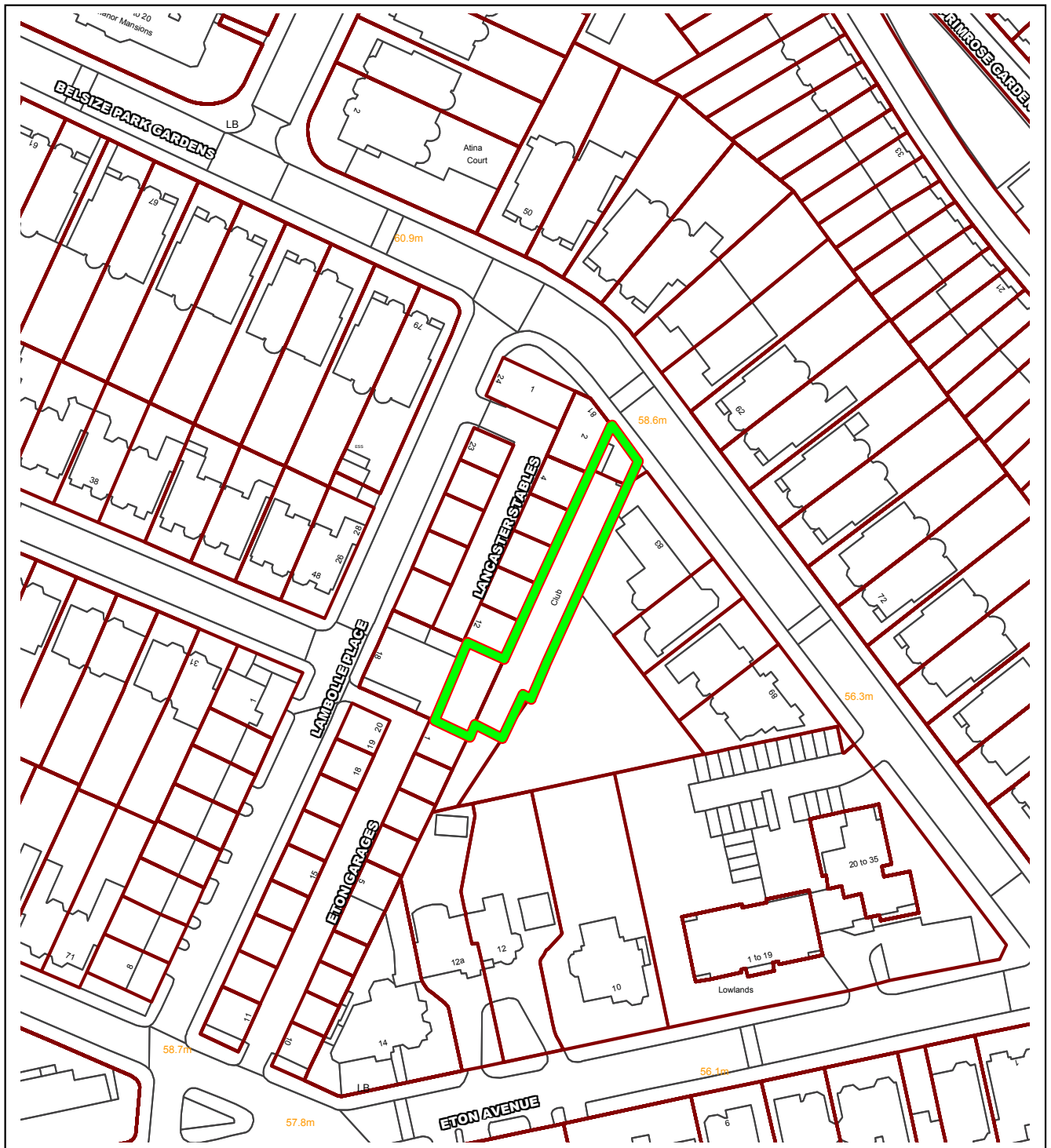


81 Belsize Park Gardens - 2020/4338/P



This material has been reproduced from Ordnance Survey digital map data with the permission of the controller of Her Majesty's Stationery Office, © Crown Copyright.

