish to apply this test but the question that I need to answer is whether the policy provides any clear justification for such an approach. I can find none. The assertion that the Council's professional officers "drill down" in order to apply the test and in so doing exercise judgement, which they are quite used to doing, is no defence. For the policy to be applied and bite as the Council wish it would need to say so. It does not. The Council may wish that it did but it cannot simply make up tests to suit its arguments which seems to me to be what it is doing. In my opinion there is no requirement under criterion (a) to look at parts of frontages and I agree with the submission for the appellants that do so is confusing the application of criterion (b) with that of criterion (a). Consequently, I am inclined to conclude that criterion (a) would be met if planning permission were granted.
21. I have taken account of the views of the Council's Planning Policy Team in terms of consultation responses recorded in the officer's reports on both the planning application by the appellant and the pursuit of enforcement action. Response on the former indicates that criterion (a) is satisfied for the prime frontage as a whole but that there is some concern with the level of non-retail frontage in the area surrounding the appeal site. Response on the latter (by Carly Dockerill) only refers to non-compliance with criterion (b) of Policy SR5 with no mention of criterion (a). The Council submit that this is not a complete statement of her response but I have not been presented with any e-mail or formal note which contains broader comments. The purpose of both reports is to inform the decision-maker when making statutory decisions under the Act and should therefore be comprehensive in identifying harm. The policy comments in both reports do not state in terms that criterion (a) is contravened and this adds weight to my conclusion that it is met.
22. Despite this finding, I have gone on to consider what the percentage breakdown would be if the frontage between Old Steine and Madeira Place is chosen, which I find to be a totally arbitrary length of frontage to pick. The corrected figure as accepted by both main parties is that, if the appeal were allowed, there would be 10 units in retail use and 10 in non-retail use (50%) each. Whilst this would not be a clear predominance (which I have already concluded is not the policy test for parts of the prime frontage) it would still leave half the units remaining in retail use.
23. My attention was drawn to a decision of a colleague Inspector who dismissed an appeal for the expansion of the amusement centre at 126/127 SJS into No. 128. At paragraph 9 of her decision she looks at a section of SJS at the western end (Nos. 122-130) of which 4 out of the 7 units were in non-retail
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use. She also comments on the length of non-retail frontage measuring 25m out of 46m. Her expressed opinion is that a predominance of A1 uses does not presently exist in this part of the prime frontage. Notwithstanding my view that there is no rationale for this approach when applying criterion (a), the situation before me is not the same as a 50/50 split remains even if the frontages chosen by the Council are considered rather than the majority being in non-retail use. Overall, I find that the Council's approach, even allowing for the appeal decision on No.128, is contrived. Bringing these points together, I conclude that criterion (a) would be met if planning permission were granted.

Criterion (b)

24. The application of criterion (b) has also led to differences of opinion as to the length of shopping frontage that should be measured. No definition of the words "shopping frontage" is given in the policy itself or the supporting text so this does not assist. The Council submit that the length of frontage should be limited to the continuous terraces or parades between streets and should not be carried over where streets intervene causing breaks. My attention was drawn to the Council's plan showing the defined prime frontages which do not include the streets in support. For the Council it is asserted that the calculations of frontage length should be carried across intervening streets but that the width of the street itself should be excluded. As I pointed out, a third alternative would be to include the street width as well but no party suggested that this approach should be followed.
25. As I have already said there is no guidance at the local level that I can apply and I do not consider it would be right to import the guidelines from other local planning authorities as was suggested for the appellant (Westminster City Council's framework). There is nothing at the national level which assists in terms of the specifics of calculation. I am inclined to favour the Council's approach bearing in mind that a street in itself causes a break in frontage continuity which would add to the overall gap between retail uses, where non-retail uses separate. On this basis, it was accepted as common ground that the combined width of the non-retail frontage would be 15.29m⁸. The road width of Charles Street at 5.27m is excluded. Criterion (b) requires the non-retail frontage to not exceed 15m. It was conceded for the appellant that if the Council's approach to calculating frontage length was accepted then this criterion was breached and this in itself amounted to conflict with Policy SR5. I agree, and find that this is the case. The fact that the breach is only of the order of 0.29m does not mean that it can be ignored but I will have regard to the quantum of this figure when looking at other material considerations.
26. I deal here with one other related point. The appellant cites an earlier appeal decision relating to 118 SJS where the Inspector referred to the 15m limit as a "useful guideline". I am conscious, however, on reading this decision as a whole that it was taken at a time when the LP was at a draft stage. The policy at that time was numbered SR6, which became Policy SR5, but when the decision was made it did not have the status of an adopted policy as now applies in terms of SR5. This has a significant bearing in that the present

