

Belsize Park Gardens Group

c/o Iain Roxborough

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David Peres Da Costa (David.PeresDaCosta@Camden.gov.uk)

Camden Planning (Planning@camden.gov.uk)

Comments on Application 2020/4338/P Site: 81 Belsize Park Gardens (“the Site”)

Dear Mr Peres Da Costa/Sirs

Thank you for offering us the opportunity to comment on the above-mentioned application for a Certificate of Lawfulness. This response is on behalf of the Belsize Park Gardens Group (being residents of the houses in Belsize Park Gardens as numbered against the signatures set out below) in respect of the above application 2020/4338/P for a lawful development certificate for a proposed use and development.

You have indicated that the assessment of the application 2020/4338/P for a lawful development certificate will involve matters of fact from which I understand you to mean that it will not be determined by reference to planning policy and other material considerations. This is of concern because we feel that will not take into account our concerns and issues about the increased noise and traffic which will be generated by a new nursery for 120 children at any one time, resulting in some 262 estimated daily drop offs and pick ups.

Notwithstanding the applicant’s case that the development is lawful because it is not development by virtue of the new Class E of the Use Classes Order, we consider this view mistaken for the following reasons:

- (1) Any previous use as a gym or leisure centre has been abandoned and therefore cannot form the basis for a change of use to another class E use as the site does not have an existing Class E use, on which to base a change of use to another class E use; therefore the new regulations do not apply: instead a fully supported application for planning permission should have been made. The Site does not appear to have the benefit of a planning permission for use as a gym.
- (2) The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 (SI 2020/757) amended the UCO 1987 to create a new Class F.1 (a) which includes any use not including residential use: “For the provision of education.”. The proposed use is as a nursery school and as such is for the provision of education and not within Class E but Class F for which change of Use Class planning permission would be required.

- (3) The proposed use as a nursery will involve a material change in the character of use outside and in addition to any change of use within use class E, in that it will result in a materially increased intensification of use of the Site, with significant impacts on traffic and noise generation; therefore an application for planning permission to cover the proposed material change of use needs to be made.
- (4) The application and the form and procedure used is not appropriate to a change of use within class E and contrary to resident's legitimate expectations and natural justice.

Explaining these in more detail:

- (1) Any previous use as a gym or leisure centre has been abandoned and therefore cannot form the basis for a change of use to another class E use as the site does not have an existing Class E use, on which to base a change of use to another class E use; therefore the new regulations do not apply: instead a fully supported application for planning permission should have been made. The Site does not appear to have the benefit of a planning permission for use as a gym.**

Our first point arises because we believe that the property has been abandoned as a matter of law and therefore no longer has an existing lawful underlying use. The basis for this view is as follows:

The application states that any existing use as a leisure facility ceased in February 2017: "Existing Use - Leisure Facility - use ceased February 2017". In the Conservation Statement it is acknowledged that in 2017 what is described as a former leisure centre/gym closed. The owners went into liquidation. On page 20 of the Conservation Statement it is stated that "The building has been vacant since 2017 with little maintenance therefore the physical condition will continue to deteriorate". The Site is therefore not actually being used or occupied as a gym or leisure centre.

In a Belsize Park Gardens Marketing letter filed with application 2020/0929 (which has since been withdrawn) the applicant stated: "The property in its current format is no longer fit for purpose as a gym or health and leisure club. Modern operators' requirements have moved on to large open plan spaces, with adequate floor to ceiling heights...The unit will remain empty until such time the use attached to it can be relaxed or changed in order that we are able to progress a letting to an operator to which the property is more suited."

In *Hartley v Minister of Housing and Local Government and Another* [1970] 1 Q.B. 413 it was held that the Minister as the tribunal of fact was entitled to find on the evidence before him that a previous use of car sales had been abandoned after a cessation of that use from 1961 to 1965, where the previous use had been not merely suspended for a temporary and determined period but had ceased for a considerable time with no evinced intention of resuming it at any particular time.

