S 78 Planning Appeal re

38 Pandora Road, London, NW6 1TR

Camden Council ref: 2018/1841/P Agents ref: 25100

Grounds of Appeal

1. The proposal and the decision

1.1 The application was for 'Change of Use from abandoned property to single family dwelling and formation of access for disabled persons. The Council amended the description of the dwelling to '*Use of premises as single family dwelling, formation of access for disabled persons at front and new bin store at rear.'*

1.2 The decision notice is dated 17 October 2018. A copy of the decision is at Annex A to these grounds of appeal.

2. The application documentation

2.1 The plans, application form and other documentation comprising the application are at Annex B. These are the 1 App Form, CiL form, Plans and Elevations as existing and proposed and a Planning, Design and Access statement. Last copies of correspondence with the case officer as the assessment of the application proceeded.

3. The delegated report

3.1 For the assistance of all parties, the delegated LPA report of 4 pages has been paginated .Every paragraph on pages 3 and 4 have been previously numbered by the Council.

4. Procedural matter

4.1 The appeal form asks if a planning obligation is to be submitted? The reply is yes; a S 106 Unilateral Undertaking will be submitted to address Reason 2 for refusal.

5. Reason 1 for refusal

5.1 The Council take the view that the proposal would result in the loss of housing with shared facilities. This is not the appellant's position and never has been having taken advice from Counsel.

5.2 The Inspector will note that the issue of abandonment of the previous use, and the evidence demonstrating abandonment, are featured in Planning, Access and Design statement being part of the application. Section 3 refers.

5.3 Both the appellant and the Council refer to *Hartley v MHLG [1970] 1 QB 413.* The Council relies, in para 3.3 of the delegated report, on quoting seven lines from the judgement.

5.4 We invite the Inspector to look further at *Hartley* and the context of the appeal. In the case of *Hartley*, matters may be summarised as follows;

A petrol station operated with an area to display and sell cars. Sales stopped in 1961 when the owner died. His son was thought too young and inexperienced son to be involved in car sales. Sales were resumed in 1965 when a new owner acquired the site. The court was asked whether that 1965 resumption amounted to an unauthorised change of use. The Minister and the Divisional Court held that it did.

The appellant site owner submitted: "The intention is an essential element; and here the evidence supports the view that though the widow, because of her son's youth and inexperience, told him not to sell cars, she would have liked the car sales to continue since the demand was there; so the evidence is that the car sales use was only temporarily suspended until such time as the then owners felt able to resume it." Held: The submission failed.

Lord Denning MR: "The question in all such cases is simply this: Has the cessation of use (followed by a non-use) been merely temporary, or did it amount to an abandonment? If it was merely temporary, the previous use can be resumed without planning permission being obtained. If it amounted to abandonment, it cannot be resumed unless planning permission is obtained. ... Abandonment depends on the circumstances. If the land has remained unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned, then the tribunal may hold it to have been abandoned."

Widgery LJ: "The substance of the defence of the appellant in this case must be that although it seems there had been no car sales use from 1961 to 1965, yet on a fair and commonsense view of the facts, the proper interpretation of those facts was that the original phase 1 use for car sales had never come to an end. It is in connection with that argument that the question of abandonment arises.

It has been suggested in the courts before, and it seems to me that it is now time to reach a view upon it, that it is perfectly feasible in this context to describe a use as having been abandoned when one means that it has not merely been suspended for a short and determined period, but has ceased with no intention to resume it at any particular time. It is perfectly true, as Mr. Glidewell says, that the word 'abandonment' does not appear in the legislation. We are not concerned with the legislation at this stage but merely with the facts of the matter. I cannot think of a better word to describe a situation in which the land owner has stopped the activities constituting the use not merely for a temporary period, but with no view to their being resumed. If that has happened, then, as a matter of fact, the use has ceased."

5.5 The case of Hartley centred on a use restarting after four years. In the appeal case there is no intention to restart the previous use. And we submit that the appellant's case does not rest '*almost entirely on the owner's intention*'. (Delegated report para 3.5).

5.6 It rests on the four criteria for testing abandonment which are common ground. As stated in *Castell-Y-Mynach v SOS for Wales and Taff Ely BC [1985] JPL 40*

5.7 The physical condition of the building.

The Council in assessing the application did not enter the property nor does the delegated report express any view on the exterior condition. Externally we suggest that the property is in reasonable order being weather tight and secure. Internally it is in a state of poor decoration, needs to be re-wired, have the rising damp treated, the internal doors replaced to give the required resistance to fire, the loft space further insulated and sanitary fittings replaced. These inadequacies need to be addressed before anyone moves in to live.

