



Planning & Development Ltd

JMS PLANNING & DEVELOPMENT LIMITED

STATEMENT IN SUPPORT OF A CERTIFICATE OF LAWFULNESS

IN RESPECT OF

A DEVELOPMENT AT

52 HOLMES ROAD

LONDON

NW5 3AB

March 2020

Client: Holmes Assets Ltd

Date: March 2020

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SECTION 1: INTRODUCTION

- 1.1 This Statement has been prepared on behalf of Holmes Assets Ltd by JMS Planning & Development Ltd in respect of an application for a Certificate of Lawfulness of a Proposed Use or Development (CLOPUD) in order to confirm the lawfulness of Class B1(a) use at 52 Holmes Road, London, NW5 3AB (*'the site'*).
- 1.2 The CLOPUD is submitted on behalf of Holmes Assets Ltd which is in the process of redeveloping the site, in accordance with planning permission LPA ref: 2016/1986/P as amended by application ref: 2018/3318/P which grants permission for the demolition of existing building and replacement with a new build mixed use development of six storeys (plus basement) comprising 9 self- contained units 8 x 2 bed, 1 x 3 bed) on floors 1-5 and 377sqm of industrial employment (B1c) on the basement and ground floors.
- 1.3 A Certificate of Lawful Use submitted under Section 191 or 192 of the Town & Country Planning Act 1990 (as amended) must be granted where the local planning authority is provided with information satisfying them of the lawfulness, at the time of the application, of the use described in the application. In all other cases, they must refuse the application.
- 1.4 Accordingly, this Statement sets out the comprehensive justification in respect of the proposed CLOPUD and confirms that on the "balance of probability" that the proposed B1(a) use is lawful.

SECTION 2: THE SITE AND SURROUNDING AREA

- 2.1 The application site comprises 52 Holmes Road, London, NW5 3AB. It is a rectangular site bound on the west and east by buildings and open to the north and south. It has an area of 0.0307 hectares (307m²). Holmes Road runs off Kentish Town Road from the east and curves around to the south connecting with Grafton Road.
- 2.2 The site is bounded to the east by a two storey industrial unit and to the west by a six storey student residence.
- 2.3 Works to develop the site are in progress. The approved development scheme is described in detail in Section 3 of this Statement.
- 2.4 The boundary of the site is shown on the attached Site Location Plan which accompanies the CLOPUD application.

SECTION 3: PLANNING HISTORY

3.1 A review of the site's planning history relevant to this application has been undertaken and is detailed below:

Application Reference	Proposal	Decision
2019/2915/P	Details of Conditions 7 (piling method statement), 8 (contamination), 10 (bird and bat boxes) 11, (Living Roof) and 12 (SUDS) of 2016/1986/P dated 25/05/2017 for demolition of existing building and replacement with a new build mixed use development of 6 storeys (plus basement) comprising 9 self-contained units 8x 2 bed, 1 x 3 bed) on floors 1-5 and 377sqm of industrial employment (B1c) on the basement and ground floors.	Approval of details
2019/2826/P	Details of facing materials for windows, brickwork, rendering, bin enclosures, planter box, balustrade, obscure glazing and metal grille, required by Condition 3(a-f) of planning permission reference 2016/1986/P dated 25/05/2017 for demolition of existing building and replacement with a new build mixed use development of 6 storeys (plus basement) comprising 9 self-contained units 8x 2 bed, 1 x 3 bed) on floors 1-5 and 377sqm of industrial employment (B1c) on the basement and ground floors.	Approval of details 24.09.2019
2018/3318/P	Variation of Condition 2 (approved plans) of 2016/1986/P dated 25/05/2017 for demolition of existing building and replacement with a new build mixed use development of 6 storeys (plus basement) comprising 9 self-contained units 8x 2 bed, 1 x 3 bed) on floors 1-5 and 377sqm of industrial employment (B1c) on the basement and ground floors. Changes include amendments to lightwells, basement, fire exit, lobbies, plant, increase in commercial floorspace, introduction of recesses to elevations, additional glazing, revision of unit layouts increase in residential floorspace.	Granted 08.03.2019
2018/3164/P	Details of Conditions 7 (piling and method statement), 8 (contamination), 10 (birds and bat boxes), 11 Living roofs) and 12 SUDS of 2016/1986 P dated 25/05/2017 for demolition of existing building and replacement with a new build mixed use development of 6 storeys (plus basement) comprising 9 self-contained units 8x 2 bed, 1 x 3 bed) on floors 1-5 and 377sqm of industrial employment (B1c) on the basement and ground floors.	Withdrawn

