



Appeal Decisions

Inquiry held on 5-8 and 12 June 2007
Site visits made on 11 and 13 June

by **Roger Priestley BA(Hons) DipTP**
MRTPI FRGS

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Decision date:
30th July 2007

Appeals Ref: APP/W1715/C/06/2027362, 2027906, 2027904, 2027897 & 2027858
Units 3, 4, 5, 8 and 9, Hedge End Trade Park, Tollbar Way, Hedge End, Southampton SO30 2JN

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Scottish Widows Unit Funds Limited against 5 enforcement notices issued by Eastleigh Borough Council.
- The Council's references are Y/E/06/58686 (Unit 3), 58683 (Unit 4), 58687 (Unit 5), 58688 (Unit 8) and 58689 (Unit 9).
- The notices were issued on 6 September 2006.
- The breach of planning control as alleged in each notice is a change of use of the land from (B1) and (B8), with ancillary showroom use granted under planning permission reference no. 33736/1, to:
 - A mixed use comprising (B1) and (B8) and (A1) retail use to the general public, and;
 - The use of the ancillary showroom which has intensified beyond the express ancillary showroom use provided in permission 33736/1.
- The requirements of the notices are :
 - (1) To cease retail sales to the general public, except as so far that such sales remain ancillary to the expressed use of the planning unit, being B1 and B8 with an ancillary showroom; and
 - (2) To cease using more than 10% of the floor space area for showroom/display use.
- The period for compliance with the requirements is 2 months.
- The appeals are proceeding on the grounds set out in section 174(2) of the Town and Country Planning Act 1990 as amended as follows:
 - Unit 3 - Grounds (a), (b) and (f); Unit 4 - Grounds (a), (b), (f) and (g);
 - Unit 5 - Grounds (a), (b) and (f); Unit 8 - Grounds (a) and (f); and
 - Unit 9 - Grounds (a), (b) and (f).

Summary of Decisions:

Units 3, 4, 5 and 9 The appeals are allowed subject to the enforcement notices being corrected and varied in the terms set out below in the Formal Decision.

Unit 8 The appeal is dismissed and the enforcement notice is upheld with corrections and a variation.

Appeal Ref: APP/W1715/C/06/2027178
Unit 3

- 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 SigmaKalon UK Limited.
- The Council's reference is Y/E/06/10975.



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- The date of issue of the notice, the alleged breach of planning control, the requirements of the notice and the period for compliance are as set out above.
- This appeal is proceeding on the grounds set out in section 174(2)(b), (c) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended does not fall to be considered.

Summary of Decision: The appeal is allowed following correction and variation of the enforcement notice in the terms set out below in the Formal Decision.

Appeal Ref: APP/W1715/C/06/2026745

Unit 5

- 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 Just For Fun (UK) Ltd.
- The Council's reference is Y/E/05/10508.
- The date of issue of the notice, the alleged breach of planning control, the requirements of the notice and the period for compliance are as set out above.
- This appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed subject to the enforcement notice being corrected and varied in the terms set out below in the Formal Decision.

Appeal Ref: APP/W1715/C/06/2026318

Unit 9

- 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 Mr Julian Hase (Hampshire Tile Warehouse Ltd).
- The Council's reference is Y/E/10977.
- The date of issue of the notice, the alleged breach of planning control, the requirements of the notice and the period for compliance are as set out above.
- This appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed subject to the enforcement notice being corrected and varied in the terms set out below in the Formal Decision.

Applications for costs

1. At the Inquiry applications for costs were made by (1) SigmaKalon UK Ltd. [SK], (2) Just For Fun (UK) Ltd. [JFF], (3) Mr Julian Hase (Hampshire Tile Warehouse Ltd. [HTW]) and (4) Scottish Widows Unit Funds Ltd [SW] against Eastleigh Borough Council. These applications are the subject of a separate Decision.

The sites and surroundings

2. The sites form part of the Hedge End Trade Park situated at the southeast quadrant of the junction between Botley Road and Tollbar Way which provides a link to the nearby M27. In addition to the appeal properties the Trade Park contains 2 restaurant premises (Pizza Hut and KFC) an auto centre undertaking tyre fitting and MOTs at Units 1 and 2, vacant premises at Units 6 and 7 and Halfords at Units 10-12. The Trade Park has a circular service road in the centre of which are shared car parking spaces. The individual units have parking for HGV service vehicles and a small number of dedicated forecourt parking spaces.
3. Land to the south and east is occupied by a variety of business, industrial and warehouse uses and immediately to the south, sharing the appeal site access, is a drive through McDonalds' restaurant. The other 3 quadrants of the Botley Road/Tollbar Way junction are occupied by retail warehouse premises, namely a single unit occupied by Wickes to the north east, 2 vacant units and units occupied by Rosebys/Bensons Beds, Harveys Furniture and Carpet Right to the north west and Homebase, PC World and Currys to the west. Further to the south is a large Sainsbury and Marks and Spencer retail complex.

Background

4. Permission was granted on 23 May 2002 for the construction of 12 units (gross floor area 4,067 sq m) Class B1 and B8 with ancillary showroom, 1 restaurant and 1 drive through restaurant (gross floor area 719 sq m) Class A3 and associated parking with alterations to existing access from Tollbar Way. 31 conditions were attached and N^o 23 stated that not more than 1.016 sq m (25%) of the floorspace of the industrial/warehouse units shall be occupied by uses falling within Class B1. Condition N^o 30 stated that the restaurant and drive through restaurant shall not be changed to Use Class A1 or A2 without prior consent.
5. Although an initial enforcement report had been considered in 2004 which recommended action be taken against the Iron Bed Co. (Units 6 and 7) and FTG (Unit 4), the current proceedings stem from Planning Contravention Notices (PCNs) served in 2005. It was resolved that enforcement notices be served in respect of the unauthorised change from B1 and B8 usage to a mixed B1 and B8 usage with A1 retail. The notices were served on SW as landlord. The Council subsequently withdrew the notices relating to Units 6 and 7 as they were vacant. They remain vacant and Unit 8 is now also vacant.