⁸ No.115 (Starbucks) = 10.97m; No.114 (hot food take-away on opposite corner of Charles Street) = 4.32m; total 15.29m

policy is not just a "useful guideline" but an adopted policy with the full weight afforded by s38(6) of the Act.

Criterion (c)

27. The final criterion to consider is (c) which states that it (*the development*) would have a positive effect on the shopping environment of the area by encouraging combined trips and attracting pedestrian activity to the centre. For the appellant, I have been provided with surveys of pedestrian flows in SJS and relative patronage of 7 outlets, including Starbucks⁹. I also have details of pedestrian flows and patronage at the Hertford and Swindon branches of the company. Whilst they have some general relevance as background material, as the circumstances there are accepted as not being the same, I do not place any significant weight on the findings in these locations. I also have on behalf of the appellant results of a questionnaire survey of 200 customers conducted within the appeal premises.
28. The Council have provided no survey information of their own. For the third party objectors I have details of a questionnaire survey of 46 passers-by conducted by Cllr. Fryer at different dates and times. There is also some survey information from her and another local resident seeking to assess the breakdown between drink/eat in and take out trade. Set against this I have records of till receipts provided by the appellant for the period from June 2008 to March 2009 giving a breakdown of drink/eat in and take out sales¹⁰.
29. I start by analysing figures on pedestrian flow and patronage. The survey conducted for the appellant on 2 days in March shows that just over 2,000 people were passing the appeal premises on each of these days with an average of 13% visiting to make a purchase (patronage). In terms of footfall this figure compares favourably with results of footfall outside the other 3 A1 shops on the south side of SJS¹¹. It was argued for the Council that the footfall fell between the Sussex Beacon Charity Shop (No.130) at the western end of SJS to that outside the appeal premises but then rose again at the chemists (No.109) to the east. I do not consider that there is a marked drop and the range is limited with the pedestrian flows being from around 2,000 to 2,400 outside all 4 units surveyed on the south side of the street. On this basis alone I consider that the use by Starbucks is not acting as a material deterrent to pedestrian flow. Indeed, the footfall measured is generally consistent with what is occurring outside other shops in the street.
30. I have considered the much higher levels of footfall measured outside the 3 shops on the north side of the street¹². However, it appears that more people are using this side of the street for a number of reasons (wider pavement, pedestrian crossing point of Old Steine (from town centre) leads into north side, location of national chains/multiples, longer frontages). It is not therefore appropriate to compare these figures as they are not representative of the

⁹ Survey carried out by PMRS on Tuesday 24th and Wednesday 25 March 2009 between 09.00 and 17.00 – The survey points were outside 3 outlets on the north side of SJS (MIND charity shop, Boots chemists & The Money Exchange) and 4 on the south (Sussex Beacon charity shop, Stephen Bower chemists, a bakers and the appeal premises); the positions are spread from one end to the other of the Centre

¹⁰ SoCG – App 13

¹¹ The range of footfall is from 2,034 (Starbucks – Tues 24th) to 2,374 (Stephen Bower chemists – Wed 25th)

¹² The range of footfall (north side units) is from 10,092 (MIND charity shop – Tues 24th) to 3,574 (The Money Exchange – Wed 25th)

characteristics prevailing on the south side. It is also a reasonable conclusion based on the survey information and my own observations that there are higher flows and more pedestrian activity at the western end of SJS, closer to Brighton Town Centre and Brighton Pavilion, which are major attractors.

