EASTLEIGH BOROUGH COUNCIL

TOWN & COUNTRY PLANNING ACT 1990 (AS AMENDED BY THE PLANNING & COMPENSATION ACT 1991) – SECTION 195

TOWN AND COUNTRY PLANNING (APPEALS) (WRITTEN REPRESENTATIONS PROCEDURE) (ENGLAND) REGULATIONS 2009

STATEMENT

Lawful Development Certificate

Appeal by Ram Capital Ltd

Bradbeers Retail Park Tollbar Way Hedge End Southampton

Planning Inspectorate reference: APP/W1715/X/12/2188688

Local Authority reference: U/12/71277

Eastleigh Borough Council
Civic Offices
Leigh Road
Eastleigh
Hampshire
SO50 9YN

January 2013

INTRODUCTION

1. This statement is in respect of an appeal by RAM Capital Ltd ("the Appellant") against the decision of Eastleigh Borough Council ("the Council") dated 25 September 2012 to refuse to issue a Certificate of Proposed Lawful Use or Development relating to Bradbeers Retail Park Tollbar Way Hedge End Southampton ("the Site").
2. The application for a Certificate of Proposed Lawful Use or Development related to a proposal to use the Site for the retail sale of all goods from up to 49% of each retail unit. The Appellant claims that the proposal would not breach condition 8 of planning permission 28673/11 dated 11 July 1989. It is the Appellant's case that the proposed use is lawful and would not require planning permission.
3. Condition 8 reads as follows:

   The principal goods sold from the retail warehouses must be restricted to any of the following: DIY materials and building supplies, furniture and carpets, domestic electrical appliances, auto accessories, garden equipment and materials, boats. Reason: To protect the viability of local shopping centres as a whole.

LOCATION AND DESCRIPTION OF APPEAL SITE AND SURROUNDING AREA

4. The Site is 32495.40 square metres. The Site is an existing retail park, bounded by Botley Road and Tollbar Way. Vehicular access is from Wellington Park and there are pedestrian access points from Botley Road and Tollbar Way.
5. The existing retail units are constructed in a single terrace. The four existing retail units as at the date of the refusal decision were occupied as follows:

   Unit 1a: Allied Carpets
   Unit 1b: Ponden Home and BedShed

Unit 2: Harveys and Benson Beds

Unit 3: Carpet Right

Unit 4: Bradbeers

6. The retails units contain substantial mezzanine floors. There is also a smaller detached building (Unit 5) occupied by Burger King.
7. The Site is one of a number of established retail/industrial parks within this area of Hedge End.

RELEVANT PLANNING HISTORY

Planning ref.	Details	Status
Z/24530/000 (Larger area not just Centre 27)	Land South Botley Road including Meadow View, Hedge End. Industrial and warehousing.	Grant outline permission – 29/07/1980
Z/24530/001 (Larger area not just Centre 27)	Land south of Botley Road including Meadow View, Hedge End. Industrial and warehousing.	Grant outline permission – 29/07/1980
Z/28673/000	Land at Hedge End to the North of the B3035 and East of M27. Outline: Office, light industry, and warehouse development.	Grant outline permission – 09/02/1987
Z/28673/001	Land At Hedge End To The North Of B3035 and East Of M27 West End/Hedge End. Outline: Erection of retail warehouses with associated parking and construction of distributor road.	Grant outline permission – 05/04/1988
Z/28673/002	Land at West End and Hedge End to the North of the B3035. Construction of access road.	Approve reserved matters - 05/07/1988
Z/28673/003	Land at West End and Hedge End to the North of the B3035 and East of M27 Hedge End. Erection of 4 retail warehouses (reserved matters) (outline permission ref no. 28673/1).	Approve the reserved matters – 06/04/1988
Z/28673/007	Land at Hedge End/West End North of Botley Road. Erection of 4 retail warehouses and restaurant.	Permit – 14/02/1989
Z/28673/007 V1	Land at Hedge End to the North of B3035 and East of M27 West End Phase II Variation to planning permission ref: 28673/7 dated 14/ Feb 1989 for erection of 4 retail warehouses	Permit – 04/07/1989

