

Report to Area Plans Sub-Committee East

Report reference: ENF/0496/06

Date of meeting: 13 May 2009



**Epping Forest
District Council**

Portfolio: Planning and Economic Development

Subject: 271 High Street, Epping

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Recommendations/Decisions Required:

That Members decide whether they would wish to have the opportunity of giving formal consideration to the use of the ground floor of 271 High Street, Epping prior to action being taken to secure compliance with the requirements of the enforcement notice issued on 12 October 2006 in respect of the use of the premises as a mixed use for purposes within Use Class A1 (shops) and Use Class A3 (restaurants and cafes).

Background:

Nero Holdings Ltd occupy the premises, a shop unit that trade from it under the name 'Café Nero'. Having regard to the way Café Nero actually operates from the premises, investigation carried out by the District Council's Planning Enforcement Team between March and June 2006 concluded the use comprised 2 primary purposes: the sale of cold food and drink for consumption off the premises and for the consumption of food and drink on the premises. The former purpose falls within Use Class A1 (shops) and the latter within Use Class A3 (restaurants and cafes). Since the use carried out at the premises comprises more than one use and neither is merely ancillary to the other they amount to primary purposes in their own right. In such circumstances the use carried out as a whole is a mixed use that does not fall into any use class of the Town and Country Planning (Use Classes) Order 1987 (as amended). Nero Holdings Ltd cooperated with the Planning Enforcement Team's investigation and agreed with the finding that the way they actually operated from the premises was as a mixed use. Since the lawful use of the premises is solely for a primary purpose within Use Class A1, the new use amounts to a material change in the use of the premises that requires planning permission from the District Council.

Accordingly, Nero Holdings Ltd submitted a planning application to continue the use on 17 July 2006, Ref EPF/1456/06. The application was opposed by Epping Town Council on the grounds that the proposal "*represents a considerable loss of the percentage of retail space in the High Street*". No representations were received from neighbours or members of the public. Officers assessed the continuation of the use as contrary to then recently adopted planning policy (adopted July 2006) and planning permission was subsequently refused on 15 September 2006 under powers delegated to officers.

The reason for refusal is:

"The development results in an unacceptable amount of non-retail units within the identified primary shopping frontage and will result in more than two no-retail units together. The development therefore undermines the retail function of the Town Centre contrary to policy TC4 of the adopted Local Plan."

As the use was continuing the District Council issued an enforcement notice on 12 October 2006 which was subsequently upheld with minor variation by the Secretary of State on 6

August 2007 following consideration of an appeal against the notice by Nero Holdings Ltd that was heard at an inquiry. The Secretary of States' decision was challenged in the High Court but the Court decided to dismiss that appeal on 12 March 2009, when the notice, as varied, became effective.

The effective enforcement notice does not require the mixed use to entirely cease. In summary, the requirements of the enforcement notice are:

1. To stop the part of the use that is for the primary purpose of the consumption of food and drink on the premises.
2. To remove all furniture brought onto the premises solely for the purpose of facilitating the consumption of food and drink on the premises.

Compliance with these requirements would result in the use carried out by Nero Holdings Ltd being primarily for the sale of drinks and cold food for consumption off the premises, i.e. in accordance with the lawful use of the premises within Use Class A1. It would be possible for Nero Holdings Ltd to lawfully retain some ancillary seating but this would amount to about 4 tables and 12 chairs.

The compliance date is 12 May 2009. Failure to comply with the notice by that date is an offence for which the occupier and those with an interest in the premises could be prosecuted.

Report

At the time of writing this report the enforcement notice had not been complied with and Officers consider it likely the notice will not be complied with by the compliance date. There has been no communication between the Council and Nero Holdings Ltd since the notice became effective. Consequently, the next step for the Planning Enforcement Team is to take action to secure compliance with the requirements of the enforcement notice.