5.8 The length of time the building has not been in use.

The Council has misinformed itself regarding this criteria. At para 2.1. of the delegated report the vacancy period is stated as 9 months. This was the vacancy period when the application was submitted in April 2018. At the date of decision on 17 October 2018 it was a further 6.5 months, a total of 15.5 months. It remains to be seen how long the vacancy period will have been at the date the appeal is determined. At this time we suggest in the order of two years.

5.9 Whether it has been used for any other purpose

The building has remained vacant. The Council's paras 3.7 and 3.8 appear to suggest that the lack of any other use taking place weighs against abandonment. We submit to the contrary. If any other use had started since the HMO use ceased, then the property would not be abandoned but would be containing an unlawful use which could be subject to planning enforcement. It weighs in favour of abandonment that no use has taken place within the building.

5.10 The owner's intentions

These have been clearly expressed in paras 2.2 and 2.3 of the Planning, Design and Access Statement. And supported by written evidence from other parties namely the VoA and the Council itself.

5.11 When the four criteria are taken together and weighed and as advised by Counsel for the appellant *'the test remains an objective one, having regard to all the facts. Although the period may be relatively short, and this may tell against abandonment, there is an abundance of other evidence which indicates that the former use has been abandoned'*.

5.12 In placing, in our submission, undue emphasis on one criteria the Council also refers to *Hughes v SoS ETR [2000] JPL 826*. This reaffirms the four tests which should be applied. And as set out above, the appellant's intention has not been relied upon alone to determine abandonment. It is one of four tests all of which have been applied.

The last sentence of the summary of the *Hartley* judgement (as quoted above) assists

I cannot think of a better word (abandonment, our insert) *to describe a situation in which the land owner has stopped the activities constituting the use not merely for a temporary*

period, but with no view to their being resumed. If that has happened, then, as a matter of fact, the use has ceased."

Lawful Use

5.13 We also note that there is no evidence that the HMO was a lawful use, in planning terms, or commenced more than ten years before ending. In the delegated report under 'Site Description' the Council acknowledges that *'it is unclear when the premises were converted to HMO use'.*

5.14 This matter is also addressed in the Planning, Design and Access Statement, para 2.2.The evidence to hand, on the balance of probability, shows the HMO use starting in September 2007 and ended by 1 June 2017 a period of less than ten years. Consequently with the property abandoned there is nothing to enforce against. And to revert to the previous use as a single family dwelling requires planning permission as set down in *Fairstate v First Secretary of State {2004} EWHC 1807 (Admin).*

5.15 To conclude this point we submit that the outcome of four tests applied with the evidence in this case is that, on the balance of probability, the use as an HMO has been abandoned.

5.16 At its para 3.4 the Council also seeks to support its case on the ground that internal works do not need planning permission. And so if such works are required before the use can resume without any planning permission the use cannot be said to have been abandoned. Indeed it goes further at its 3.7 and makes the need or not for planning permission to recommence the use as in its own words '*the determinative issue'*

5.17 This ignores the criteria set out by the courts by which this test shall be made. When these are applied then on the balance of probability the use has been abandoned. In which case planning permission is required to make any use lawful.

5.18 We submit that there is confusion here between an act of development namely building works and an act of development being a material change of use. Just because the former may not, in this case, be an act of development does not prevent the latter from being an act of development. No conclusion can be drawn as to abandonment by conflating acts of development. The appropriate test duly applied is that set out in 5.1 to 5.15 above.

6. Planning Policy

6.1 On the basis that the HMO use has not been abandoned the Council prays its policy H10 in aid of the refusal.

6.2 This policy states in part, by way of exceptions to the policy

g If it can be demonstrated that the accommodation is incapable of meeting the relevant standards for houses in multiple occupation, or otherwise genuinely incapable of use as housing with shared facilities; or

h adequate replacement housing with shared facilities will be provided that satisfies criteria (a) to (f) above ;or

I the development provides self contained social affordable rented homes

6.3 Taking point g, the Council suggest that any lack of facilities may be remedied without the need of planning permission being internal work. It is common ground that the property as it stands is incapable of HMO use having only one kitchen and one bathroom. We underline that the policy does not include the test that any deficiencies shall be disregarded if making good such deficiencies is not development. The building is plainly incapable today of returning to a house with shared facilities for seven people.