	and restaurant to the following extent only: filling of culvert and regrading of land in accordance with plans and letter dated 10 Mar 1989.	
Z/28673/011	Land At Hedge End - Phase Ii To The North Of The B3035 and East Of M27. 4 Retail warehouses and restaurant (amended scheme).	Permit – 11/07/1989
Z/28673/018	Land To The North Of B3035 (Botley Road) East Of M27 Phase Ii Hedge End. Extension to west elevation Unit 1 Centre 27 retail park.	Permit – 29/08/1990
Z/33823/000	Land at Centre 27, Tollbar Way, Hedge End. Outline: Construction of free standing retail unit (Class A1).	Refused – 05/03/1996
F/07/60497	Centre 27 Retail Park, Wellington Park, Hedge End. Amendment to external design of retail units, new vehicular and pedestrian access off enlarged roundabout, regrading and redesign of car parking; revisions to landscaping and amendment to condition 8 of planning permission 28673/11 to include soft furnishings in the range of goods to be sold (amended description).	Withdrawn – 24/09/2007
F/08/62428	Centre 27 Retail Park, Wellington Park, Hedge End. Amendments to external design of retail units, sub division of unit 4, provision of new vehicular and pedestrian access, and an enlarged roundabout, regarding and realigning of car parking and revisions to landscaping.	Permit – 22/07/2008
F/10/68320	Centre 27 Retail Park, Wellington Park, Hedge End. Extension of time to implement extant planning permission F/08/62428 for amendments to external design of retail units, sub division of Unit 4, provision of new vehicular and pedestrian access and an enlarged roundabout, regrading and realigning of car parking and revisions to landscaping.	Permit – 11/07/2011
X/11/68611	Centre 27 Retail Park, Wellington Park, Hedge End. Removal of condition 7 of Planning Permission F/08/62428 and replacement with a phasing condition for alternative implementation timetable.	Permit – 08/07/2011
U/11/69785	Unit 1a and 1b Bradbeers Retail Park, Wellington Park, Hedge End. Application for a lawful development certificate for a proposed development: Expansion of range of goods sold beyond those specified in condition 8 of planning approval Z/28673/11.	CLOPUD – Certificate Not Issued 08/12/2011 Appeal dismissed – 15/6/2012

APPLICATION

8. On 27 July 2012 the Appellant submitted a Certificate of Lawful Proposed Use or Development application for determination by the Council under section 192 of the Town and Country Planning Act 1990 ("TCPA 1990"). The application related to a proposal to a use the Site for the retail sale of all goods from up to 49% of each retail unit. In support of their application the Appellant submitted the following documents to the Council:

Application form dated 27 July 2012

Site Location Plan (Drawing ref.: RAM/BRP/SLP)

Letter dated 27 July 2012 from Savills to Eastleigh BC

Planning permission Z/28673/11granted by Eastleigh BC

Planning permission 2002/0995 granted by Gedling BC

Planning permission 2007/0288 granted by Gedling BC

Planning permission 2007/1045 granted by Gedling BC

Planning permission 2009/0325 granted by Gedling BC

Lawful Development Certificate dated 13 December 2005 issued by Gelding BC

Lawful Development Certificate dated 28 January 2010 issued by Gedling BC

Units 1A & 1B Bradbeers Retail Park Appeal decision APP/W1715/X/112166044

Legal Opinion of Christopher Lockhart – Mummery QC dated 27 June 2007

9. The Appellant's argument advanced at the time of the application was determined was that "principal goods" refers to 51% or more. The Appellant's interpretation of condition 8 and in particular the word "principal" means that 51% of the goods sold from each unit must be the listed goods and that 49% of the goods sold can be any goods. The Appellant sought confirmation that "principal goods" refers to 51% or more and therefore 49% of the floorspace can be used for the sale of any goods.

10. The Council's view is that this is not a reasonable interpretation of the condition and that in order to comply with the condition more than 51% of the goods sold from each unit must be the listed goods.

11. The Council refused the application on 25 September 2012 for the following reason:

    The use described in the First Schedule would be unlawful in that it would breach condition 8 of planning permission Z/28675/11. Condition 8 reads as follows:

    The principal goods sold from the retail warehouses must be restricted to any of the following: DIY materials and building supplies, furniture and carpets, domestic electrical appliances, auto accessories, garden equipment and materials, boats.

12. It is this refusal of a section 192 TCPA 1990 application which the Appellant is appealing and to which the Council is responding.

GROUNDS OF APPEAL

13. The Appellant's grounds of appeal are as follows:

Lawful Effect of Condition 8 of Planning Permission: Z/28976/11

The Condition which controls the use of the floorspace at the Units at the Appeal Site states:

> *'The principal goods sold from the retail warehouses must be restricted to any of the following goods: DIY materials and building supplies, furniture and carpets, domestic electrical appliances, auto accessories, garden equipment and materials, boats'*

The Collins English Dictionary defines the word 'principal' in the following way:

> *'First in importance, rank, value, etc; chief'*

The definition is clear that the term 'principal' refers to the largest or dominant amount in any given context. The meaning of the term 'principal' is widely understood and is considered to be clear and precise.