Matters concerning the Allegation and the Requirements

B1 use

6. The allegation is in two parts with the first element defined as the change of use from B1 and B8 with ancillary showroom use to a mixed use comprising B1 and B8 and A1 retail use to the general public. During the course of the Inquiry the Council requested an amendment in the form of the deletion of reference to Class B1 use, conditional upon the appellants through evidence / submissions justifying such a correction. On the Council's own evidence, however, not disputed by the appellants, the office use of Units 3, 4 and 9 is no

more than ancillary to the primary use of each of these Units which I address below. There is no substantive evidence to lead to conclude otherwise in respect of Unit 8. I am intending therefore to strike out the reference to B1 use from the Notices on Units 3, 4, 8 and 9 and am satisfied that I can do so without causing injustice.

7. Within the premises at Unit 5 there is centralised administration for the overall JFF business which includes shops in Winchester and Southampton and with this in mind I find the B1 use as a matter of fact and degree to be properly part of the mixed use.

B8 Use

8. Mr Wright for the Council in his proof of evidence took the view that other than in relation to Unit 5 the element of storage and distribution was minor and generally no more than ancillary to the predominant use of each unit as a Class A1 shop. In answer to my questions, however, he made clear that the Council's position was that there was a mix of uses including B8 at each of the appeal Units, and that in the effort to demonstrate an A1 use he may have exaggerated that element or used the wrong words to describe the use of each planning unit. It is common ground in respect of the latter that the individual units comprise the relevant planning units. The Council thus adheres to the allegation of a mixed use incorporating B8 in each case, and the evidence for each of the appellants plainly demonstrates that the B8 element is more than merely an ancillary activity. The Notices in this regard therefore do not require correction.

The "ancillary showroom"

9. In contrast to the later permission for the Halfords development on Units 10-12 where condition 6 expressly states that the floor area for the display of all goods for ancillary retail sales shall not exceed 25% of the gross area of the auto centre, there were no conditions attached to the original permission seeking to define the use of the B1 / B8 permitted units or, in particular, the scale and extent of the ancillary showroom. In the absence of any such conditions and bearing in mind the judgment in *I'm Your Man Ltd v. SSE, 1998*, the submission for the appellants that there are real problems of definition over the showroom use is well founded. In the event, however, the showroom element in each Unit does not involve any material change of use beyond that already alleged under the first bullet point.
10. I am intending therefore to delete the extended allegation set out in the second bullet point since it adds nothing of substance to what is the principle allegation of mixed use. It follows that the Notices will be varied by taking out the second requirement. Since the enforcement notice relating to Unit 4 has been ordered differently it is requirement (1) which will be deleted.

Requested substitution of the word 'incidental' for 'ancillary'

11. The Council has requested that the word 'incidental' be inserted between the words 'remain' and 'to' in the first requirement. I shall consider this later in the event that the ground (f) appeals still fall to be considered.

The appeals on ground (b) and (c)

12. It is appropriate to consider grounds (b) and (c) together, and before dealing with the individual units I shall address some general considerations.
13. The Council made clear in its letter dated 21 February 2007 to Addleshaw Goddard LLP that its surveys and the decision to enforce were based on a perception that a sale was a retail sale when the purchaser was a non-tradesman. It was excessive sales to non-tradesmen, as well as the fact that the internal areas were being used as showrooms to an extent which exceeded "ancillary", which was perceived as being the breach. The letter went on to state, however, that the Council had been advised that the correct distinction between A1 and B8 is not based on whether the purchaser is a tradesman but rather on whether a sale is a retail sale to a visiting member of the public (A1) or storage and distribution which could still include some element of wholesale sales (B8).
14. My attention is drawn to *LTSS Print and Supply Services Ltd v. Hackney LBC* [1976] QB 663 where the Court of Appeal approved of an extract stating that "Wholesale is taken to mean selling, generally in bulk to retailers in the trade for resale elsewhere" and "Whether customers attending the premises are retailers, manufacturers, builders etc purchasing for business purposes or whether they are members of the public buying goods for their own use or consumption, the use of the building is not use as a wholesale warehouse but use for the sale of goods". With this in mind, and also the Concise Oxford Dictionary definitions which do not exempt tradesmen from being included in the term "members of the public", the Council's primary case is that most sales, including to tradesmen, are not wholesale. The vast majority of transactions rather are retail, that is to say low value sales of a single or a few individual goods from shop-type displays with shop-type advertising to visiting customers during shop-type hours.
15. At the same time I am aware that the enforcement notices are expressly directed at an A1 retail use to the "general public". The report to Committee distinguished throughout between "trade" use and use by the "public", and paragraph 37, for example, which deals with Unit 8 states that "Results showed that 64% of visitors were the public and 50% of sales were to the public". A similar interpretation is found in the notes of the pre-Committee Meeting discussion between the parties. At paragraph 5.2, for instance, there is reference to the general public being targeted more so than tradesmen and in paragraph 6.1 there is the indication for the Council that Unit 3, "targeting trade professionals", was of least concern.
16. This distinction had also been apparent in the Council's letter of 8 November 2004 in response to the enquiry concerning the intended use of Unit 9 by HTW. The reply, subject to some provisos, confirmed that the proposed use for the storage, distribution and sale of hard floor and wall finishes and associated products to predominantly trade customers would fall within the permitted B8 use. With the above in mind I fully accept the submission that the description "general" public provides an important clarification of the Council's approach to the breach at the date of the notices.