31. In terms of patronage, the average for Starbucks is 13% of passing footfall which is the second highest of all 7 outlets surveyed with only Sussex Beacon Charity shop showing a higher figure at 20%. I do not consider this to be surprising given the position of the latter at western edge of the Centre, closest to Old Steine. For the Council, there was some criticism of the types of shop or use chosen but I consider that the units surveyed are a reasonable mix of uses found within the Centre. I agree with the conclusion for the appellant that the results show that the appeal use is a significant attractor of pedestrian activity in SJS and that the patronage levels are relatively high compared to other uses surveyed. As a consequence, the use can only realistically be seen as one which contributes to pedestrian activity and vitality during the normal working day. Certainly, there is no evidence that the use has acted as a deterrent to pedestrian flows or that pedestrian activity has been stifled since its introduction.
32. As far as encouraging linked shopping trips is concerned, I have had regard to the customer survey carried out for Starbucks¹³. This was conducted by a market research expert and I have no reason to doubt the credibility of the methodology or the results. As I have already mentioned, the Council have produced no survey information of their own to set against these findings. The Council have commented that the survey reveals that only 6% were visiting SJS to shop. This is not correct. The 6% (or 12 people) is in answer to Qu.2a "What is the main purpose of your visit to SJS". 35% answered for work, 22.5% for leisure purposes and 18% to visit Starbucks. Qu.2b asked "What else will you be doing in SJS today". The answer to this included a variety of responses but 42 (21%) said for shopping/supermarket and a few other responses mentioned browsing/window shopping (3) and visiting a post office (2), off licence (1) or photo shop (1). So I conclude that over 20% of customers of Starbucks were also intending to visit shops in SJS and I consider that this amounts to a number of combined trips. It should also be noted that it is the vitality and viability of the Centre as a whole that I am concerned with and that combined trips were also noted in respect of other attractors in SJS (e.g. language school, dentist).
33. I have noted the high response (Qu.6a - 83.5%) of customers who consider that Starbucks adds to the vitality of the street but this has to be tempered by the fact that they are customers and presumably the vast majority are supportive of their presence and what is offered. Similarly, I am not surprised that 39% said they would visit SJS more often if they are actual customers already.
34. I have had regard to the survey of Cllr. Fryer which she says excludes those she knows signed the petition opposing the development and anyone she saw entering or leaving the premises. It is not clear to me exactly when these responses were obtained or how objectively the survey was conducted and it was not undertaken by a market research specialist. I accept from the

¹³ KJK Market Research Services conducted 200 interviews of customers on 5th and 6th May 2009

generality of the responses that the majority who live in the area (80% with BN2 postcode) were not in favour of another coffee shop of this size in SJS and wanted more shops. There were also a number of negative comments on the effects of Starbucks on the area. It is claimed by the objectors that this survey shows that the vast majority of local people do not feel that Starbucks has a positive effect on the area. I cannot except this as being the case given the limited number of people interviewed and the fact that those who might have just used or be about to use Starbucks were excluded.

35. Bringing these points together, the test under criterion (c) is whether the use has had a positive effect on the shopping environment encouraging combined trips and pedestrian activity. From the evidence before me this appears to be the case. I have no doubt there are those who would never frequent Starbucks in SJS or anywhere else for that matter for whatever reasons. However, because some feel that way should not be taken as a reason for prohibiting the choice of others. Criterion (c) does not require every person or even a majority to be attracted only for combined trips and pedestrian activity of a material amount to be generated. The evidence supports such a conclusion.
36. I have considered the argument for the Council that the use presents a dead frontage to SJS. I cannot agree. Whilst the goods for sale are not displayed in the window, the presence of people sitting and conversing inside does not present a bland or blank frontage which is typical of some non-retail uses such as an office where screens are erected behind the window to shield workers. I accept that looking down from pavement level into the café may deter some passers-by from lingering but overall the presence of people visible from the street adds to the overall vibrancy and vitality of the area. Moreover, the pedestrian flow figures before me do not suggest that people are avoiding walking past or into the premises. Hence, I do not consider that the dead frontage argument is made out.