In the context of this application, Condition 8 therefore requires each unit to be used principally or primarily for the sale of the range of goods listed. It follows, that if at least 51% of the sales area of any unit is used for the sale of the goods listed within the Condition, then it must be the case that the Condition is complied with.

The inverse position of this principle is that up to 49% of the sales area of any unit can be used for the sale of any goods.

It follows that the proposed use would comply with the controls imposed by the relevant Condition and is therefore lawful.

Enforcing the Condition

The Condition is not explicit in respect of how the Condition should be interpreted or enforced in respect of determining a measurement for the term 'principal'.

It is our view that the only proper measurement for the term 'principal goods sold from the retail warehouses' can relate to the floor area used for the retail sale and display of the defined goods. The planning system and its relevant regulations and statutes are based upon the control of land uses and the condition imposed should be interpreted in this common way unless expressly stated otherwise.

Defining the term by floor area would enable the applicant, the LPA and any reasonable reader of the Planning Permission to be able to understand the restriction and assess whether any operation, at any given time, is in compliance with its terms.

Summary and Conclusions

The Appellant will provide evidence to demonstrate that, provided 51% of the net sales area of any unit is used for the sale of goods listed in Condition 8, then the remaining 49% can be used for the sale of any goods (i.e. Open A1).

It follows that the use is lawful and the LPA was wrong to refuse the original application. The Appeal should be allowed and the Certificate issued in accordance with the terms of the original application.

CONSIDERATION OF ISSUES

14. The Council agrees with the Appellant that this matter concerns the interpretation of the words "principal goods" within condition 8.

15. The Council has considered the Collins English Dictionary definition of the word 'principal' that is *'First in importance, rank, value, etc; chief'* and the Collins Thesaurus entry for the word 'principal' which is set out below:

    principal *Adjective = main, leading, chief, prime, first, highest, controlling, strongest, capital, key, essential, primary, most important, dominant, arch, cardinal, paramount, foremost, pre-eminent...their principal concern is that of winning the next election...Opposites: minor, subsidiary subordinate, inferior, supplementary, auxiliary*

16. In the Council's opinion for goods to be the principal goods then there must be a clear distinction between the principal goods (in other words the goods listed in condition 8) and the non-principal goods (in other words goods which are not listed in condition 8).

17. The Council notes that the Appellant refers to enforcing the condition in their grounds of appeal. It is not necessary to specify here how the Council enforces the Condition this is matter for the Council. However as the Appellant's application was made on the basis that 49% of the sales floorspace can be used for the sale of any goods the Council will consider it in these terms.

18. If 51% of the goods sold were furniture (one of the goods listed in condition 8) and 49% of the goods sold were clothes (an example of goods not listed in condition 8) then a mere 2% more floorspace would be used for the sale of furniture. If this were the case then you would not be able to distinguish which were the principal goods that is, the most important, dominant goods. With these percentages one type of goods could not be said to be more important or dominant than the other. The Council does not consider that the Appellant's case that the condition allows 49% of the floorspace of each retail unit to sell goods not listed in condition 8 is a reasonable interpretation of the condition.

19. The Council's interpretation of the condition is that it means that there should be a clear and obvious distinction between the principal goods and non-principal goods.

20. The Council's view is supported by the 399 Edgware Road Appeal Decision a copy of which is attached to this statement as **Appendix A**.

21. In this appeal decision a certificate of lawful use or development for the use of 49.9% of the existing floorspace of the retail units for unrestricted purposes within Use Class A1 was refused by Brent Council on the basis that it would fail to comply with condition 14 of planning permission 90/1727 which requires the retail element of the development to be used as part of a comprehensive development for the sale of goods of mainly oriental and Far Eastern origin. The Appellant's application to Brent Council was supported by documents including the Opinion of Russell Harris QC.

22. Paragraph 7 of the appeal decision is set out below:

The appellant argues that the word 'mainly' in Condition 14 should be strictly interpreted to mean 'more than anything else' – a definition from the Oxford English Dictionary (OED). On this basis, it should follow that the smallest margin of floorspace available for sale of goods of oriental or Far Eastern origin over that available for other goods would satisfy the condition.