17. It was held in *Dudley Bowers Amusements Enterprises Ltd v. SSE* [1986] 52 P & CR 3765 that the language of an enforcement notice must be given its ordinary or popular meaning, and in *Miller-Mead v. MHLG* [1963] 1 AER 459 that the citizen must be able to extract from the 4 corners of the document exactly what he is required to do or abstain from doing. These enforcement notices as the appellants' say have been drafted on the basis of a particular set of Reports to Committee and an approach to enforcement distinguishing between trade and retail sales. The notices do not say that the material change of use was simply to A1 or a mixed use incorporating A1. Irrespective therefore of the more recent change of approach, I find that these notices on their construction and read as a whole are directed at retail use by the "general public".
18. The appeals on grounds (b) and (c) thus fall to be determined on this basis, and in the context of the alternative argument for the Council that an A1 use has occurred because disregarding tradesmen transactions there remain a significant number of purchasers by members of the public who visit to buy single or a few individual items or lots of goods from shop-type displays with shop-type advertising to visiting customers during shop type hours. I do not assign any significant weight to the Mapinfo and COICOP retail / wholesale classifications on which the appellants rely because these to my mind classify products as retail or non-retail goods rather than focus on use.

Unit 3- Johnstone's Leyland Decorating Centre (JLDC)

19. This is 1 of 140 premises in the UK trading as JLDC. Business hours at Hedge End are 07.00 – 17:00 hours Monday to Friday and 08:00 – 12 noon on Saturdays. The premises are closed on Sundays and on Bank Holidays. With the exception of a small, enclosed, delivery area and a closed storage area behind the trade counter, the Unit for the most part (some 82% of the total floorspace of 253 sq m) comprises a storage / sales area accessible to customers. There are 2 full-time members of staff and 1 part-time. The brands / products are formulated for the trade professional; there are no dedicated retail ranges. Advertisements are only in the trade press; the JLDC network is not advertised to the general public.
20. Prior to the issue of the enforcement notice the Council carried out surveys of the activity at Unit 3 on 26 January 2006 from 13:30 – 15:30 hours, on 29 January from 10:20 – 11:20 hours, and on 23 February from 14:00 – 16:30 hours. These surveys, and indeed the surveys in relation to all the appeal units, distinguished between trade and public customers and on each occasion at Unit 3 there was just one trade customer making one purchase. Shortly before the Inquiry further surveys were carried out on Friday 30 March (09:50 – 12:50), Saturday 31 March (09:45 – 12:00) and Saturday 7 April (09:15 – 10:00), and these records identify purchases by 3 members of the public and 3 tradesmen on the 30th, by 2 members of the public and 4 tradesmen on the 31st, and by 1 tradesman only during the survey period 7 April.
21. There is no restriction on who may visit and buy at Unit 3 and it is apparent from the company sales records that a significant proportion of goods are not sold in bulk. Nevertheless, products and brands, in particular the paints, are directed at the trade professional, marketing is only through the trade press,

and the shelf prices have only been displayed in JLDC stores following the insistence of Trading Standards officers in Derbyshire. The early opening at 07:00 and the closing on Saturday afternoons, Sundays and Bank Holidays lends further weight to the argument that this Unit is directed to the trade professional.

22. Cash sales, even on the worst case scenario of including "depot" account customers, represent around 13% of overall sales, and I find no comparison with the *Monomart* and *Decorative Paints and Caravans Ltd* cases where retail sales amounted to some 95% and 75% of total sales respectively. Despite the absence, moreover, of a specific restriction as referred to in *R v. Thurrock BC ex p Tesco Stores [1993]* there is a cogent argument that the appellant company is effectively selling to a restricted section of the public, namely trade customers. I am satisfied that the error in submitting sales figures for the Southampton as opposed to the Hedge End branch was genuine and indeed found Mr Smith to be a reliable witness.

23. In conclusion, bearing in mind the advice in paragraph 57 of Cir. 03/2005 that Class B8 is defined by the character of the use of the land and whilst noting the Glaven Road, Holt appeal decision, I find as a matter of fact and degree that retail sales to the general public as alleged in the enforcement notice have not been such as to amount to a breach of planning control. Such purchases have remained ancillary to the lawful storage and distribution activity, and the "showroom" is no more than part and parcel of this use. This appeal succeeds on ground (c).

Unit 4 – Floors 2 Go

24. This unit extending in total to some 232 sq m has a combined storage and showroom area of around 216 sq m with the stock being piled on pallets, with space for a fork lift to circulate. Samples of the flooring materials are displayed above the storage pallets to give an impression of how the floor would appear once laid. The operational statement indicates that some 10 – 20 tradesmen visit per day with a similar number of visits from members of the public. There are 2 full time and 2 part time members of staff and opening hours are Monday 09:00 – 20:00, Tuesday 09:30 – 18:00, Wednesday 09:00 – 18:00, Thursday 09:00 – 20:00, Friday 09:00 – 18:00, Saturday 09:00 – 18:00 and Sunday 10:30 – 17:00 (viewing only until 11:00). Approximately 40 to 50 trade accounts are held. Goods are collected from the store, typically by tradesman's van, or delivery to customers can be arranged.

25. This unit is advertised locally as a shop and describes itself as a one-stop wood floor shop. A sign indicates that a floor fitting service is available and this, and likewise the advertisement of a home estimating service, is clearly directed at the general public. The Floors 2 Go logo is similarly directed in its reference to 'Make Your Home Beautiful'. The later opening hours, moreover, together with Unit 3, also serve to emphasise the element of use by the general public. In these circumstances, and in the absence of details of transactions, the contention that a mixed B8 / A1 use has not occurred as a matter of fact has not been demonstrated. The appeal by SW on ground (b) therefore fails.