Site photos (from site visit undertaken 27/03/2018)



1. (Image above) Photograph of front elevation of 81 Belsize Park Gardens



2. (Image above) Photograph of reception area



3. (Images above) Photographs of interior



4. (Images above) Photographs of interior

Delegated Report (Members Briefing)		Analysis sheet		Expiry Date:	28/12/2020
		N/A		Consultation Expiry Date:	n/a
Officer			Application Number(s)		
David Peres Da Costa			2020/4338/P		
Application Address			Drawing Numbers		
81 Belsize Park Gardens London NW3 4NJ			Refer to Draft Decision Notice		
PO 3/4	Area Team Signature	C&UD	Authorised Officer Signature		
Proposal(s)					
Use of the property as a nursery (Use Class E).					
Recommendation(s):		Grant Certificate of Lawfulness			
Application Type:		Certificate of Lawfulness (Proposed)			

Conditions or Reasons for Refusal:	Refer to Draft Decision Notice					
Informatives:						
Consultations						
Adjoining Occupiers:			No. of responses	03	No. of objections	03
Summary of consultation responses:	<u>There is no statutory requirement to consult on lawful development certificate applications. Nevertheless, residents or local groups can comment or object to this type of application.</u> Three letters of objections have been received from the occupiers of 8, 10 and 12 Lancaster Stables. Two of the letters of objection contained identical content to the letter of objection received from the Belsize Park Gardens Group which is summarised in the next section of the report. The other letter of objection did not raise any particular issues.					

Belsize Park Gardens Group

Belsize Park Gardens Group - object

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 pickups.

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.

In the event that you do not consider that the use has been abandoned, it is submitted that the property appears to have in any event been the subject to a material change of use which means that it does not sit within the Class E. Specifically, the property was used as a gallery for displaying art from at least 13 February to 22 March 2020. The text from one of the promotional flyers that was used at the time is included in the Annexe re Display of Art Use. It is submitted this change of use was and is material and is another reason why the former use as a gym no longer applies and the property cannot benefit from changing to a nursery use.

This was a change from a D2(e) use to a D1(d) use. D1(d) uses, that is, for the display of works of art (otherwise than for sale or hire) are now found in the F1(b) use class.

More importantly it means that the most recent use of the Property – that is, as F1(b) use – is it is submitted in respect of this part of the objection non-lawful because the material change of use was initiated without planning permission. It can only go back to, say, a gym use within Class E if planning permission is granted for such a change or enforcement action taken against the breach of planning control.

Given what therefore appears to be its current status, it is submitted the Site has a nil use and cannot benefit from the provisions of the Use Classes Order. In the case of *Rugby Football Union v Secretary Of State For Transport, Local Government & Regions* [2002] EWCA Civ 1169 (17 July 2002) Longmore LJ held at para. 16 that “if a landowner wishes to rely on the Use Classes Order the burden of proof must be on him to show that he comes within the order”. In this case, it is submitted that burden cannot be discharged either because, for reasons which are explained in the letter, the use has been abandoned or in the alternative because there has been a material change of use which means that the Property can no longer be deemed to enjoy the benefits of Class E. Instead planning permission is required for whatever new use the owner wishes to secure.

In addition a Technical Note by Markides Associates on Traffic and parking and a Review by Scotch Partners on acoustics or Noise were submitted in support of the comments and concerns.

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.

Officer's comment:

- *The issue of abandonment is assessed at paragraphs 2.11-2.32 below.*

- | | |
|--|---|
| | <ul style="list-style-type: none">• <i>The Use Class of a nursery is considered at paragraph 2.38 below.</i>• <i>Intensification is considered at paragraph 2.39-2.41 below.</i>• <i>The use as an artist studio is considered at paragraphs 2.28-2.30 below.</i>• <i>The temporary use as an artist studio was not a material change of use and the lawful use remains as a gym within Use Class E.</i> |
|--|---|

Site Description

The site is on the southern side of Belsize Park Gardens and is linear in form with a narrow frontage and forecourt facing onto Belsize Park Gardens. The site is occupied by a part 3, part 4 storey building. The site falls within the Belsize Conservation Area.