Conclusions on Policy SR5

37. In concluding on Policy SR5, I find that the policy is satisfied in all respects save criterion (b) where the limit of 15m of non-retail frontage is exceeded by 0.29m. This means that the development is in conflict with the terms of the policy to this degree and it is necessary to examine other material considerations to see whether they outweigh the harm caused.

Other material considerations

Mixed use – retail element

38. The appellant's evidence on till receipts examined over a 9 month period is that 51% of trade is take out and 49% drink/eat in. I raised the question of whether one take out sale would be recorded as the same as a group sale to say 6 people staying in. However the figures used are monetary values and not individual transactions. On this basis it is clear that retail sales amount to about half of the total sales. Whilst this may primarily be in the form of hot coffee sales (as accepted for the appellant) it is still categorised as a retail use if the drink is taken away. I note that the proportion of take out trade appears to be considerably higher than some of the Starbucks operations or competing coffee outlets in other towns but I have no sound basis for questioning the authenticity of the figures before me, as accepted by the Council.

39. The objectors have carried out their own assessments. Cllr. Fryer's was limited to 7 people seen entering/leaving the premises of which she considers only 2 were purchasing take-out items. I cannot afford this ad hoc survey of 7 people the same weight as the detailed till receipts supplied by the appellant. Another objector (Mr Barrenechea) produced a survey carried out by 2 colleagues standing opposite the appeal premises on 30 April 2009 between 11.27 am and 12.47 pm. Of the 29 persons observed it is estimated that about 24% were taking away and 76% drinking/eating in. Again the sample number is limited and, as submitted for the appellant, confined to a particular time of day which may exclude a greater proportion of take out trade in the early morning.
40. Applying a level of rigour to the evidence presented, I consider that greater weight should be afforded to the more comprehensive survey for the appellant of actual sales. Moreover, even if I was to take the figure of 24% take out trade this is still significant and shows that the use contains a genuine element of retail use. In my view the degree of retail use shown, which is likely to be of the order of about 50%, is a material factor which weighs in favour of granting permission. This opinion accords with that of some other Inspector's whose decisions on coffee shops in other locations have been produced and where the proportion of retail trade was a lower percentage.

Health Check guidelines – PPS6

41. These are found at paragraph 4.4 (p.28) of PPS6. I have already dealt with pedestrian flows and the proportion of retail and non-retail uses. I consider that the centre shows a high diversity of uses with a good range of retail, eating/drinking, leisure and service businesses. I consider that the presence of at least 3 redevelopment sites where planning permissions have been obtained, including one for a Tesco store, demonstrates the potential capacity for growth in retail floorspace and other appropriate District Centre uses. These schemes may not have commenced but I consider that they show a level of investor confidence. Moreover, it was accepted by the Council that Tesco has now obtained a liquor licence and that the redevelopment planned at Nos. 25/26 is likely to proceed.
42. There are not a lot of major multiple retailers in the street but this is the nature of a District Centre; a concentration of such operators is not expected as they would be more likely to be represented in Brighton Town Centre. Nevertheless, the presence of Boots, Somerfield, the Co-op and the likely arrival of Tesco all goes to show that there is representation of some national retailers; there are also a number of independent convenience and comparison goods shops, including a large grocers store at the western end of the street. Vacancies are few (only 6 units out of 131 recorded with the possibility of others at Nos. 84 & 96). A number of these are being marketed (sales boards evident) and 3 of the largest in floorspace terms are subject to the permitted redevelopment schemes, which could preclude any long term letting/occupation.
43. My perception of the Centre is that it is vibrant and lively with few signs of any deterioration or decay. In saying that I am mindful from comparing the Council's 1996 and 2006 Retail Studies that economic performance in SJS has improved dramatically since the mid-1990's not least due to the investment in environmental improvements that have taken place. In 1996 the number of vacancies stood at 30 in the Centre as a whole of which 20 were in the prime