23. This is essentially the argument that the Appellant in this appeal has put forward.

24. The Inspector notes that the Oxford English Dictionary cites a number of meanings of 'mainly' including 'principally'. It appears to the Inspector that the word 'mainly' is open to a wider interpretation than a strict arithmetic assessment.

25. Paragraph 9 of the appeal decision is set out below:

It appears to me that the intention of Condition 14 is to ensure that the sale of goods of oriental or Far Eastern origin predominates over sale of other goods to an extent that it would be obvious to members of the public that the premises are part of an Oriental Cultural Centre. In my opinion, if the appellant's view were adopted, this might not be the case. For example, if 50.1% of the floorspace were given over to oriental and Far Eastern goods, and the remainder to goods from a different specific part of the world, it would probably not be practically discernible whether the predominant culture presented would be Oriental, or that of the other part of the world.

26. The Council considers that this would equally apply to the situation where 51% of the goods were goods listed in condition 8 e.g. furniture and 49% were any goods e.g. clothes.

27. The Inspector concludes that '*in order to satisfy the condition and ensure the relevant distinction is made there would need to be a very clear preponderance of goods of the specified type over unrestricted goods*' and considers that a ratio of 1:3 or 1:2 would not be unreasonable. The Inspector notes that Brent Council had granted a Certificate of Lawfulness relating to unrestricted use of 33% of the existing floorspace of each of the retail units within Use Class A1.

28. A copy of a Certificate of Lawfulness referred to in the appeal decision is attached as **Appendix B.** The Certificate granted by Brent Council on 19 December 2011 confirmed that condition 14 of planning permission 90/1727 allows 33% of the floorspace of each unit to be used for unrestricted purposes within Use Class A1. The use was lawful based on the interpretation of the word 'mainly' within condition 14.

29. The Council considers that the Inspector's interpretation in the 399 Edgware Road Appeal Decision was a reasonable interpretation and is relevant to this appeal.

SUMMARY AND CONCLUSION

30. The Council considers that the Appellant's interpretation of condition 8 is not a reasonable one. In order to satisfy the condition there needs to be a clear distinction between the principal goods and the non-principal goods which requires the principal goods to be sold from more than 51% of the floorspace of each unit.

APPENDIX A

The Planning Inspectorate

Appeal Decision

No site visit undertaken.

by Stephen Brown MA(Cantab) DipArch RIBA

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

Decision date: 26 April 2012

Appeal Ref: APP/T5150/X/11/2161184
No. 399 Edgware Road, Colindale, London NW9 0JJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Development Securities Plc against the decision of the Council of the London Borough of Brent.
- The application ref. 11/1092, dated 28 April 2011, was refused by notice dated 28 June 2011.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- A certificate of lawful use or development is sought for use of 49.9% of the existing floorspace of the retail units, implemented under planning permission 90/1727 for unrestricted purposes within Use Class A1.

Summary of decision: the appeal is dismissed.

Preliminary matters

1. This case concerns the interpretation of wording of a condition on an outline planning permission. The physical nature of the site and surroundings play no part in my determination. The main parties have agreed that the case can be determined on the basis of the submitted documents, without the necessity of a site visit. I concur with this view, am satisfied that no party would be prejudiced, and have proceeded on this basis.

2. For the avoidance of doubt, I should explain that the planning merits of the proposed use are not relevant, and they are not therefore an issue for me to consider in the context of an appeal under Section 195 of the Act[1], which relates to an application for a lawful development certificate. My decision rests on the facts of the case, and on relevant planning law and judicial authority.

Reasons

3. The Council refused the application for a LDC for the use of 49.9% of the existing floorspace of the retail units for unrestricted purposes within Use Class A1 on the basis that it would fail to comply with Condition 14 of planning permission ref. 90/1727, which requires the retail element of the development to be used as part of a comprehensive development for the sale of goods of mainly oriental and Far Eastern origin.

[1] The Town and Country Planning Act 1990 as amended.

4. From the representations made in writing I consider the main issue in this appeal is whether the Council's refusal of the application to grant a lawful development certificate was well-founded.

5. In January 1992 outline planning permission was granted, subject to conditions[2], for re-development of the 4.34 hectare site to provide an Oriental Cultural Centre comprising retail (A1), professional and financial services (A2), restaurant (A3), business (B1), and residential (C3) uses.

6. Condition 14 of the outline permission says:

'The retail element of the development shall be used as part of the comprehensive development for the display and sale of goods of mainly oriental and Far Eastern origin'.