Application Reference	Proposal	Decision
2016/1986/P	Demolition of existing building and replacement with a new build mixed use development of 6 storeys (plus basement) comprising 9 self-contained units 8x 2 bed, 1 x 3 bed) on floors 1-5 and 377sqm of industrial employment (B1c) on the basement and ground floors.	Granted 25.07.2017
P9601386R1	The division of the building into 2 light industrial units (B1), involving change of use of the car showroom (SG) to B1 – within the meaning of the Town and Country Planning (Use Classes) Order 1987, as amended, alterations to the front and rear elevations, including relocation of the loading bay as shown on drawing no 03/01-03 inclusive 04A, 05, 06, 07.	Granted 10.09.1996

- 3.2 As set out above planning permission was granted on the 25th July 2017 (see **Appendix 1**) subject to conditions and a legal agreement (see **Appendix 2**) for the demolition of the existing building and replacement with a new build mixed use development of 6 storeys (plus basement) comprising 9 self-contained units 8 x 2 bed, 1 x 3 bed) on floors 1-5 and 377 sqm of industrial employment (B1c) on the basement and ground floors.
- 3.3 An application to amend the permission was made in 2019 (LPA ref: 2018/3318/P). The amendments were approved through the variation of Condition 2 (see **Appendix 3**). Changes to the scheme approved under the amendment included amendments to lightwells, basement, fire exit, lobbies, plant, increase in commercial floorspace, introduction of recesses to elevations, additional glazing, revision of unit layouts increase in residential floorspace. Accordingly, the legal agreement was updated to reflect the proposed changes to the scheme (see **Appendix 4**).

SECTION 4: LEGAL APPROACH

- 4.1 A Certificate of Lawful Use submitted under Section 191 or 192 of the Town & Country Planning Act 1990 (as amended) must be granted where the local planning authority is provided with information satisfying them of the lawfulness, at the time of the application, of the use described in the application. In all other cases, they must refuse the application.
- 4.2 The issue of Lawful Development Certificates is considered specifically within the National Planning Practice Guidance (NPPG). It is confirmed that anyone can apply to the local planning authority to obtain a decision on whether an existing use or development, or a proposed use or development is lawful for planning purposes or not. If the local planning authority is satisfied that the appropriate legal tests have been met, it will grant a Lawful Development Certificate. It is confirmed that an application needs to describe precisely what is being applied for (not simply the use class) and the land to which the application relates. Without sufficient or precise information, a local planning authority may be justified in refusing a Certificate. This does not preclude another application being submitted later on if more information can be produced.
- 4.3 The applicant is responsible for providing sufficient information to support an application, although a local planning authority always needs to cooperate with an applicant who is seeking information that the authority may hold about the planning status of the land. A local planning authority is entitled to canvas evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter evidence.
- 4.4 In the case of applications for an existing use, if the local planning authority has no evidence itself, nor any from others to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability. This has been supported by the Courts which have held that an applicant's own evidence does not need to be corroborated by "*independent*" evidence in order to be accepted (F.W. Gabbitas v. S.F.E. & Newham LBC [1985]). It is noted that this test "*on the balance of probability*" is significantly less onerous than the criminal

test of "*beyond reasonable doubt*". It is confirmed that a local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is, or would be lawful. Planning merits are not relevant at any stage.

4.5 It is considered that the applicant has submitted comprehensive information to justify the lawfulness of Class B1(a) on the "*balance of probability*". Full details for the justification for issuing a Certificate is set out in the following Sections.

SECTION 5: JUSTIFICATION FOR ISSUING A CERTIFICATE

5.1 This Section sets out the evidence submitted to justify on the “*balance of probability*” that the use of the site for B1(a) is lawful.

Background to the Lawful Development Certificate

5.2 Since the granting of the 2017 consent (LPA Ref: 2016/1986/P) the site has been sold to a new owner who has commenced the delivery of the development.