frontage; 22% of the premises were judged to be in poor condition. I also agree with the submission for the appellant that the change in fortunes is likely in some part to be due to the introduction of a more flexible and relaxed policy (as suggested in the 1996 Retail Study) in terms of permitting changes of use from retail to A3 uses.

44. In terms of rents, Cllr. Fryer said she spoke to 2 local traders who claimed that the rent quoted by the appellant (£50,000 p.a.) seemed to be high. One of these traders is said to have commented that another trader opposite the appeal premises running an off-licence was only paying £7,000 which was estimated to have about a quarter of the floor area of No.115. This is second or third hand evidence from people who were not called to give evidence at the inquiry to substantiate their claims. I have no objective analysis to show that the rent paid by Starbucks is excessive compared to others in SJS. Moreover, even using the figures given, a proportionate figure of rent for a quarter of the floorspace would be £12,000. The nature of No.115 with its broad frontage and projecting façade may provide good reason for why this unit attracts a higher proportionate rent of this order.
45. There is no evidence to show that since the introduction of Starbucks, rents have risen dramatically or that local traders have been forced out of business as a consequence. The level of vacancies (about 5-6%) is low and this suggests that interest in retail units in this location remains high. It was not suggested that there are long term problems in re-letting floorspace and, as I have already said a significant number of the vacant units are awaiting redevelopment which is under active consideration.
46. I have been presented with some anecdotal evidence regarding conversations between Cllr. Fryer and traders from 6 shops in SJS about current trading conditions. Again, as they did not appear to speak at the inquiry, I can only afford the claimed comments limited weight. 3 indicated that sales had remained the same over the past year, one that sales had dropped slightly and the other 2 that sales had gone down by about 50%. It has to be borne in mind that this is in a climate of severe recession; that 4 traders have either maintained their position more or less suggests that SJS is a relatively good trading location to be in at present. Overall, and bearing in mind that there could be many reasons for trade declining at the other 2 shops, I do not find this evidence as being indicative of harm to trading caused by the presence of Starbucks.
47. In conclusion, my findings on the application of the health checks is that they reveal that SJS has a relatively high level of vitality and viability and there is little sign of this being undermined by the presence of Starbucks over the past 12 months. The Centre appears to me to be robust and is a location where considerable investment is currently being contemplated. This is not a failing centre in any sense but one which I consider is performing remarkably well given the present national economic circumstances. These findings weigh in favour of granting planning permission.