6.4 Whilst there are several pages of supporting text to this policy, it is well established law * that this text may explain or interpret the policy but of itself is not policy. It cannot trump or add to policy or impose a requirement which is not contained in the policy itself. So not only on the face of the policy but when properly applied exception g within the development plan may attract considerable weight.

6.5 Taking the Council's standards for HMOs May 2016 pages 1-12 (See Annex D) the deficiencies include:

Page

3 Power Sockets Insufficient in the bedrooms
3 There is no current Fire Risk Assessment
4 With seven letting rooms two complete kitchens are required. There is only one
4. Since the kitchen is at lower ground level a dining area is required with the kitchen
8 There is no mechanical ventilation to the kitchen. There is rising damp.
11. Two full sets of bathrooms are required; there is only one. Also one WC in a separate compartment is required.

6.6 We submit that if an application was made today for an HMO licence then on the basis of the Council's standards this would be refused.

- Note: Cherkley Campaign Ltd v Mole Valley DC [2014] EWCA Civ 567 and Old Hunstanton Parish Council v Secretary of State [2015] EWHC 1958

7 <u>Reason 2 for refusal</u>

7.1 Moving on from Para 4 above, the Council take the view that an undertaking is needed to ensure occupiers cannot apply for on street parking permits. There is no reasoning as to why this approach should be taken in preference to the PPG August 2018.

7.2 The Camden Local Plan, adopted on 3 July 2017, includes policy T2. We note that the PPG advises at Para 11 Ref ID 21a-20140306 that if an objective can be achieved by either an agreement or condition then a planning condition should be use.

7.3 In case this material consideration does not attract sufficient weight a unilateral undertaking will be submitted, to secure car free development, as part of the appeal. Heads of Terms will include that the undertaking will only take effect if the

appeal is allowed and the development permitted is commenced. That the appellant will give written notice of commencement within 7 days of work starting on site and that both sides will bear their own costs in so far as the undertaking is concerned.

8. Conclusions

8.1 First this appeal revolves around whether the previous use as an HMO has, on the four tests set out in judicial authorities and the evidence supplied, been abandoned. If the Inspector is satisfied that as a matter of fact and degree that this is the case then the Local Pan policy H10 does not come into play in making a decision. Since there would be no loss of shared housing

8.2 Second if policy H10 does come into play, the exception at H10-g also takes effect. It is common ground that the property is not capable of providing housing with shared facilities without a significant amount of work.

8.2 Third the LPA has expressed concern about car parking. This is acknowledged. In the event that the Inspector concludes that implementation of policy T2 may not be achieved by condition a Unilateral Undertaking will be submitted, to achieve this objective, within the appeal timetable.

8.4 Fourth and last, we submit that this appeal should be allowed with conditions regarding 'car free parking' or in the alternative a Unilateral Undertaking and the detailed design of the access ramp to the front door.

Roger Pidgeon, Dip TP, MRTPI, MCIM
Lamont Planning Associates
17 December 2018

Enclosures

A Decision Notice
B Planning Application including plans and supporting documents
C LPA Delegated Report
D Council HMO regulations May 2016 (part)

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Draft Statement of Common Ground

1. The property has not been in use since at least June 2017.

2. The Council in assessing the application now at appeal did not inspect the interior of the property. This is known because neither key holder nor agent was asked to arrange access.

3.The four criteria for testing if abandonment has taken place are as set out in judicial authority. These exclude whether planning permission is needed before the previous use may recommence.

4 On the balance of probability the HMO use had been present for less than 10 years when it ceased by June 2017.

5. Policy H 10 does not stipulate that deficiencies in the property shall be discounted in applying the policy if making them good does not involve an act of development.

6. The property is deficient when the Council's current HMO standards are applied.

7. The Council offers no reason why the advice in the PPG that preference be given to imposing conditions rather than using S 106 has not been followed.

Lamont Planning Associates
17 December 2018.

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Further Information relevant to a Hearing

We submit that matters of fact and opinion need to be tested without formal cross examination including:

- That the property has been vacant since at least June 2017
- That there is no planning record of an HMO use before September 2007 being less than 10 years since the use ceased by June 2017.
- The Internal condition of the property
- The application of the four tests to establish the abandonment of an use and
- The use of a planning condition rather than a Unilateral Undertaking to secure a 'car free' development.

Lamont Planning Associates
17 December 2018