Immediately abutting the site to the west is the residential mews 'Lancaster Garages'. To the east of the site are residential properties on the southern side of Belsize Park Gardens. Behind these properties (83-89 Belsize Park Gardens) and to the south east of the site is a triangle of open green space.

Relevant History

3242: Alterations and additions to the Hampstead Squash and Rugby Fives Club, 81, Belsize Park Gardens. Granted 29/03/1967

5244: Revised proposals for the front elevation and main entrance to Squash Club, at 81 Belsize Park Gardens, Camden. Granted 06/06/1968

29742: Change of use of part of second and third floors to dance and/or linguistic school. Granted 10/03/1980

33601: Continued use of part of the second and third floors as a dance school and linguistic school. Granted 22/03/1982

P9600922: The installation of new roof lights over the existing roof of the swimming pool. Granted 11/07/1996

PW9703128: Installation of windows in the front elevation at first and second floor level. Granted 08/09/1997

2010/3390/T: FRONT GARDEN - 1 x Cherry - Remove. Approve Emergency Works 07/07/2010

2020/0929/P: Change of use from gym (Class D2) to nursery (Class D1) including the addition of windows to front and side (south east) elevation, 2 rooflights (following removal of existing skylight) and front canopy. Withdrawn 13/10/2020

2020/4336/P: Alterations to front and side (south east) elevations incorporating new windows and entrance portico; replacement rooflights and installation of plant; removal of roof to form enclosed garden including acoustic barrier; and replacement store at front of site. This application is currently being assessed and the decision is pending.

Assessment

1. Lawful development certificate application

- 1.1. Section 192 of the Town and Country Planning Act 1990 ("the 1990 Act") provides for an application to determine whether any proposed use would be lawful for planning purposes. This application seeks to determine if use as a nursery (Use Class E) would be lawful on the date of the application (2 November 2020). Establishing the current lawful use of the site is the starting point, as use rights for a proposed use stem from that current lawful use.

2. The last lawful use - private member's gym

- 2.1. The site was formerly in use as a Health and Leisure Club, known as Springhealth Leisure Club. This use appears to have first commenced many years ago, with the planning register showing historical applications from the late 1960s referring to the use of the site as a sports club. It appears that this use ceased in February 2017. There are several corroborating pieces of evidence that the site was in continuous use as a private member's gym and sports facility from at least the late sixties, until February 2017.
- 2.2. For example, a letter prepared by Prime Retail dated 16th April 2020, submitted with the previous application (2020/0929/P), states (emphasis added):
Prime Retail were instructed as the sole letting agents on the property in March 2017 following the previous tenant, SpringHealth Leisure Limited, going into liquidation in February 2017. SpringHealth had been in occupation for nearly 30 years prior the company collapsing. Prior to the letting instruction, the investment sale had been on the market via a London based agency.
- 2.3. Furthermore, the planning history includes a notification for works to dead or dangerous trees submitted 23/06/2010 (ref: 2010/3390/T). This application includes a letter from Albert Huber Ltd (dated 23/06/2010) which states "we have been asked by our clients SpringHealth Leisure Plc to remove a cherry tree from the above address". This letter is evidence of the gym/ leisure use being at this site in June 2010. The Valuation Office Agency has records for Springhealth for 2012, 2014 and 2017.
- 2.4. The objections received also seem to acknowledge this previous gym use over a significant period, although there is a claim (from Belsize Park Gardens Group) that the use ceased slightly earlier, in December 2016.
- 2.5. On the balance of probability, the site was used continuously as a private member's gym from at least the late sixties, and the use ceased at some point between December 2016 and February 2017.
- 2.6. Section 191(2) says uses and operations are "lawful" if no enforcement action may be taken against them – for example, because a use has occurred continuously for a period of ten year or more. Therefore, the site would have accrued a lawful use over that period as a private member's gym.
- 2.7. This use would have fallen within Use Class D2 of 'The Town and Country Planning (Use Classes) Order 1987' prior to 1 September 2020, when the use ceased.
- 2.8. From 1 September 2020 Class D2 (amongst others) was revoked and Classes E, F1 and F2 were introduced. Therefore, any subsisting lawful use as a private member's gym would now fall within Use Class E – specifically (d) 'Indoor sport, recreation or fitness'.