The reason given for imposing the condition is:

'So that the retail element remains compatible with, and a component part of the proposed overall use of the premises as an Oriental Cultural Centre and is not used as a separate retail use, which would conflict with the Council's adopted policies protecting established retail centres and primary industrial areas'.

7. The appellant argues that the word *'mainly'* in Condition 14 should be strictly interpreted to mean *'more than anything else'* – a definition from the Oxford English Dictionary (OED). On this basis, it should follow that the smallest margin of floorspace available for sale of goods of oriental or Far Eastern origin over that available for other goods would satisfy the condition.

8. The OED cites a number of meanings of *'mainly'* in addition to that put forward by the appellant including *'in the main'*, *'as the chief thing'*, *'chiefly'*, and *'principally'*. In this context it appears to me that the word is open to a wider interpretation than a strict arithmetic assessment.

9. It appears to me that the intention of Condition 14 is to ensure that the sale of goods of oriental or Far Eastern origin predominates over sale of other goods to an extent that it would be obvious to members of the public that the premises are part of an Oriental Cultural Centre. In my opinion, if the appellant's view were adopted, this might not be the case. For example, if 50.1% of the floorspace were given over to oriental and Far Eastern goods, and the remainder to goods from a different specific part of the world, it would probably not be practically discernible whether the predominant culture presented would be Oriental, or that of the other part of the world.

10. To my mind, in order to satisfy the condition, and ensure the relevant distinction is made, there would need to be a very clear preponderance of goods of the specified type over unrestricted goods. I do not consider the Council's suggestion that the ratio would need to be in the order of 1:3 or 1:2 is unreasonable. In that regard, I note that the Council have recently granted a LDC relating to unrestricted use of 33% of the existing floorspace of each of the retail units within Use Class A1[3].

[2] Outline planning permission ref. 90/1727, dated 14 January 1992.
[3] Decision notice ref. 11/2384, dated 19 December 2011.

11. For the reasons given above and having regard to all other matters raised, I am satisfied that the Council's refusal to grant a LDC in respect of the use of 49.9% of the existing floorspace of the existing units, implemented under planning permission 90/1727, for unrestricted purposes within Use Class A1 at no. 399 Edgware Road, Colindale, London NW9 0JJ, was well-founded and that the appeal should not succeed. Accordingly, I shall exercise the powers transferred to me under Section 195(3) of the 1990 Act as amended.

Formal Decision

12. The appeal is dismissed.

Stephen Brown

INSPECTOR

APPENDIX B

BRENT COUNCIL

TOWN AND COUNTRY PLANNING ACT: SECTION 191 (a) (b) (c)

DECISION NOTICE - CERTIFICATE OF LAWFULNESS
EXISTING USE OR DEVELOPMENT - CERTIFICATE GRANTED

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Application No: 11/2384

To: Mr Ben Ford
QUOD
33 Cavendish Square
London
W1G 0PW

I refer to your application dated 12/09/2011 proposing the following:
Certificate of Lawfulness for 33% of the existing floorspace of each of the retail units implemented under planning permission 90/1727 can be used for unrestricted purposes within Use Class A1
and accompanied by plans or documents listed here:

Planning Statement BF/Q10160/LDCEU (No. 3)

at All Units, Oriental City, Edgware Road, Kingsbury, London, NW9

The Council of the London Borough of Brent, the Local Planning Authority, hereby certify that the above existing use or development, more particularly shown edged bold on the attached plan is LAWFUL within the meaning of Section 191 of the Town and Country Planning Act (as amended) for the reason(s) set out in Schedule B.

Date: 19/12/2011

Signature:

Assistant Director, Planning and Development

Notes:

1. This certificate is issued solely for the purposes of Section 191 of the Town and Country Planning Act 1990 (as amended)
2. It certifies that the matters specified above subsisting on the date of the application were lawful on that date and thus, not liable to enforcement action under Sections 172 or 187A of the Act.
3. This certificate applies only to the extent of the existing use, operations or other matters described above and to the land specified above. Any use, operation or other matter which is materially different from that described or which relates to other land may render the owner or occupier liable to enforcement action.

DnCluG

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REASONING

1 The application for a Certificate of Lawfulness for the use of 33% of the existing floorspace of each of the retail units implemented under application 90/1727 for unrestricted purposes within Use Class A1 is lawful based on the interpretation of the word 'mainly' within condition 14 of permission for comprehensive development for an Oriental Cultural Centre for the sale of goods of mainly oriental and Far Eastern origin.

