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Dear Sir

**81 BELSIZE PARK GARDENS
PLANNING APPLICATION 2020/4338/P**

We refer to application 2020/4338/P (the “Application”) for a certificate of lawfulness in relation to 81 Belsize Park Gardens, London NW3 4NJ (the “Property”) for use of the Property as a nursery (Use Class E).

The Conservation Statement submitted with the Application records that the Property was first developed for leisure use in c.1935 by the construction of purpose-built buildings for the Hampstead squash and rugby fives club. The original buildings underwent subsequent alterations and extensions (between 1937 and 1954 and again at some point in the 1960’s with the addition of a swimming pool) and have changed hands and been rebranded on several occasions, but remained in continuous use as a health and leisure club until February 2017.

Immediately prior to its closure in February 2017, the Property was occupied the Springhealth Leisure Centre on a leasehold basis. Springhealth Leisure Centre ceased trading in February 2017 and vacated the Property. Since then, the Property has reverted to its freehold owner who has sought to relet the Property for use as leisure centre.

Such use now falls within Class E as defined in Schedule 2 of the Town and Country Planning (Use Classes) Order 1987 (as amended). The Application therefore seeks a Certificate of Lawfulness on the basis that the existing use and the proposed use fall within Use Class E and that, as a consequence, the conversion of the building from a gym to a nursery would not involve a material change of use.

Against this background, several objections have been made to the application by members of the public asserting (amongst other things) that the previous use of the Property as a leisure centre has been abandoned. We refer in particular to the comments of the Belsize Park Gardens Group dated 22 November 2020.

We are asked to respond to the matter of abandonment.

The key question in such cases was laid out by Lord Denning M.R. in *Hartley v Minister of Housing and Local Government (1970) 1 Q.B. 413* in the following terms:

“...Has the cessation of use (followed by 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.”

This is an objective test, based on how the facts in each case would appear to a reasonable man. This has been expanded upon and clarified in a number of subsequent cases including *Trustees of the Castell-Y-Mynach v Secretary of State for Wales (and Taff Ely Borough Council) [1985] JPL 40*. In that case, four factors were found to be relevant in applying the test:

- (a) The physical condition of the building;
- (b) The period of non-use;
- (c) Whether there had been any other use; and
- (d) Evidence regarding the owner's intentions;

The weight to be attached to any particular factor will depend on the particular facts of the case.

The physical condition of the building

Many of the cases concerning abandonment do not involve buildings at all. They relate to the use of open or bare land for a particular purpose. In *Hartley*, the land was used for the sale of cars. In *White v Secretary of State for the Environment [1989] WL 649773*, the land was used for stationing circus caravans and equipment. In each case, when the use ceased, the land was left substantially vacant such that there was no obvious evidence of it having a particular use or purpose to the reasonable observer.

In cases concerning buildings, the building in question is invariably in a serious state of disrepair. For example, *Castell-Y-Mynach* concerns a cottage that had become nearly derelict. It had not been used from 1965 until 1983 (18 years) and, during that time “no attempt had been made to maintain the building in a condition suitable for it to be used as a dwelling house” such that it had “fallen into considerable disrepair”. More particularly, the building was described as “constructed of stone and brick under a pitched slate roof. The western and eastern stone gable walls appear fairly sound but a large part of the northern flank wall has collapsed leaving a section of severely damaged roof hanging unsupported...Both flank walls, particularly the northern wall, appear unsound. Many slates have been lost from the roof and evidence of substantial rot and structural damage to the roof timbers can be seen. No doors or window frames remain to the building. Internally, all fittings have been removed. No ground floor construction can be seen and all internal timber including floor joists, staircase and some ceiling joists to the roof have been removed. The general appearance is one of almost total disrepair and dereliction. Some signs of entry by cattle could be seen amongst the rubble on the floor”

Similarly, in *Forest of Dean District Council v Large (1992) 7 P.A.D. 1* a residential cottage had vacant from 1968 until 1991 (23 years). The cottage was in such a dilapidated state that it had been the subject of a demolition order in 1968. It had deteriorated so that it could no longer be called a dwelling. “There were no windows and doors, the stones in the wall construction appeared to be without bonding and the rafters were exposed...all the joists were there although they were rotten”

In *Hughes v Secretary of State for the Environment*, the subject property (a bungalow) had been vacant from 1964 to 1998 (34 years) and was described as being “in a ruinous state with its roof and part of its walls missing” and “beyond repair”

In contrast, the buildings on the Property are quite evidently not in any such state of disrepair. The buildings are structurally sound and weather tight. From the outside, (although the leisure centre has closed), they appear intact and as a building designed for use as a leisure centre. On the inside, the buildings are still laid out as they were when the club was open - complete with separate reception area, exercise studios, swimming pool, changing rooms, spa facilities, café, creche. Subject to the usual cosmetic refurbishment that would be undertaken by any incoming operator, the Property could still be used at any time as a leisure centre.