Other mixed A1/A3 uses in SJS District Centre

48. The appellant's agent has drawn attention to the existence of 4 premises¹⁴ within the Centre which appear to contain a significant level of eat in café trade. Three of these have no planning permission for anything other than A1 use and another (No.100) had an appeal dismissed for A3 use but subsequently obtained conditional permission for a mixed A1/A3 use subject to the A3 use being confined to the rear garden. I have evidence from the appellant of the number of covers or seats provided within these premises all of which are significant and in my view go well beyond what could reasonably be argued as ancillary to A1 use.
49. I made my own observations at the premises. The Tea Cosy describes itself as a "Tea Room" and I could see a substantial number of tables and chairs through the window. It was said for the Council that 'memorabilia' is sold but I gained the impression from the described use and layout that it is functioning primarily as a café. I should add that the fact that it is independent and sells mainly tea rather than coffee is not a good reason for drawing a distinction from Starbucks in terms of the application of planning policy.
50. Options Deli had 5 tables and 5 bar stools in the front of the premises and therefore is providing considerable scope for eat in trade beyond what could reasonably be seen as *de minimis*. The Cherry Tree provides about 10 seats and 4 people were eating a meal at the time of my visit. Again this is indicative of an element of A3 use. Destination 100 appears to be operating in conflict with the imposed use condition as there are 5 tables and 10 chairs for eat-in customers in the front part of the shop, clearly visible through the window.
51. I am not considering the lawfulness of the uses taking place and it remains a matter for the Council to consider whether it is expedient to take enforcement action. Nevertheless, the circumstances I observed suggest that the Council may be acting inconsistently in its application of its retail policies in SJS. The fact that the planning authority appears to be tolerating significant levels of A3 use in other shops, including one where a previous appeal for such a use was dismissed and the conditional permission subsequently granted is not being complied with, does smack of partiality. Putting it another way, the Council does not appear to be unduly troubled by the existence of these mixed A1/A3 uses in the Centre and this adds weight to the argument in favour of a similar mixed use at the appeal premises.
52. I have taken account of the lack of marketing that took place of the appeal premises after the stationers vacated and before Starbucks moved in, having entered into a lease. I agree with the Council that this did not give any opportunity for interest in re-occupation by an A1 use to be considered. It may be that such a use would have come forward and the relative good health of the Centre suggests that this was certainly a possibility. I say this notwithstanding the general views of surveyors representing the appellant on current difficult letting conditions in Brighton as a whole¹⁵. However, there is no policy which says that No.115 must remain in retail use or that a diversity of uses cannot be beneficial to the Centre as a whole in terms of vitality and

¹⁴ The Tea Cosy - 3 George St; Options Deli - 117 SJS; The Cherry Tree Deli - 107 SJS; Destination 100 - 100 SJS

¹⁵ Letter dated 11 May 2009 from Monatgu Evans to Mr G Thomas (Estates and Construction Manager), Starbucks

viability. Paragraph 36 of C03/2005 concerning the Use Classes Order indicates that coffee shops should be considered on a case by case basis and there is no embargo on such uses in prime frontages.

53. I accept that SJS appears to be well provided with cafés, coffee shops and other eating and drinking establishments. There is no crying need for such a use but that does not mean that another is necessarily unacceptable. The appellant's agent was at pains to say why Starbucks provided a special 'offer' but it seemed to boil down to comfortable seating and leg room. I am not convinced that they offer something so unique that it cannot be found or provided in other establishments and I do not find that this in itself represents a persuasive reason for allowing the appeals. I would accept, however, that Starbucks does provide an attractive café environment (patronage bears this out) which appeals to a number of people, including local people and this adds to the overall vitality of the centre.
54. I have taken account of the number of people who have signed petitions opposing the development, which is said to number of just over 3,000, and the individual letters of objection sent at the application stage (400+). The addresses given show the vast majority living in this part of Brighton. However, it is clear to me that the nature of the appellant, being a multi-national company has generated a lot of animosity for a number of reasons and led to regular protests outside the premises since Starbucks opened. A campaign has been well orchestrated to oppose the use continuing. Notwithstanding these facts, and the potentially intimidatory presence of objectors outside, customers have still chosen to frequent the premises. It was also accepted that even 3,000 signatories is only about 10% of the adult population of the ward (Queen's Park). The remaining 90% are not registered as objectors. They may not support the development but they have not signalled their opposition. Finally, the weight of objection is not in itself a reason for dismissing the appeals. It is a question of the basis or grounds for objection in planning terms which I believe I have carefully considered above.