Unit 5 – Just For Fun (UK) Ltd

26. Unit 5 is some 516 sq m in size, with a showroom / picking centre of 224 sq m, a storage area of around 194 sq m, offices of 46 sq m and staff facilities of 28 sq m. The business, established in Southampton in 1974, is a supplier of party goods – fancy dress, balloons, jokes, fireworks, novelties, wigs, hats and so on. There are now over 4000 items in the product range. Management is carried out from the appeal premises at Hedge End and the unit also supplies goods to its retail stores in Southampton and Winchester. At one time there was also a shop in Eastleigh but this closed in 2005 as it was too small and uneconomic.
27. At Hedge End many of the products are displayed in a showroom setting, and in addition to being used by both trade customers and the general public, the showroom is used by the staff dealing with mail and internet orders for "picking" the requested goods prior to despatch. There is a full time equivalent of 10 people at the Hedge End unit (including the 2 Directors), 5 at Winchester and 6 at the Southampton store.
28. The evidence in this instance leads me to conclude that retail activity is substantially in excess of that which might properly be considered to be ancillary to the B1 / B8 lawful use. Company literature¹ describes JFF as "a family-run retailer of all things fun" and the Council's surveys suggest that far more visitors to the Hedge End premises are non-tradesmen. The surveys in March 2007, albeit after the date of the notice, showed that 100% of visiting customers were private members of the public buying for use in their own home. In addition, opening hours are those of a shop and are no different to the shops in Southampton and Winchester. In the circumstances, irrespective of JFF's assertion that retail sales amount only to 30% of total turnover, I conclude that there has been a breach of control to the mixed use as alleged. These appeals on grounds (b) and (c) must therefore also fail.

Unit 9 – Hampshire Tile Warehouse Ltd

29. This unit extends to around 418 sq m and contains a defined storage area at the rear and a further defined storage / delivery area on part of the frontage amounting together to approximately 30% of the complete unit. The rest is accessible to customers, in the main having a dual purpose for storage and display. Opening hours are 07:30 – 17:00 Monday to Friday, 09:00 – 17:00 on Saturday and 10:00 – 16:00 on Sunday.
30. When the appellant company was seeking to occupy this Unit in 2004 a letter was sent to EBC setting out the basic parameters of what was proposed – in summary the use would be for B8 storage and distribution with an element of ancillary retail sales (around 10% - 11%) to the public. The Council replied confirming that the proposed use for the storage, distribution and sale of hard floor and wall finishes (tiles) and associated products to predominantly trade customers would fall within the permitted Class B8 use. This was based on the information provided, on the indication that any retail use would be at an

¹ Document 8

ancillary level of less than 11% business turnover and on the understanding that opening hours would not include Sundays or Bank Holidays.

31. Although, for reasons of competition, no specific transaction details have been supplied, the indication for HTW in the response to the PCN that retail sales to the public fell within the range of 10% to 15% is not in dispute. Such an increase of itself, however, is not determinative of whether the retail activity has moved beyond the level as discussed between the parties in 2004. Nor, given first that it did not take into account the early morning period just after opening when tradesmen would have been more likely to have visited, and second, that the 'public' customers comprising 50% of the total amounted in fact to just 2 people, do I ascribe undue weight to pre-enforcement survey. Nor do I find any strict comparison with the Louth Carpets appeal where advertisements were plainly directed at the public.

32. Even so, and whilst conscious of the 'trade card' system and the degree of business with the 'key clients' I am conscious of the Sunday opening and agree with EBC that the internal advertising using words such as "enjoy, play relax and indulge" are also aimed at private home owners rather than tradesmen. Overall, and whilst realising that there are members of the public who are visiting the premises just to view goods, I consider the character of the activity here, as a matter of fact and degree, to be that of a mixed B8 /A1 use. This amounts to a breach of planning control and these appeals on ground (b) and (c) also fail.

The ground (a) appeals and the deemed applications

33. The appeals on planning merit fall to be considered on Units 4, 5, 8 and 9. I propose to deal firstly with Units 4, 5 and which are in operation and then with Unit 8 which is now closed.

Policy background

34. The relevant Development Plan comprises the Hampshire County Structure Plan 1966-2011 (Review) [SP] and the Eastleigh Borough Local Plan (2001-2011) [LP]. SP Policy EC1 sets out the circumstances where planning permission will be approved for industrial, commercial or business use. S2 seeks to maintain or enhance the vitality and viability of district, local and village centres and S4 sets out the circumstances where permission will be granted for retail development outside town centres.

35. In the LP the site is identified as an employment site, subject to Policies 117.E and 118.E. The former supports the development of such areas for employment purposes and 118.E indicates that a change of use to use other than B1, B2 or B8 will only be permitted if it does not, either by itself or cumulatively with other changes on the same employment site adversely affect the employment base either by markedly reducing the potential choice of employment in the local area or by significantly reducing the range and variety of premises or sites available for employment purposes within the local area. There is a second proviso but this does not bear on the present appeals.

36. Retail Policy 134.TC sets out the criteria which need to be met if out of centre or edge of centre development for retail, leisure, office or other town centre

uses are to be permitted. Whilst mindful that the related text in paragraph 8.31 expressly states that proposals with a gross floorspace of 500 sq m or more must comply with 134.TC I take the view nonetheless that this Policy should properly be applied to these developments. The Policy in any event is consistent with the SP and with the thrust of national guidance in PPS6.

The main issues

37. The main issues are first, whether the development undermines the Council's policy objective of sustaining the vitality and viability of established retail centres; and second, the effect on the range and variety of premises available for employment use in the locality.