- 2.9. A use, once it has become lawful, may become dormant but remain lawful. The judgment in *Panton and Farmer v SSETR* [1999] J.P.L. 468 is authority for this, which allowed that, a dormant use which was now inactive, could still maintain its use rights. For a lawful use (and so the use rights that flow from it) to be lost, that use must be abandoned.
- 2.10. Objections have been received which question the lawfulness of the proposed use under the current application. Although the objectors do not question the lawfulness of the previous use as a gym, the objectors have claimed that this use has been abandoned.
- 2.11. **Abandonment of the gym use**
- 2.12. 'Abandonment' is a legal concept used by the courts to describe the circumstances in which rights to resume a use which has been lawfully carried on in the past may be lost. In *Hartley v MHLG* [1970] QB 413, Lord Denning set out the key question in the following terms:
- 2.13. *"...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."*
- 2.14. The case of *Trustees of Castell-y-Mynach Estate v Secretary of State for Wales* [1985] JPL 40 set out four tests when considering whether a lawful use 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. No single test is decisive on its own.
- 2.15. The applicant has made a further written submission in response to the claim of abandonment made by the objectors.

The owner's intention

- 2.16. The Prime Retail letter (referred to above) provides evidence that the property was actively marketed between 2017 and 2018. This confirms that the property owner was looking to let the property as a gym and provides evidence that the owner did not intend to abandon the existing use of the property. In this time period the property was viewed by various prospective tenants who were investigating gym operations. One prospective tenant is listed as a dance studio which would also have fallen within the D2 Use Class that existed at that time.
- 2.17. More recently, the planning history demonstrates that other uses have been explored for the existing building. A pre-application enquiry was received 23/05/2017 which proposed a change of use to Use Class B1. This enquiry did not result in a planning application. A further pre-application enquiry was received 16/02/2018 which proposed a change of use to Use Class D1. This enquiry did not result in a planning application. Another pre-application enquiry was received 11/09/2018 which also proposed a change of use to Use Class D1. This enquiry did not result in a planning application. A planning application was received 24/02/2020 for a change of use from gym (Class D2) to nursery (Class D1) including various external alterations (planning ref: 2020/0929/P).
- 2.18. The applicant was asked to comment on the pre-application enquiries in relation to the owner's intention. The applicant's solicitor made the following observation:

2.19. *"In general terms, it is quite reasonable for a prospective purchaser and (indeed) a prudent owner to consider options for the future use and development of property - even where the property is in beneficial occupation. However, in such circumstances, the owner's intentions for the Property may not change until all the options are known and a plan is decided upon. In that respect, a pre-application request that did not result in a planning application is at best evidence of "considering options" and not a change of intention."*

2.20. It is evident that the owner's overriding intention is to achieve a letting for the floorspace and the floorspace has been actively marketed for gym use until relatively recently. The recent interest by prospective tenants in uses other than a gym, and the planning application submitted 24/02/2020 for a change of use to a nursery, do not indicate an intention by the owner to abandon the land's previous use as a gym.

The physical condition of the building

2.21. The Prime Retail letter (referred to above) provides evidence of the property's condition.

"the former tenant had left the unit in a very dilapidated state, any ingoing tenant would have a large capex to bring the unit into a condition from which they could trade. Even with a contribution from the landlord the sums were too large for the majority of occupiers."

2.22. The applicant's submission draws attention to the following:

2.23. *"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."*

2.24. The Prime Retail letter also provides evidence of the suitability of the floorspace for gym or health and leisure club use:

"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."

2.25. It is not unusual for a property to require substantial refurbishment between tenants. However, the gym use continued until the beginning of 2017 and so was adequate to operate as a gym until that time. Officers visited the site on 27th March 2018. While refurbishment may be required, the state of the property at that time was not indicative of abandonment and the former use could resume if a new tenant had been willing to take on the floorspace.