Overall conclusions on s78 and ground (a) appeals - conditions

55. The development fails to comply with criterion (b) of Policy SR5 of the LP and this conflict weighs against the granting of planning permission. Set against this the use taking place includes a significant element of retail use and makes a positive contribution towards pedestrian activity and the overall vitality of SJS District Centre which appears in a robust condition at present. There is no clear evidence of any material harm being caused to retailers by the presence of Starbucks trading in the Centre over the past year. In carrying out the necessary balancing exercise under s38(6) of the Act of weighing the harm flowing from the conflict with policy against other material considerations, I am mindful that the breach of policy is limited.
56. Notwithstanding the submissions for the Council, I consider that the extent of any breach should be carefully considered. In this case, the frontage length of non-retail use is only 0.29m above the limit of 15m. This is a very small excess and one which would be barely discernible to passers-by. I appreciate that another Inspector dismissing the appeal for A1/A3 use at 100 SJS¹⁶ where

¹⁶ APP/Q1445/A/06/2032138 – 100 St James's Street – Appeal dismissed 22 May 2007

the length of non-retail frontage was similar (15.3m) said the upper limit was absolute. However, he records that none of the other circumstances which had been brought to his attention outweighed the harm identified. In this case I consider that there are number of other material considerations which weigh in favour of granting permission. Based on my assessment above I find that there is no conflict with any other part of SR5 or any other local or national policy of relevance. I also have found no other demonstrable harm has arisen or would be likely to arise and that the vitality and viability of the Centre and its retail function is unlikely to be materially prejudiced should planning permission be granted and the use continues.

57. I have had regard to the statutory test in s72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 that special attention should be paid to the desirability of preserving or enhancing the character or appearance of the East Cliff Conservation Area. I am satisfied that the use and the associated physical features (shopfront, signs, etc) meet this test by preserving the character and appearance of the conservation area.
58. Taking account of all these conclusions, I am satisfied that although some conflict with Policy SR5 is identified other material considerations indicate that the granting of conditional planning permission is justified and that a departure from strict adherence to this policy is warranted. I do not consider that this would set an unfortunate precedent as the policy itself remains and would still apply when considering any future proposals of a similar nature on their merits. I have had regard to all the other decisions referred to in Brighton, Hove and other towns but none of these alter my conclusions on this particular case.

Planning conditions

59. A list of agreed conditions (with the exception of unloading time restrictions) was tabled at the inquiry. I agree that it is necessary to limit the use of the building to avoid the upper floor being used for customer seating and to restrict the types of food sold to light refreshments only, to accord with the thrust of the retail policies applying. I will impose conditions to this effect. Restrictions on the hours of opening and a requirement that deliveries are confined to St James's Street (not Charles Street) between certain times are also necessary in the interests of the living conditions of nearby residents. As the loading/unloading could only take place in SJS, a busy commercial street containing uses open in the evening, and not the residential side roads, I consider that a reasonable restriction on delivery hours would be between 07.00 and 22.00. A condition is necessary to require details of refuse collection and I will expand this to include a 'backstop' of an appeal in the event that no details are agreed within a requisite period. I do not consider that conditions relating to the air-conditioning units are needed as they have already been imposed on the earlier planning permission that applies to this plant.
60. For the reasons given above I conclude that the appeals under s78 and ground (a) of s174 should succeed and conditional planning permission will be granted. The appeal on grounds (f) and (g) does not therefore need to be considered. I will vary the wording of the notice, as described in paragraphs 1 and 2 above, before quashing it.