5.3 At the time of the application it had been anticipated that the commercial space within the scheme would be re-occupied by Henry Bertrand who were the previous owners of the site. However, Henry Bertrand no longer require the commercial floorspace within the scheme, so the new owner of the site Holmes Assets Ltd have marketed the employment space on the site seeking potential tenants for the proposed B1(c) space.

5.4 The applicant commissioned Pilcher Hershman Partnership LLP to act on its behalf in the marketing of the premises. To date, the marketing has comprised the following:

- 5 June 2019 – Pilcher Hershman + Burlington Green formerly appointed as agents
- 12 June 2019 – Details sent round Agents Society (over 500 agents)
- 24 June 2019 – The details are sent round Estate Agents Clearing House (over 1,000 agents)
- 8 July 2019 – property listed on Pilcher Hershman website
- 30 September 2019 – A joint agents marketing board goes up on hoarding reading ‘B1c Space, All enquiries’

5.5 This marketing has continued to the present day. To date no interest in any B1(c) use of the premises has occurred. In addition the site has been advertised within the Estates Gazette. Due to nature of the employment use, it is not considered that it is likely there will be any interest in the site going forwards as evidenced by the lack of interest following nine months of marketing. However, it is considered that there would be significant interest in the site for employment B1(a) office use. This would have the effect of keeping the employment floorspace proposed on the site in employment use and, it is considered, that this is likely to give rise to a greater level of job creation than a B1(c) use to the site.

- 5.6 On the basis that no B1(c) occupiers have been identified during the marketing of the site by commercial agents an alternative B1(a) tenant is now sought.
- 5.7 Notwithstanding the above background, it is considered that legally the site can be used for B1(a) use without the need for planning permission. However, it remains the case that there is a sensible and beneficial justification for this submitted Certificate of Lawfulness notwithstanding that it is determined on legal grounds only.

Planning History

- 5.8 The planning history of the application site is set out within the table contained at Section 3 of this Statement. As described above, the relevant planning permission is for the demolition of existing building and replacement with a new build mixed use development of six storeys (plus basement) comprising 9 self-contained units (8 x 2 bed, 1 x 3 bed) on floors 1-5 and 377sqm of industrial employment (B1c) on the basement and ground floors (2016/1986/P), this was subsequently amended through the variation of Condition 2 (2018/3318/P).
- 5.9 Whilst the commercial floorspace consented as part of the scheme is referenced as "*industrial floorspace (B1c)*" in the description of development of both Decision Notices (see Appendices 1 and 3), there is no reference to the requirement that the commercial floorspace is to be provided as B1(c) industrial employment within the planning conditions which have been attached to the consents. As set out within Section 3 the relevant permission is subject to a legal agreement (see Appendices 2 and 4). Neither the original agreement nor its subsequent amendment makes reference that the commercial floorspace is to be provided only for B1(c) light industrial occupation.

I'm Your Man Ltd v Secretary of State for the Environment, Transport and the Regions

- 5.10 As set out above whilst the use of the commercial floorspace as B1(c) is set out within the description of development it is not referenced within the planning conditions and therefore the permission does not impose any limitation to the occupation of the commercial floorspace by a B1(a) occupier.

- 5.11 The key Case Law on this matter is the I'm Your Man Case (I'm Your Man Limited v Secretary of State Environment, Transport and the Regions) which established the principle that where planning permission is granted for certain use, any limitation on the way that use is exercised must be imposed by conditions, not just in the description of development.
- 5.12 In accordance with principles as established under this case law the reference to B1c in the description of development is, therefore, not binding.

Winchester City Council v Secretary of State for Communities and Local Government and Others [2015] EWCA CIV 563

- 5.13 The principles laid down in I'm Your Man have now been examined again in "*Winchester City Council v Secretary of State for Communities and Local Government and Others [2015] EWCA CIV 563*".
- 5.14 This Court of Appeal decision held that I'm Your Man is relevant where the use of the site remains the same not, as in the Winchester case, where there is a change of use. The Court went on to say that where a material change of use was alleged in an Enforcement Notice, the absence of any condition limiting the use of the relevant land, the question for a Planning Inspector, is whether an alleged change of use has taken place and, if so, is it a material change of use for planning purposes.
- 5.15 Where there has been a material change of use, there will have been development and planning permission will be required. As such, this Court of Appeal decision has helped clarify the parameters of the I'm Your Man principle, which is concerned with restrictions on the manner in which the same use is exercised, not a change of use.