The case of the *Trustees of Castell-y-Mynach Estate v Secretary of State for Wales* [1985] JPL 40 is authority for the view that there are four elements to consider when considering whether a property has been abandoned: (i) the owner's intention; (ii) the physical condition of the property; (iii) the length of time not used; and (iv) whether it has been used for other purposes. Each criteria has equal weight. Applying these criteria to the facts at hand, we ask you to take account of the following:

- i. It is clear that the owner has intended to abandon the use of the property as a gym given its physical characteristics and long period of vacancy.
- ii. The property is beginning to deteriorate and could not be used as a gym without substantial refurbishment. Quite possibly it would have to be demolished – note for instance the lack of interest by gym operators most of whom were put off by the physical state of the property.
- iii. The property has been empty and unoccupied for over three years, close to four. This is long enough for a property to be considered abandoned.
- iv. Since closing as a gym, we understand it has been used as artists' studios and for an artist's exhibition and for storage of goods. For example, in February 2020 it was used for an exhibition of the Zabłudowicz Collection; see: <https://www.zabludowiczcollection.com/news/view/semelparous-by-joey-holder>. Details from the internet are set out in the attached annexe re Art Exhibition

It follows that on the basis of criteria i-iv that the property should be deemed to be abandoned for the following reasons.

The owner's intention was and is to abandon the gym use. The previous occupier's intention was to abandon the gym use.

The property is no longer fit for purpose as a gym and therefore it is impossible to re-start the use as a gym without substantial changes, possibly requiring the demolition and rebuilding of much if not all of the property.

The length of time since the building was last occupied and used as a gym is sufficient for the gym use to be deemed abandoned.

The Site is being used for other purposes than as a gym.

As a consequence, the former use as a gym has been abandoned as a matter of law. The result in either case is the property does not fall within Class E. It follows it cannot be changed to another class E use without planning permission.

We should add that the gym was never subject to a planning permission and therefore cannot benefit from the rule in *Pioneer Aggregates* that uses authorised and implemented under a planning permission cannot be abandoned. Page 21 of the Conservation Statement filed in support of the application sets out the planning history of the site and this shows applications to remove a tree, retain air handling units, instal windows and make other alterations but no application for use as a squash club, gym or leisure centre.

The only documentary evidence relied on is a letter dated 9 March 1998 from Camden Council which concerns a proposal for the installation of windows in the front elevation at first and second floor level as shown in various drawing. This appears to evidence only a decision to permit development in the form of the installation of windows as per the drawings and does not consent to gym use. It is understood the permission to instal windows was not used (page 21 notes it appears not to have been implemented) and so the permission would have expired.

- (2) The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 (SI 2020/757) amended the UCO 1987 to create a new Class F.1 (a) which includes any use not including residential use: “For the provision of education.”. The proposed use is as a nursery school and as such is for the provision of education and not within Class E but Class F for which change of Use Class planning permission would be required.**

The Transport Assessment filed with the now withdrawn application 2020/0929/P for the same site identified various similar nursery school institutions as comparable or as potential competitors including Keren’s Nursery, which markets itself as having an “Outstanding” Ofsted inspection and Dulwich Village Pre-School and Henley Village (said to be a part of the applicant’s organisation) which also have and advertise Ofsted inspection reports. An annexe of extracts from websites of these nursery schools is attached together with copies of the Ofsted educational inspection reports.

In the Transport Assessment filed with 2020/0929/P it was noted that the nursery proposed would be Ofsted regulated.

In the circumstances we submit the proposal is for the provision of education in the form of Ofsted regulated pre-primary school education.

- (3) The proposed use as a nursery school or nursery will involve a material change in the character of use outside and in addition to any change of use within use class E, in that it will result in a materially increased intensification of use of the Site, with significant impacts on traffic and noise generation; therefore an application for planning permission to cover the proposed material change of use needs to be made.**

While recognising that the Town and Country Planning (Use Classes) Order 1987 at Schedule 2, Part A, Class E deems that a gym and nursery are now in the same use class and therefore a change between the two uses does not amount to development by virtue of Section 55(2)(f) Town and Country Planning Act 1990, the proposed change of use amounts to intensification to the extent there is a change in the character of use and is development in any event. This is because the change would lead to a massive increase in the scale of activities and a change in their nature which would result in a fundamental change in character; see *Hertfordshire CC v Secretary of State* [2010] JPL 836.

At the moment there is nil use as a gym and so no traffic generation or noise. A transport assessment and comment on the same made in relation to the withdrawn application 2020/0929 indicate that, with a nursery and 120 children at any one time on site, there is the potential for substantial traffic generation of 262 daily vehicle movements with peaks at drop off and pick up times in the morning and afternoon, leading to parking stress and impacting on the character and appearance of the area. We refer to an annexe detailing traffic data.