Our client commissioned a survey of the Property by Philip Newman MRICS in November 2019. The survey was prepared and presented in the context of our client’s proposal to convert the Property for use as a day nursery. It therefore, appropriately, focusses on what would need to be done to the existing buildings (by way of refurbishment) as part of that conversion. However, it concludes that all of the buildings on the Property are well built and structurally sound, wind and watertight. It records the interior layout of the buildings and the facilities described above. Photographs of the building within the report show the exterior in a sound condition. Photographs of the interior focus on some areas in need of refurbishment, but also indicate that the retained plant and fittings including stair cases, studio lighting, mirrors and flooring, reception desk and signage, customer entrance gates and changing facilities (complete with lockers and showers).

The Conservation Statement submitted with the Application also includes photographs of the Property including one of the signage pertaining to the Springhealth Leisure Centre still affixed to the outside of the Property.

In their comments, the Belsize Park Gardens Group refer (as evidence of abandonment) to the statement on page 20 of the Conservation Report under the heading “physical risks” that “the building has been vacant since 2017 with little maintenance therefore the physical condition will continue to deteriorate”. However, this statement (when properly read in context) is setting out what would happen to the building if it were to remain vacant. It does not describe an existing situation in which the building is unsound or unsuitable for occupation. By no means does it describe the type of dilapidation and degradation observed in *Castell-Y-Mynach*, *Forest of Dean* and *Hughes* (described above).

The period of non-use

The Belsize Park Gardens Group assert that the period of four years since the Springhealth leisure centre closed “is long enough for a property to be considered abandoned”. However, this is a relatively short period of time compared to many of the cases of abandonment considered by the Courts.

Certainly, there are cases of uses being found to have been abandoned over that time frame. In *Hartley* the period was 4 years (from 1961 to 1965), but that case concerned the use of open land/forecourt for selling cars and consideration was also given to the stated intention of the owner to cease the use. In *White*, which also concerned the use of bare land, the land in question was substantially vacant for 7 years (1974-1981).

In the cases concerning buildings referred to above, the period of non-use was much longer. In *Castell* it was 18 years, in *Forest of Dean*, 23 years and in *Hughes*, 34 years. In each case, much longer than the 4 years since the Springhealth leisure centre closed.

Although the point is not developed in the cases themselves, it stands to reason that an objective observer would consider that a vacant building, which is structurally sound and weather tight, might well be reoccupied at any time for its design purpose unless a very substantial period of time has passed. This is in contrast to an area of bare land that, when not in use, has no obvious purpose or function.

Whether there had been any other use

Part of the Property has been used temporarily since its closure as an artist's studio on a Tenancy at will. This has been for security reasons – ensuring a presence in the building – until a tenant is found for the Property as a whole. However, it has not affected the interior layout of the building and has not involved any remodelling or fit-out. It is not considered to be a material change of use of the Property or a material interruption in the use of the Property as a leisure centre.

Evidence regarding the owner's intentions

The relevance of an owner's intentions was considered quite thoroughly in *Hughes*. In that case, (as noted above) a bungalow had been left vacant for 38 years and had fallen into a state of dereliction. The owner had, in fact emigrated to Australia. However, the owner said that he had always intended to use the bungalow again at some point. The owner's intentions were taken into account, but it was nevertheless held (applying the objective test in *Hartley*) that, given the building's state of disrepair and the length of time that it had been vacant, the reasonable man would conclude that the use had been abandoned.

However, the Court (in *Hughes*) gives an example of a contrasting situation in which "there has been a fire and the owner is simply getting together the means to replace the dwelling over a limited period of time, or to restore it to its former glory". In those circumstances, "the objective observer...not knowing of the owner's intentions, might temporarily conclude that the use of the property as a residence had been abandoned where in reality it had not, because the intention factor would be determinative the other way".

Accordingly, where the use of a building might be presumed to have been abandoned, that presumption is capable of being rebutted by the intentions of the owner.

It is therefore relevant in the current case that the Property has been marketed by its owner for use as a health club since before the Springhealth Leisure Centre closed. Marketing particulars were prepared in January 2017 by Lewis Ellis and again in May 2019 by Prime Retail Property. Copies of the brochures are enclosed.

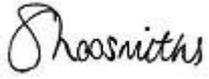
Unlike in *Hartley*, there has been no conscious decision by the landlord to permanently cease using the Property. Although the Property was vacated in 2017 by the lessee operator, this was a consequence of the operator going into administration. It was not a result of any decision or intention on the part of the freehold owner. The lease to Springhealth would otherwise have run until 2050. The intention of the freehold owner has always been to use of the Property as a leisure centre and that this would continue and would recommence if a suitable tenant is found.

Conclusion

For all the reasons given in this letter, it is clear that the use of the Property as a leisure centre (within Use Class E) has not been abandoned and the Council should proceed with certainty to grant the Certificate of Lawfulness in accordance with the Application.

Yours faithfully

David Peres da Costa
PLANNING APPLICATION 2020/4338/P

The logo for Shoosmiths, featuring the word "Shoosmiths" in a stylized, cursive script font.

SHOOSMITHS LLP