Reasons – Units 4, 5 and 9

Retail

38. It is important to note that the developments comprise a mixed B8 / A1 use and in the case of Unit 5 a mixed B1 / B8 / A1 use. Whilst it is appropriate therefore to apply retail policy given the retail component in each case it is necessary to bear in mind that the retail element forms part of the mixed use.
39. I agree that the mixed use is not a town centre use for the purposes of PPS6, and in relation to the disaggregation point raised by the Council, and whilst recognising that paragraphs 3.17 and 3.18 do not apply to uses other than retail and leisure proposals, I am nonetheless alive to the advice in paragraph 3.18 that the policy intention is to ensure that consideration is given as to whether there are elements which could reasonably and successfully be located on a separate sequentially preferable site or sites.
40. Even, however, if policy on disaggregation were to apply to these mixed uses there is no realistic basis upon which the retail element at any of these Units could be physically disaggregated since in each case it is so interlinked with the storage and distribution of flooring goods (Unit 4), party goods (Unit 5) and tiles (Unit 9). There is cogent evidence from the appellants in this regard. The fact that the same goods are involved in the B8 element distinguishes these appeals from that concerning Barley Farm Services, Spilsby. If it were appropriate, moreover, to seek to locate these uses in a town centre then Mr Pyrke for the appellants provided compelling evidence of the absence of suitable premises. Having seen the location of the units at 3 High Street and 44C Market Street to which the Council refer and noted the double yellow lines and that the buildings occupy almost their entire sites I can well understand the appellants' concerns as to suitability given the likely problems in terms of vehicle parking and the delivery and collection of goods.
41. The 4 vacant retail warehouses at Hedge End which have been drawn to my attention, when considering their much greater size, cannot be seen as viable alternatives. I understand that these Hedge End retail warehouses, moreover, were taken into account by DTZ in their 2006 report on the capacity for new retail and other town centre uses in South Hampshire so that the quantitative need found would have been in addition to those units. On the basis of the DTZ report, and with the appeal units in total equating to some 39% of the identified need for out of centre floorspace, there is sufficient retail need to

support the proposals at Units 4, 5 and 9. I am satisfied that criteria (i) and (ii) of Policy 134.TC are met.

42. The Council take no point on the accessibility criteria (iv) and (v) and Mr Irvine for HTW shows that the Trade Park is well served by alternative means of transport to the private car. It nevertheless remains likely as a consequence of the need to transport goods that the majority of persons visiting the site would do so by car or van.

43. The key retail issue focuses on the effect on the vitality and viability of to all intent and purposes Eastleigh town centre, and the Council whilst acknowledging that the use of any one of the appeal units would have no material impact, argue that the units cannot reasonably be considered in isolation. On this basis EBC contend that the developments have a negative impact by offering competition to town centre / edge of centre retailers selling similar products, a disincentive to those who might otherwise set up such businesses in these sequentially preferred areas, and a disincentive to developers who might otherwise invest in the town centre / edge of centre locations. The Local Plan and the Area Action Plan (Issues and Options, May 2007) seek amongst other things to renew and support shopping in Eastleigh town centre.

44. A survey of neighbouring centres has been carried for the appellants, with a finding that is unchallenged that no centre shows any significant levels of vacancy. Eastleigh town centre itself is on the second tier of the regional hierarchy, and it is not contended that it does not perform the function attributed to it. The recent Issues and Options report indicates that it underperforms in relation to comparable centres in the South East, but under the heading of 'strategic concerns' it is nonetheless stated that the town centre has considerable potential to capitalise on its strengths, which include a prosperous and growing population, a very compact central core, excellent transport links and a distinctive identity. The level of vacancies in Eastleigh is low, lending weight to the appellants' contention that no impact has occurred during 3 to 4 years trading at appeal units.

45. The overlap moreover between goods sold here and in Eastleigh town centre is very limited, and in relation to Units 4 and 9, since the goods associated with these premises are routinely sold out of centre it is likely that any impact of the use has been borne by existing out of centre retailers. The DTZ study 'Convenience Retailing: Joint Capacity Assessment' undertaken on behalf of Southampton and Eastleigh in June 2006 showed that town centres in Eastleigh retain just 2% of retail expenditure on furniture and DIY goods, and the appeal units were not identified as retail destinations by local residents.

46. Eastleigh, seeking large scale multiples and specialist retailers, is the only centre with a specific strategy and to my mind the B8 /A1 mixed uses (B8, B1 and A1 in the case of Unit 5), have no direct impact in this regard. There is not the effect on the vitality and viability of Eastleigh town any other centre, even on a cumulative basis, to merit dismissal. The criteria to LP Policy 134.TC are properly met.

Employment

47. The survey undertaken by Mr Cooper for the appellants, not disputed by EBC, has showed that within the Borough there were some 55 units available offering a range of premises amounting to in excess of 50,000 sq m (gross internal). In the immediate locality and apart from the 3 vacant units within the Hedge End Trade Park (Units 6-7 and the appeal Unit 8) there are around 14 industrial / warehouse vacancies within walking distance of the size range available at the Hedge End Trade Park. The survey indicates a total area involved of some 7,150 sq m (gross internal). Although present position, described by the Council as a 'glut' relates to a period of around 6 months, there is not the evidence to support the contention that the glut could soon become a shortage.
48. As to employment density, bearing in mind the indication that the survey which led to the average figures set out in the DTZ Report 'Use of Business Space and Changing Working Practices in the South East (2004)' considered a range of warehouse sizes, I find some strength in the contention that the number of jobs generated, a full-time equivalent of some 23 persons, is on a par with that likely to be associated with the approved business use. I can well understand also that uncertainty arising from the enforcement action has had its impact on the number of jobs which have in practice resulted at Unit 9. The figure is less than that envisaged in the initial correspondence between this developer and the Council in 2004. When considering, moreover, that the relevant planning unit at Unit 5 is the whole premises and that the 'picking' area is used as part of the 'shop' and as part of the B8 operation for mail / internet orders, the suggestion for the Council that almost double the number could be expected to be employed here based on the lawful use is a substantial overestimate.
49. In summary, whilst recognising that there are major hurdles to be overcome in progressing the major employment land allocation which relies on the proposed Chickenhall Lane Link Road, I find that the mixed use of these units in the terms of LP Policy 118.E neither markedly reduces the potential choice of employment nor significantly reduce the range and variety of premises or sites available for employment purposes within the local area. Subject to the imposition of conditions, these appeals on ground (a) should be reasonably allowed.