The Use Classes Order

- 5.16 Under the Town and Country Planning (Use Classes) Order 1987 (as amended) Use Class B1 business comprises three uses defined as follows:
- a. office other than a use within Class A2
 - b. research and development of products or processes

- c. for any industrial process (which can be carried out in any residential area without causing detriment to the amenity of the area).

5.17 As such B1(a) offices and B1(c) light industrial technically fall within the same use class i.e. B1. On this basis and in light of the case law above, it is considered that the commercial floorspace can be lawfully used as Class B1(a) office use.

Lawful Use as Class B1a

5.18 As B1(c) (Light Industrial) and B1(a) (office) are both parts of the same Use Class (B1 Use) and are merely three subsets of it, it is therefore considered that there is no change between a particular Use Class, both being within the B1 Use Class.

5.19 On the basis that no change of use is occurring the findings of I'm Your Man apply in this case, i.e. that the use can only be restricted through a condition. There is no restriction within the legal agreement which would prevent such a change. As such it is considered that a B1(a) can lawfully occupy the commercial space approved under 2016/1986/P as amended by 2018/3318/P.

SECTION 6: CONCLUSIONS

- 5.1 This Statement has been prepared on behalf of Holmes Assets Ltd by JMS Planning & Development Ltd in respect of an application for a Certificate of Lawfulness of a Proposed Use or Development (CLOPUD) in order to confirm the lawfulness of Class B1(a) use at 52 Holmes Road, London, NW5 3AB ('the site').
- 5.2 The CLOPUD is submitted on behalf of Holmes Assets Ltd who are in the process of redeveloping the site, in accordance with planning permission (2016/1986/P) as amended by (2018/3318/P) which grants consent for the demolition of existing building and replacement with a new build mixed use development of 6 storeys (plus basement) comprising 9 self-contained units (8 x 2 bed, 1 x 3 bed) on floors 1-5 and 377sqm of industrial employment (B1c) on the basement and ground floors.
- 5.3 A Certificate of Lawful Use submitted under Section 191 or 192 of the Town & Country Planning Act 1990 (as amended) must be granted where the local planning authority is provided with information satisfying them of the lawfulness, at the time of the application, of the use described in the application. In all other cases, they must refuse the application.
- 5.4 At the time of the application it had been anticipated that the commercial space within the scheme would be re-occupied by Henry Bertrand who were the previous owner of the site. Henry Bertrand no longer require the commercial floorspace within the scheme, so the new owner of the site Holmes Assets Ltd has taken the site to the market for potential tenants. No B1(c) light industrial occupiers have been identified during the marketing of the site by commercial agents, which has been ongoing for almost nine months. As such an alternative B1(a) office tenant is now sought.
- 5.5 The I'm Your Man Case (I'm Your Man Limited v Secretary of State Environment, Transport and the Regions) which established the principle that where planning permission is granted for certain use, any limitation on the way that use is exercised must be imposed by conditions, not just in the description of development. The use of the commercial floorspace as B1(c) is set out within the description of development it is not referenced within the planning conditions and therefore the permission does not impose any limitation to the occupation of the commercial floorspace by a B1(a) occupier.

- 5.6 As B1(c) (Light Industrial) and B1(a) (Office) are both parts of the same Use Class (B1 Use) and are merely three subsets of it, it is therefore considered that there is no change between a particular Use Class, both being within the B1 Use Class.
- 5.7 On the basis that no change of use is occurring the findings of I'm Your Man apply in this case, i.e. that the use can only be restricted through a condition. As such it is considered that a B1(a) can lawfully occupy the commercial space approved under 2016/1986/P as amended by 2018/3318/P. The legal agreement associated with the relevant planning permission does not restrict any change to B1(a).
- 5.8 Accordingly, this Statement sets out the comprehensive justification in respect of the proposed CLOPUD and confirms that on the "*balance of probability*" that the proposed B1(a) use is lawful.
- 5.9 The above legal arguments aside, this Certificate of Lawfulness will ensure the retention of an employment use on site, which is likely to result in a greater level of job creation than simply a B1(c) use.