OTHER INFORMATION

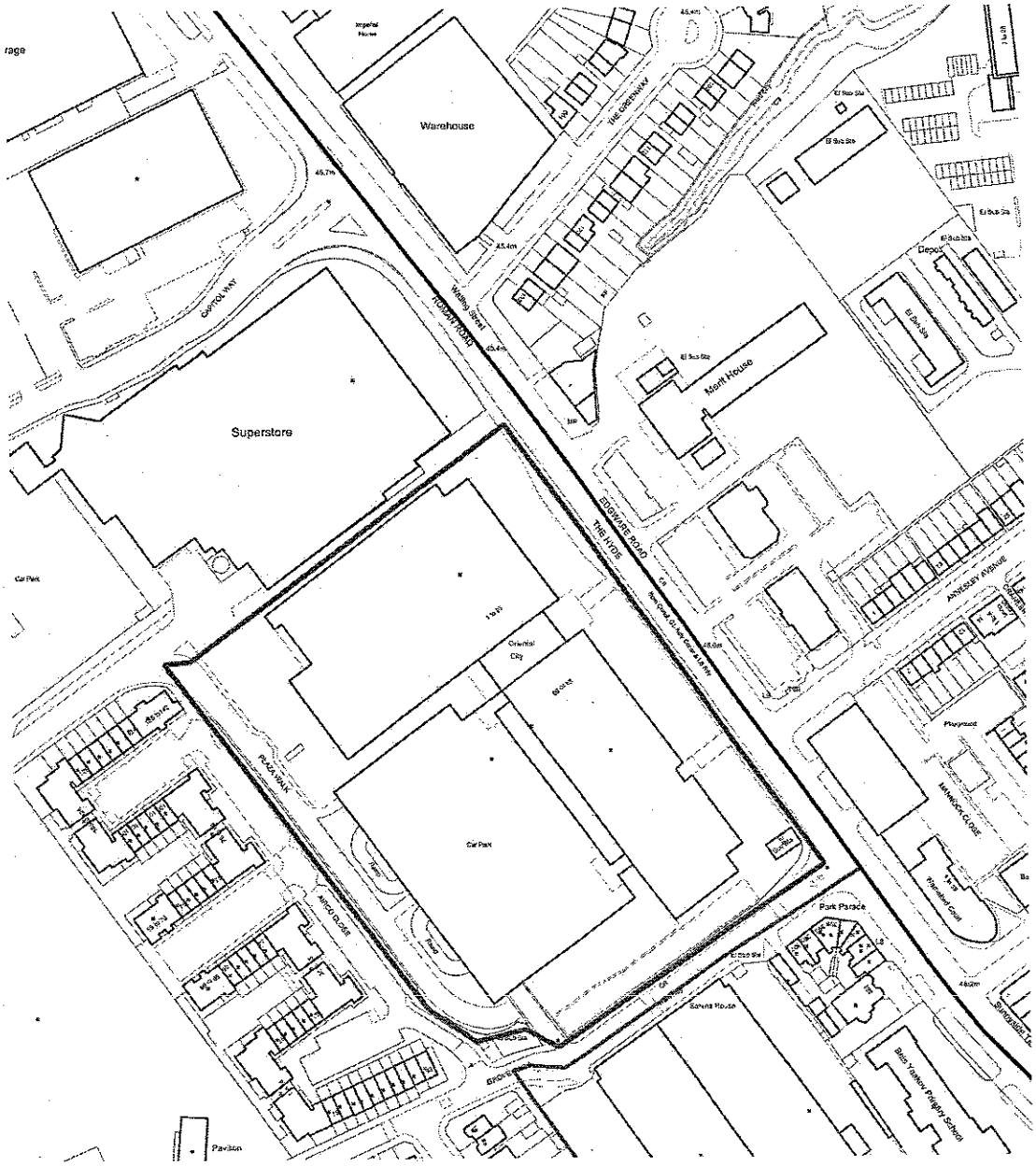
1 Use of 33% of the existing floorspace of each the retail units implemented under application 90/1727 for unrestricted purposes within Use Class A1 would be considered lawful as it refers both to the floorspace and each retail unit; such a reference maintains a link to the comprehensive development as an *Oriental Cultural Centre*, as evidenced in the reason for the condition, and would prevent a single large open retail unit establishing on the site. This decision is based on the interpretation of the word 'mainly' in the context of the intention to create a comprehensive development as an *Oriental Cultural Centre*.

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Plan referred to in Town Planning Decision Notice

Site address: All Units, Oriental City, Edgware Road, Kingsbury, London, NW9

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This map is indicative only.