2.26. Weight is given to the claim that the floor to ceiling heights are no longer suitable for modern gym operator's requirements. However, while the current building may not be optimal for gym use, there is no evidence that is not capable of gym use. Indeed, it was in gym / leisure use up until this use ceased in late 2016 or early 2017.

The length of time not used

- 2.27. The gym / leisure use ceased at this site in late 2016 or early 2017, approximately four years ago. The length of time not used is considered to be relatively short given the long-term use of the building.

Whether it has been used for other purposes

- 2.28. The objectors have advised that the building 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”. The objectors submission includes the following:
- 2.29. *“The property was used as a gallery for displaying art from at least 13 February to 22 March 2020. The text from one of the promotional flyers that was used at the time is included in the Annexe re Display of Art Use. It is submitted this change of use was and is material and is another reason why the former use as a gym no longer applies and the Property cannot benefit from changing to a nursery use.”*
- 2.30. The applicant has confirmed that part of the property has been used temporarily since 21st May 2019 as an artist’s studio on a ‘Tenancy at Will’. The applicant confirms this has been for security reasons – ensuring a presence in the building – until a tenant is found for the Property as a whole. This is a temporary passive form of security. The occupiers are predominantly located in two of the gym studio spaces at the second floor, which are around 129sqm – about 8.6% of the total floorspace. The occupiers’ (normally 3 or 4 individuals) primary activity is providing security and making art but they do also on occasion use other parts of the building from time to time to exhibit their works. The space has been opened up to the public for exhibitions once. It is not on a day to day basis. The tenancy has not affected the interior layout of the building and has not involved any remodelling or fit-out. It is understood that a ‘Tenancy at Will’ is a short, flexible tenancy that can be terminated at any time by either party. The tenancy is not for a fixed term or a minimum period and there is ‘a peppercorn’ rent. There is no assessment or decision required under this application on whether the artist’s use is itself lawful, only on whether the introduction of this use is a material interruption sufficient to contribute to abandonment of the gym and leisure use. In any event, this is well under the requirement of 10 years to establish a use as immune from enforcement action and a lawful planning use.

Conclusion on abandonment

- 2.31. There is no evidence to suggest the owner had any active intention to abandon the gym use and indeed it has been marketed as a gym. The building remains laid out as a private member’s gym and is capable of reuse as such with minimal physical intervention or refurbishment. It has only been vacant for around four years, during which time it has been marketed and options for reuse explored. Whilst there has been some limited temporary occupation of the property as an artist’s studio and gallery, this appears to be primarily to provide security for the building through some active occupation.
- 2.32. The use had clearly become lawful after 10 years, prior to the end of 2016. While there has subsequently been some discontinuity in the use this has not been sufficient to amount to abandonment. As such, the last lawful use as a private member’s gym has not been abandoned and so remains the current lawful use, albeit a dormant one.
- 2.33. **Use rights flowing from the lawful use as a private member’s gym**

- 2.34. On the date of the application (submitted on 23 September 2020, but valid on 2 November 2020) the lawful use as a private member's gym fell within Use Class E. This use class explicitly includes 'Indoor sport, recreation or fitness'.
- 2.35. Section 57 of the 1990 Act states planning permission is required for the carrying out of any development of land. Development is defined by s.55 and includes '*...the making of any material change in the use of any buildings or other land*'. However, s.55(2) sets out operations or uses of land that are **not** taken to involve development. This includes, at paragraph (f), changes of use between uses within the same use class.
- 2.36. Therefore the change of use to any other use within Use Class E will not constitute development, and so would be lawful because it would not require planning permission.
- 2.37. **Proposed nursery use**
- 2.38. The objectors assert that the proposed use as a nursery school is for the provision of education and therefore not within Use Class E but Use Class F of the Use Classes Order as amended. Class E of the Order is a broad use class covering commercial, business and service uses. Class E part (f) states that the use for the following purpose falls within Class E: "*for a creche, day nursery or day centre, not including a residential use, principally to visiting members of the public*". Use Class F1 is for learning and non-residential institutions including use for the provision of education. Whilst education is an important function of a nursery, the primary function is one of a childcare service and so "day nursery" is specifically identified in the Order as falling within Class E.
- 2.39. **Intensification of use**
- 2.40. The objectors claim that the proposed use as a nursery would result in a materially increased intensification of use of the site.
- 2.41. The High Court in Brooks and Burton v SoS for the Environment [1977] 1 WLR made it clear that whilst intensification can result in a material change of use, where that change of use occurs within a use class, it does not constitute development unless and until intensification takes the use outside of that class altogether. There is no indication that would be the case in this instance.
- 2.42. **Conclusion**
- The lawful use of the property is as a private member's gym and leisure use and this has not been abandoned. This use falls within Use Class E and is specified under paragraph (d) of the class. The proposed use as a nursery would also fall within Class E and is specified under paragraph (f) of the class. As the existing use and the proposed use are within the same Use Class, the proposed change of use would not constitute development and so would not require planning permission.
- 2.43. **Grant Lawful Development Certificate**