Unit 8

50. Topps Tiles ceased trading at Unit 8 shortly before the Inquiry and the appeals initially made by Multi-Tile Ltd t/a Topps Tiles have been withdrawn. The planning merits nonetheless still fall to be considered in the context of the ground (a) appeal by SW. With the Unit no longer in operation, however for the mixed B8 / A1 use, I assign considerable weight in this instance to the concerns in relation to cumulative impact, and am alive in this regard to the further vacant premises at Units 6 - 7. In these circumstances the grant of deemed permission for the mixed use encompassing retailing at this now vacant Unit would be inappropriate, notwithstanding by conclusions described above on the main issues. This ground (a) appeal therefore fails.

Units 4, 5 and 9 - Conditions

51. I shall attach the condition limiting the use of the premises on the lines the Council suggest, but removing the reference to B1 on Units 4 and 9 in the light of the corrected allegation. I do not intend to adopt the wider approach suggested for the appellants given the out of centre location and the qualitative need advanced for the specific goods involved here. Since the 'showroom' is part of the overall mixed use I consider it to be unnecessary to impose a percentage floorspace restriction. Nor for the same reason, in the case of Unit 5, do I believe it necessary to impose a specific limit on the B1 component of the mixed use. Having regard, however, to the judgment in *Eastleigh BC v. FSS and Asda Stores [2004]* I agree the need to attach the overall floorspace limit and the restriction on mezzanine floorspace. The Council's suggested condition preventing sub-division is also entirely appropriate. To avoid uncertainty I believe it to be necessary in each case to re-impose the drainage, open storage and parking conditions attached to the original permission.

Grounds (f) and (g)

52. Ground (f) falls to be considered on Unit 8 and I shall vary the enforcement notice as discussed earlier striking out the requirement to cease using more than 10% of the floorspace for showroom / display use. To this extent the ground (f) appeal succeeds. Since this enforcement notice has been complied with I am not proposing to make the further variation inserting the word "incidental" in place of "ancillary" which I referred to earlier. The ground (g) appeals do not fall to be considered.

Conclusions

53. For the reasons given above and having regard to all other matters raised I conclude as follows:

Unit 3

54. That the appeal should succeed on ground (c) and accordingly the enforcement notice, subject to the correction and variation as discussed, will be quashed.

Unit 4

55. That the appeal should succeed on ground (a) and I will grant planning permission in accordance with the application deemed to have been made under section 177(5) of the 1990 Act as amended, which will now relate to the corrected allegation.

Unit 5

56. That the appeals should succeed on ground (a) and I will grant planning permission in accordance with the application deemed to have been made under section 177(5) of the 1990 Act as amended, which will now relate to the corrected allegation.

Unit 8

57. That the appeal should not succeed. I shall uphold the enforcement notice with a correction and variation and refuse to grant planning permission on the deemed application.

Unit 9

58. That the appeals should succeed on ground (a) and I will grant planning permission in accordance with the application deemed to have been made under section 177(5) of the 1990 Act as amended, which will now relate to the corrected allegation.

Formal Decisions

Unit 3 - Refs: APP/W1715/C/06/2027178 and 2027362

59. I direct that the enforcement notice be corrected by the deletion of (i) the words "(B1) and" from the first bullet point in the allegation and (ii) the deletion of the allegation set out under the second bullet point, and varied by the deletion of the second requirement. Subject to these corrections and variation I allow the appeal, and direct that the enforcement notice be quashed.

Unit 4 - Ref: APP/W1715/C/06/2027906

60. I direct that the enforcement notice be corrected by the deletion of (i) the words "(B1) and" from the first bullet point in the allegation and (ii) the deletion of the allegation set out under the second bullet point, and varied by the deletion of the first requirement.
61. Subject to these corrections and this variation 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 (B1) and (B8) with ancillary showroom granted under planning permission ref. 33736/1 to a mixed use comprising (B8) and (A1) retail use to the general public at Unit 4, Tollbar Way, Hedge End, Southampton SO23 2JN subject to the conditions set out in the attached Schedule.

Unit 5 - Refs: APP/W1715/C/06/2026745 and 2027904

62. I direct that the enforcement notice be corrected by the deletion of the allegation set out under the second bullet point, and varied by the deletion of the second requirement.
63. Subject to this correction and variation 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 (B1) and (B8) with ancillary showroom granted under planning permission ref. 33736/1 to a mixed use comprising (B1) and (B8) and (A1) retail use to the general public at Unit 5, Tollbar Way, Hedge End, Southampton SO23 2JN subject to the conditions set out in the attached schedule.

Unit 8 - Ref: APP/W1715/C/06/2027897

64. I direct that the enforcement notice be corrected by the deletion of (i) the words "(B1) and" from the first bullet point in the allegation and (ii) the

deletion of the allegation set out under the second bullet point, and varied by the deletion of the second requirement. Subject to these corrections and this variation I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Unit 9 - Refs: APP/W1715/C/06/2026318 and 2027858

65. I direct that the enforcement notice be corrected by the deletion of (i) the words "(B1) and" from the first bullet point in the allegation and (ii) the deletion of the allegation set out under the second bullet point, and varied by the deletion of the second requirement.
66. Subject to these corrections and this variation 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 (B1) and (B8) with ancillary showroom granted under planning permission ref. 33736/1 to a mixed use comprising (B8) and (A1) retail use to the general public at Unit 9, Tollbar Way, Hedge End, Southampton SO23 2JN subject to the conditions set out in the attached schedule.