A roof is proposed to be removed to give outdoor space in what was a swimming pool and noise will come out from the children in that space. There are concerns that noise will come out from the 120 at any one time children in the nursery especially if windows are opened. A report from Scotch partners raised various concerns and issues with the noise assessment made to date and these concerns and issues do not appear to have been addressed. A copy of the Scotch partners report is annexed.

(4) The application and the form and procedure used is not appropriate to a change of use within class E and contrary to resident's legitimate expectations and natural justice

- it adopts a procedure which does not provide for formal consultation when this was provided in relation to application 2020/0929/P.
- the application does not appear to have been advertised in streets in the vicinity of the site and so has not been brought to the attention of residents.
- it fails to require the applicant to present adequate information and supporting materials such as, for example, drawings, tree surveys and assessments in relation to the proposed building operations which it would normally be required to produce and had produced under a normal application for planning permission.
- in circumstances where the lawful development certificate is sought in relation to a site where permission to use the site as a gym may not previously have been provided or may have been abandoned, it fails to break down the steps required of the applicant to first establishing a lawful existing use, for example as a gym, and then, as a separate and second step, establishing a change of use; by conflating the 2 steps the first step is not properly or adequately addressed.
- it fails to require the applicant to address any collateral material change of use implicit in the change to another use within class E: in this case, it appears that the change to a nursery involves a material change in the intensification of use of the site in that it results in an increase in visits to the site and its road by in excess of at least 216 per day, thereby impacting adversely on the character and nature of the streets in the neighbourhood, in a manner which appears to be contrary to the conservation area guidelines, yet the applicant has not been required to address such factors or aspects, even though they are aware of them, given that a transport assessment report was filed in relation to the almost identical but subsequently withdrawn application 2020/0929 /P.

If the normal and expected planning permission procedure was adopted, we would be able to raise issues and concerns which we have in response to the application as regards (1) the style and detail of the proposed building alterations (2) the level of noise which will be generated by the proposed use as a nursery and by the removal of the roof over the swimming pool to create an outdoor secret garden and (3) the impact of the increased traffic generated by daily drop offs and pickups of 120 young children from a nursery.

Finally, officers will be aware that there is an existing legal challenge to a series of legislative changes of which the new Class E formed just one part; see: *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* EWHC [2020] 3073 (Admin). The judgment is likely to be appealed and, if successful, would strike down Class E. It follows that we believe that the application should not be determined until this challenge has been finally determined, that is to say it is "functus officio".

We would also ask that, notwithstanding these concerns, should officers be minded to recommend the application for approval, elected members of the planning committee should determine it. This is on the basis that although at heart the issues raised in the application and this objection are legal ones, members are nonetheless empowered to and capable of forming a legal judgment when determining such applications.

In any event should the application be allowed we reserve all our legal options, including the right of challenging the decision by way of an action for judicial review.

Yours sincerely

Belsize Park Gardens Group

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.....Jimmi Rembiszewski 87 Belsize Park Gardens
... .. Eva Rembiszewski 87 Belsize Park Gardens
..... David Herz 85 Belsize Park Gardens
..... Veronique Herz 85 Belsize Park Gardens
.....Frederick Mulder 83 Belsize Park Gardens
..... Jenni Little 74 Belsize Park Gardens
.....Marius Gruss 74 Belsize Park Gardens
.....Deborah Dale 74 Belsize Park Gardens
.....Stephen Joelson 74 Belsize Park Gardens
.....Peter Green 58 Belsize Park Gardens
..... Ken Kerman 60 Belsize Park Gardens
..... Gillian Keve 76 Belsize Park Gardens
..... Dr E.T. Keve 76 Belsize Park Gardens
..... Catherine Byfield 56 Belsize Park Gardens
..... Mike Posner 62 Belsize Park Gardens
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.....Jorge Pikunic 56 Belsize Park Gardens
.....Pavol Popp 56 Belsize Park Gardens
.....Alexandra Poppova 56 Belsize Park Gardens

Enc:

Belsize park Gardens Marketing Letter

Annexe re Traffic

Annexe re Noise

Extracts from Nursery/ Nursery School websites

Ofsted reports re Keren's Nursery, Dulwich Village Pre School and Henley Village
Montessori Nursery School

Annexe re Art Exhibition