Formal Decisions

Appeal A: APP/Q1445/C/08/2092192

61. I direct that the enforcement notice be corrected at Section 3 by the deletion of the words under the heading "THE BREACH OF PLANNING CONTROL ALLEGED" and the substitution of the words "Unauthorised change of use from A1 (retail) to the A1/A3 mixed use as a coffee shop". I also direct that the fourth requirement at Section 5 of the notice be deleted in its entirety.
62. Subject to these corrections I allow the appeal, and direct that the enforcement notice be quashed. I grant planning permission, on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the change of use from A1 (retail) to the A1/A3 mixed use as a coffee shop on the land at 115 St James's Street, Brighton, BN2 1TH subject to the following conditions:
- 1) The first floor of the premises shall only be used for purposes ancillary to the approved A1/A3 mixed use and shall not be used for additional customer seating or floor space.
 - 2) The premises shall only be used for the sale of hot and cold drinks, sandwiches and light refreshments for consumption on or off the premises. No primary cooking of unprepared food shall be carried out on the premises.
 - 3) The premises shall only be open to the public between the hours of 07.00 to 22.00 on Mondays to Saturdays and the hours of 08.00 and 20.00 on Sundays.
 - 4) Loading and unloading of vehicles delivering goods to the premises shall only take place in St James's Street and no other side streets, including Charles Street. The loading and unloading shall only take place between to the hours of 07.00 and 22.00 on any day.
 - 5) The use hereby permitted shall cease within 28 days of the date of failure to meet any one of the requirements set out in (i) to (iv) below:
 - i) within 1 month of the date of this decision details of refuse and recycling storage shall have been submitted for the written approval of the local planning authority;
 - ii) within 9 months of the date of this decision the details shall have been approved by the local planning authority or, if the local planning authority refuse the details, or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State;
 - iii) if an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted details shall have been approved by the Secretary of State;
 - iv) the approved details shall have been carried out and completed within 1 month of receiving written approval and be retained thereafter so long as the use continues.
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Appeal B: APP/Q1445/A/08/2090672

63. I allow the appeal, and grant planning permission for the change of use from A1 (retail) to the A1/A3 mixed use at 115 St James's Street, Brighton, BN2 1TH in accordance with the terms of the application, Ref BH2008/01039, dated 18 March 2008, and the plans submitted therewith, subject to the same conditions as set out in paragraph 62 above.

N P Freeman

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Stephen Morgan of Counsel, instructed by Pegasus Planning Group LLP, 2-10 Kings Parade, Clifton, Bristol, BS8 2RE

He called:

Mr J R Tarzey MRTPI Partner at Pegasus Planning Group LLP

FOR THE LOCAL PLANNING AUTHORITY:

Harriet Townsend of Counsel, instructed by the Head of Law, Brighton & Hove City Council

She called:

Mrs E Thomas MRTPI Senior Planning Officer (Planning Strategy & Projects team) with the Council

Mr C Smith Senior Planning & Investigation Officer with the Council

INTERESTED PERSONS:

Cllr. R Fryer City Ward Councillor (Queen's Park)

Mr J Barrenechea

Dr J Thomas

Mr Edmonds

Mr J Goodey

DOCUMENTS SUBMITTED AT THE INQUIRY

Doc 1 Council's letter of notification dated 20 May 2009 and listed of persons to whom it was sent

Doc 2 Statement of Common Ground (SoCG)

Doc 3 Opening statement on behalf of appellant

Doc 4 Vacant premises schedule (Council)

Doc 5 Letter from Head of Law at the Council (Hilary Woodward) to Pegasus Planning dated 5 June 2009 with attached planning permission re. 29 & 30 SJS dated 16 January 2008

Doc 6 Transcript (Council) re. *R oao Nero Holdings Ltd v SoS*

- Doc 7 Planning permission re. 100 SJS dated 25 February 2009
- Doc 8 Schedule of agreed application drawings
- Doc 9 E-mail from Chris Elphick (DC Planner) to Carly Dockerill (Policy Planner) dated 1 May 2008
- Doc 10 Submissions of Cllr. Fryer (statement and appendices)
- Doc 11 Submissions of Mr Barrenechea (statement, appendices and petition)
- Doc 12 Statement of Dr Thomas
- Doc 13 List of recommended planning conditions
- Doc 14 Closing submissions for the Council
- Doc 15 Closing submissions for the appellant

PLANS SUBMITTED AT THE INQUIRY

Plan A Ground floor internal layout plan - No.115 (Council)

PHOTOGRAPHS SUBMITTED AT THE INQUIRY

Photos showing the interior of No.115 (Council)