Roger Priestley

Inspector

APPEARANCES

FOR SCOTTISH WIDOWS UNIT FUNDS LTD:

Mr S Pickles	of Counsel, instructed by Addleshaw Goddard LLP, Solicitors, Alder Castle, 10 Noble St., London EC2V 7JW
He called	
Mr N Cooper BA(Hons) MCD DipSurv MRICS MRTPI	Director and Head of Planning & Development Consultancy Dept., Colliers CRE
Mr A Pyrke BA(Hons) DipTP MRTPI	Director of Planning and Development Consultancy Dept., Colliers CRE

FOR SIGMAKALON UK LTD:

Mr P Wadsley	of Counsel, instructed by GVA Grimley LLP, University Gate, Park Row, Bristol BS1 5UB
He called	
Mr C S Smith MBA	Commercial Controller Decorator Centres, SigmaKalon UK Ltd
Mr M Morris BSc(Hons) DipTP MRTPI	Associate, GVA Grimley

FOR JUST FOR FUN (UK) LTD:

Mr P Airey BA MSc MRTPI DMS	Senior Consultant, The Luken Beck Partnership, 30 Carlton Crescent, Southampton SO15 2EW
He also gave evidence and called	
Mr P Richards	Director Just For Fun (UK) Ltd, Unit 5, Hedge End Trade Park, Tollbar Way, Hedge End, Southampton SO30 2JN

FOR MR JULIAN HASE (HAMPSHIRE TILE WAREHOUSE LTD):

Mr M Mundy	Partner, Clarke Willmott, Burlington House, Botleigh Grange Business Park, Hedge End, Southampton SO30 2DF
He called	
Mr S Irvine MA BA(Hons) DipTP MRTPI	Senior Planner, Turley Associates, Brunswick House, 8-13 Brunswick Place, Southampton SO15 2AP

FOR THE LOCAL PLANNING AUTHORITY:

Mr J Burns

of Counsel, instructed by the Head of Legal and Democratic Services, Eastleigh BC, Civic Offices, Leigh Road, Eastleigh SO50 9YN

He called

Mr T Wright DipTP MRTPI

Mr M Fletcher

Mrs C Thomas

Assistant Head of Policy and Design, Eastleigh BC
Enforcement Officer, Eastleigh BC
Enforcement Team Leader, Eastleigh BC

DOCUMENTS

1 The Council's letters of notification and lists of persons notified.

2(a)-(b) Statement of Common Ground and related Appendices (CD1-CD15).

Eastleigh BC

3 Proof of evidence of Mr T Wright, and related Plan 2.

4(a)-(c) Proof of evidence of Mr M Fletcher [4(a)], and appendices MF1-MF14 [4(b)] and manuscript of surveys undertaken at Unit 3 [4(c)].

5(a)-(b) Proof of evidence of Mrs C Thomas [4(a)] and appendices CT1-CT6 [4(b)].

6 Experian Retail Planner Briefing Note 4.0.

7 Bundle of PCN replies.

8 Brochure - 'Just For Fun, the Party store'.

9 Operational Statement from Floors-2-Go plc attached to PCN reply.

10 Suggested planning conditions.

11(1)-(8) Bundle of cases / appeal decisions: - LTSS Print and Supply Services v. Hackney LBC, 1975; Tesco, Sainsbury and Safeway v. Thurrock BC 1993; Monomart Warehouses v. SSE, 1977; Decorative & Caravan Paints v. MHLG 1970; and appeals re. Unit 5, Louth; Louth Carpet Warehouse; Units 4A and 4B Hempstead Road Industrial Estate, Holt; and Barley Farm Services, Spilsby.

Scottish Widows Unit Funds Ltd

12(a)-(b) Proof of evidence of Mr N Cooper [12(a)], related appendices NRC1-5 and calculation of employment (revised version, 8 June 2007) [12(b)]

13 South Hampshire Strategic Employment Zones - Issues and Options, May 2007.

14(a)-(c) Proof of evidence of Mr A Pyrke [14(a)], related appendices AP1-20 [14(b)] and response to the Council's suggested planning conditions [14(c)].

15 Supplementary Proof of Mr A Pyrke.

- 16 Eastleigh Town Centre, Issues and Options, May 2007.
17 Employment densities by sector and use class, DTZ, 2004.

SigmaKalon UK Ltd

- 18(a)-(b) Proof of evidence of Mr M Morris [18(a)] and related appendices [18(b)]
19(a)-(b) Proof of evidence of Mr C Smith [19(a)] and related appendices [19(b)]. (Including sample 'credit' and 'depot' account application forms).
20 Record of Sales, handed in by Mr Smith on 7 June.
21 Record of Sales (corrected) handed by Mr Smith on 8 June.
22 Customer codes and transaction types.
23 List of Johnstone's Leyland Decorating Centres
24(a)-(b) Extracts from (a) the Oxford Dictionary and (b) the PCN reply.
25(a)-(c) Dudley Bowers Amusements Enterprises Ltd v. SSE 1986; Miller Mead v. MHLG 1962; and Kerrier DC v. SSE 1980.

Just For Fun (UK) Ltd

- 26 Proof of evidence of Mr P Airey.
27 Proof of evidence of Mr P Richards.
28 Appendices (1-5) to the evidence for Just For Fun (UK) Ltd.

Julian Hase – Hampshire Tile Warehouse

- 29(a)-(b) Proof of evidence [29(a)] of Mr S Irvine and related appendices 1-7 [29(b)].
30 Rebuttal letter dated 22 May 2007.
31(a)-(c) I'm Your Man Ltd v. SSE 1998; JPL commentary on holiday occupation condition, 2003; and appeal decision concerning Chatteris Airfield, 2003.