The planning enforcement position has been reviewed in anticipation of the need to take appropriate action that might include prosecution. In doing so a number of matters have been identified that could amount to material considerations, but no view has been taken on what if any weight should be attached to them. The matters are:

- A considerable amount of time has passed since the appeal against the enforcement notice was dismissed by the Secretary of State and recently there has been a significant change for the worse in trading conditions. Neither the Council nor the Secretary of State would have been able to take that into account when they made their decisions since that change had not yet occurred.
- On 22 April 2009 this Sub Committee decided to grant planning permission for a similar use in Theydon Bois that was contrary to adopted planning policy to safeguard the vitality and viability of a local shopping centre, Ref EPF/0190/09. While officers did support that application, Members made the final decision. In contrast, Members did not have the opportunity of considering the planning application submitted by Nero Holdings Ltd since it was refused under delegated powers.
- As a consequence of publicity given to the High Court's decision to uphold the Secretary of State's decision to dismiss the appeal against the enforcement notice by Nero Holdings Ltd, both the District Council and the Epping Town Council has received correspondence expressing concern about the possible loss of Café Nero from Epping town centre.

In the circumstances, prior to starting any action following the anticipated failure to comply with the notice, Officers would like a clear indication by the Sub Committee as to whether it would wish to have the opportunity to consider the planning merits of the existing use of the ground floor of 271 High Street, Epping when the above matters could be taken into account. If Members take the view that such steps should not be taken until they have had the opportunity to consider the planning merits, Nero Holdings Ltd can be invited to make a

further planning application to continue their use of the premises. In the event of planning permission being refused the Council would be able to demonstrate it had recently taken into account all material considerations in connection with this development. However, Members should be aware that, if Nero Holdings Ltd did make a further planning application, in the event that planning permission is refused the company will have an opportunity to make an appeal to the Secretary of State against that decision. Any action to secure compliance with the enforcement notice while a decision on such an appeal is pending is unlikely to be successful since a magistrate is likely to give weight to the argument that the planning appeal might be allowed and if it were the planning permission granted would override the enforcement notice.

On the other hand, if Members are content that steps be taken to secure compliance with the enforcement notice without further review by the Sub Committee the Planning Enforcement Team will proceed accordingly.

Conclusion:

Members should be clear that they are not being asked to take a view on the planning merits of the existing use of the ground floor of 271 High Street at this time. The decision to be made is whether or not Members would like to have the opportunity to take a view on that matter in the near future.

Members may take the view that it is in the interests of securing proper town planning for the locality that they be given the opportunity of considering the planning merits of the existing use. Members have not previously had this opportunity and, if that did arise they would be able to decide how much weight, if any, should be given to new material considerations that have not previously been assessed by any decision maker. If Members agreed that is their preferred approach, the only way the matter could be brought before them is in the form of a planning application to continue the existing use of the premises. However, if such an application was refused, it is likely that any steps to secure compliance with the extant enforcement notice would be considerably delayed to allow for any appeal process to be completed. In taking a decision that they would like to consider the planning merits of the existing use Members would not be fettering their discretion to make a decision on any planning application submitted proposing the continuation of the use since such a decision is neutral on the merits of such a proposal.

On the other hand, Members may take the view that there is no merit in revisiting a decision that has been upheld by both the Secretary of State and the High Court, even though they were not able to take into account the new material considerations identified in this report. Accordingly, they may be content that steps should be taken to secure compliance with the enforcement notice without further review by the Sub Committee.

Members are reminded that compliance with the requirements of the enforcement notice would result in the use carried out by Nero Holdings Ltd being primarily for the sale of drinks and cold food for consumption off the premises. This would be achieved by the remove furniture brought onto the premises solely for the purpose of facilitating the consumption of food and drink on the premises. In complying with the requirements of the notice it would be possible for Nero Holdings Ltd to lawfully retain some ancillary seating but this would amount to about 4 tables and 12 chairs.

Members are requested to decide whether or not they would like to have the opportunity of giving formal consideration to the use of the ground floor of 271 High Street, Epping in the light of the above report.

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