The decision to refer an application to Planning Committee lies with the Director of Regeneration and Planning. Following the Members' Briefing panel on Monday 22nd March 2021, nominated members will advise whether they consider this application should be reported to the Planning Committee. For further information, please go to www.camden.gov.uk and search for 'Members Briefing'.



Application ref: 2020/4338/P
Contact: David Peres Da Costa
Tel: 020 7974 5262
Email: David.PeresDaCosta@camden.gov.uk
Date: 9 March 2021

Development Management
Regeneration and Planning
London Borough of Camden
Town Hall
Judd Street
London
WC1H 9JE

Phone: 020 7974 4444

planning@camden.gov.uk
www.camden.gov.uk

Robert Potter & Partners LLP
110 West George Street
Glasgow
G2 1QJ

DRAFT

Dear Sir/Madam

DECISION

Town and Country Planning Act 1990

Certificate of Lawfulness (Proposed) Granted

The Council hereby certifies that the development described in the First Schedule below, on the land specified in the Second Schedule below, would be lawful within the meaning of Section 192 of the Town and Country Planning Act 1990 as amended.

First Schedule:

Use of the property as a nursery (Use Class E)

Drawing Nos: 6402/00; Conservation Statement prepared by Robert Potter & Partners dated September 2020; Decision notice for Lingfield Health Club, 81 Belsize Park Gardens, NW3 planning reference PW9703128 dated 08/09/1997; Letter prepared by Shoosmiths LLP dated 4 February 2021; Prime retail brochure for 81 Belsize Park Gardens; Lewis Ellis brochure for 81 Belsize Park Gardens; Letter prepared by Shoosmiths LLP dated 16 February 2021; 19086-13-B-: G; 1; 2; 3; R

Second Schedule:

81 Belsize Park Gardens
London
NW3 4NJ

Reason for the Decision:

- 1 The use of the property as a nursery is within the same Use Class (Class E) as the existing use as a gym and leisure club, and so does not fall within the "meaning of development" requiring planning permission as defined by Section 55 of the Town and Country Planning Act 1990.

In dealing with the application, the Council has sought to work with the applicant in a positive and proactive way in accordance with paragraph 38 of the National Planning Policy Framework 2019.

You can find advice about your rights of appeal at:

<http://www.planningportal.gov.uk/planning/appeals/guidance/guidancecontent>

Yours faithfully

Chief Planning Officer

DRAFT

Notes

1. This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).
2. It certifies that the use*/operations*/matter* specified in the First Schedule taking place on the land described in the Second Schedule was*/would have been* lawful on the specified date and thus, was not*/would not have been* liable to enforcement action under Section 172 of the 1990 Act on that date.
3. This Certificate applies only to the extent of the use*/operations*/matter* described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use*/operations*/matter* which is materially different from that described or which relates to other land may render the owner or occupier liable to enforcement action.
4. The effect of the Certificate is also qualified by the provision in Section 192(4) of the 1990 Act, as amended, which states that the lawfulness of a described use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters relevant to determining such lawfulness.