PLANS

- A(i)-(v) The plans attached to the enforcement notices

SCHEDULE of PLANNING CONDITIONS

Unit 4

- (a) Unit 4 Hedge End Trade Park shall be used for a mixed B8 Storage or Distribution / A1 Shops use (under the provisions of the Town and Country Planning Use Classes (Amendment) Order 2001. The permitted A1 Shop use shall be for the display and sale of timber and laminate flooring materials and related materials and equipment only.
- (b) The permitted gross floorspace, measured externally, shall not exceed 232 sq m and no upper floor or mezzanine floorspace shall be installed without the prior grant of permission by the local planning authority.
- (c) The unit the subject of this permission shall not be subdivided into more than one unit without the prior grant of planning permission by the local planning authority.
- (d) No goods, plant or machinery shall be stored in the open outside the unit.
- (e) No sewage or trade effluent (including vehicle wash or vehicle steam cleaning effluent) except site drainage shall be discharged to any surface water drainage system.
- (f) Prior to being discharged into any watercourse, surface water sewer or soakaway system, all surface water drainage from parking areas and hard standings shall be passed through an oil interceptor designed and constructed to have a capacity and details compatible with the site being drained. Roof water shall not pass through the interceptor.
- (g) Drainage from loading bays and waste storage areas shall not be discharged to any watercourse, surface water sewer or soakaway.
- (h) Any facilities for the storage of oils, fuels or chemicals shall be sited on impervious bases and surrounded by impervious bund walls. The bund capacity shall give 110% of the total volume for single and hydraulically linked tanks. If there is multiple tankage, the bund capacity shall be 110% of the largest tank or 25% of the total capacity of all the tanks, whichever is the greatest. All filling points, vents, gauges and site glasses and overflow pipes shall be located within the bund. There shall be no outlet connecting the bund to any drain, sewer or watercourse or discharging onto the ground. Associated pipework shall be located above ground where possible and protected from accidental damage.
- (i) The existing provision on the site for the parking, loading and unloading of vehicles shall be retained and reserved for that purposes at all times.

Unit 5

- (a) Unit 5 Hedge End Trade Park shall be used for a mixed B1 Business / B8 Storage or Distribution / A1 Shops use (under the provisions of the Town and Country Planning Use Classes (Amendment) Order 2001. The permitted A1 Shop use shall be for the display and sale of party goods, fancy dress, joke products and related items only.

- (b) The permitted gross floorspace, measured externally, shall not exceed 516 sq m and no upper floor or mezzanine floorspace shall be installed without the prior grant of permission by the local planning authority.
- (c) The unit the subject of this permission shall not be subdivided into more than one unit without the prior grant of planning permission by the local planning authority.
- (d) No goods, plant or machinery shall be stored in the open outside the unit.
- (e) No sewage or trade effluent (including vehicle wash or vehicle steam cleaning effluent) except site drainage shall be discharged to any surface water drainage system.
- (f) Prior to being discharged into any watercourse, surface water sewer or soakaway system, all surface water drainage from parking areas and hard standings shall be passed through an oil interceptor designed and constructed to have a capacity and details compatible with the site being drained. Roof water shall not pass through the interceptor.
- (g) Drainage from loading bays and waste storage areas shall not be discharged to any watercourse, surface water sewer or soakaway.
- (h) Any facilities for the storage of oils, fuels or chemicals shall be sited on impervious bases and surrounded by impervious bund walls. The bund capacity shall give 110% of the total volume for single and hydraulically linked tanks. If there is multiple tankage, the bund capacity shall be 110% of the largest tank or 25% of the total capacity of all the tanks, whichever is the greatest. All filling points, vents, gauges and site glasses and overflow pipes shall be located within the bund. There shall be no outlet connecting the bund to any drain, sewer or watercourse or discharging onto the ground. Associated pipework shall be located above ground where possible and protected from accidental damage.
- (i) The existing provision on the site for the parking, loading and unloading of vehicles shall be retained and reserved for that purposes at all times.

Unit 9

- (a) Unit 9 Hedge End Trade Park shall be used for a mixed B8 Storage and Distribution / A1 Shop use (under the provisions of the Town and Country Planning Use Classes (Amendment) Order 2001. The permitted A1 Shop use shall be for the display and sale of floor and wall tiles/coverings and related goods, materials and equipment only.
- (b) The permitted gross floorspace, measured externally, shall not exceed 418 sq m and no upper floor or mezzanine floorspace shall be installed without the prior grant of permission by the local planning authority.
- (c) The unit the subject of this permission shall not be subdivided into more than one unit without the prior grant of planning permission by the local planning authority.
- (d) No goods, plant or machinery shall be stored in the open outside the unit.

- (e) No sewage or trade effluent (including vehicle wash or vehicle steam cleaning effluent) except site drainage shall be discharged to any surface water drainage system.
- (f) Prior to being discharged into any watercourse, surface water sewer or soakaway system, all surface water drainage from parking areas and hard standings shall be passed through an oil interceptor designed and constructed to have a capacity and details compatible with the site being drained. Roof water shall not pass through the interceptor.
- (g) Drainage from loading bays and waste storage areas shall not be discharged to any watercourse, surface water sewer or soakaway.
- (h) Any facilities for the storage of oils, fuels or chemicals shall be sited on impervious bases and surrounded by impervious bund walls. The bund capacity shall give 110% of the total volume for single and hydraulically linked tanks. If there is multiple tankage, the bund capacity shall be 110% of the largest tank or 25% of the total capacity of all the tanks, whichever is the greatest. All filling points, vents, gauges and site glasses and overflow pipes shall be located within the bund. There shall be no outlet connecting the bund to any drain, sewer or watercourse or discharging onto the ground. Associated pipework shall be located above ground where possible and protected from accidental damage.
- (i) The existing provision on the site for the parking, loading and unloading of vehicles shall be retained and reserved for that purposes at all times.