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Your ref: 2018/0645/P
Our ref: BRO005/0001

13 March 2023

Dear Sir/Madam

**Certificate of Proposed Lawfulness (continue development in respect of the planning permission referred to below) in respect of Barrie House, 29 St Edmunds Terrace, London NW8 7QH (the "Property")
Town and Country Planning Act 1990, Section 192**

We act as legal representatives of Broxwood View Limited (the "Applicant") and we write this letter in support of the application submitted pursuant to the above.

We enclose for your attention an application for a certificate of lawfulness in respect of proposed operations (in this instance the continued implementation of the planning permission) pursuant to planning permission 2018/0645/P, granted on appeal under reference APP/X5210/W/19/32040 dated 19 March 2020 (the "**Planning Permission**").

In accordance with the relevant regulations governing the submission of an application for certificate of proposed lawful works, the application includes:

1. The requisite application form;
2. The requisite site location plan (drawn to scale with the North direction showing);
3. A copy of a Statutory Declaration by the contractors who carried out the works pursuant to the Planning Permission at the Property;
4. A copy of all relevant evidence to support the application; and
5. The relevant fee of £734.20

The application site

At the time of grant of the Planning Permission, the Property comprised an 8 storey 'T' shaped block of 24 self-contained flats, known as Barrie House, at the corner of Broxwood Way and St Edmunds Terrace, together with a 2 storey porter's lodge and car parking.

Partners: Elizabeth Christie, Mary Cook, Duncan Field, Clare Fielding, Michael Gallimore,
Raj Gupta, Meeta Kaur, Simon Ricketts, Patrick Robinson, Louise Samuel, Spencer Tewis-Allen

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tn.

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The statutory framework

The application made in respect of works under the Planning Permission is made pursuant to Section 192(1) of the TCPA 1990. These legislative powers allow for a certificate to be issued by a Local Planning Authority to determine if a proposed operation (in this instance the continued implementation of the Planning Permission) would be lawful.

When a CLOPUD is made, the Local Planning Authority is required to consider the lawfulness of the use at the time of the application and to issue a certificate if it is satisfied that it should do so on the basis of the factual documentation submitted and the legal framework. It is not a planning judgement. Lawfulness is defined by Section 192(2) of the TCPA 1990 as follows:

“the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application”.

Section 56 of the TCPA 1990 defines the circumstances in which development will be taken to be initiated. In the present case, the Planning Permission is not for a change of use. The use of the Property was, and will remain to be, Class C3 (residential) or ancillary to that primary use. The Planning Permission relates to operational works. The Planning Permission permits the redevelopment of Property by demolishing the existing porter's lodge and surface level car park to construct a part four, part five storey extension to Barrie House including excavation of a basement level to provide 9 self-contained residential flats, and associated works.

Subsections 56(2) and (3) further provide that the date of commencement of development for the purposes of satisfying the time-limit condition imposed under Section 91 is to be the earliest date on which any “material operation comprised in the development” begins to be carried out. Once a material operation comprised in the development has been carried out, and provided all pre-commencement conditions have been complied with, the Planning Permission will have been lawfully implemented and thereafter be capable of full delivery without a time limit. Subsection (4) of Section 56 lists all those items of work which can constitute a material operation. For the present purposes, it is sufficient to note that a material operation includes any work of construction in the course of the erection of a building and any demolition work to a building. By virtue of Section 336 of the TCPA 1990, the term “erection” in relation to buildings includes extensions and alterations and the word “building” includes any part of a building.

Failure to comply with a condition attached to a planning permission which expressly prohibits any development taking place before its terms have been complied with can, in some circumstances, have the effect of rendering those such works unlawful and incapable of constituting the commencement of development. Each condition has to be considered on its terms and against strict interpretation as to whether it is a true condition precedent which goes to the heart of the permission (*R (on the application of Hart Aggregates Ltd v Hartlepool Borough Council* [2005] EWHC 840).

In the present case, there are some pre-commencement conditions attached to the Planning Permission. We have dealt with each of these in Appendix A.

All pre-commencement conditions were complied with prior to any works taking place at the Property pursuant to the Planning Permission.

The works

Since the grant of the Planning Permission, the following works have been undertaken to the Property pursuant to the Planning Permission:

1. Piling of foundations at the locations shown marked 1 on marked up ‘Proposed Ground Floor Plan’ Ref. P_21 Rev A.

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2. Formation of concrete retaining wall at the location shown marked 2 on marked up 'Proposed Ground Floor Plan' Ref. P_21 Rev A;
3. Demolition of the existing porter's lodge at the location shown marked 3 on marked up 'Proposed Ground Floor Plan' Ref. P_21 Rev A; and

The case to be made

It is appreciated that the onus of proof lies with the Applicant to prove the contention that a material operation comprised in the development has lawfully occurred and in time. The legal test, as derived through case law, is whether the works done are in accordance with the Planning Permission; and second, whether they are more than de minimis. This is a matter of fact and degree. Dealing with each in turn:-

(a) Retaining wall

A section of reinforced concrete retaining wall to the north of the site forming part of the overall retaining wall at ground floor and basement lightwell has been installed.

The retaining wall works were commenced on 9 February and completed 24 February 2023. The location of the retaining wall is shown on marked up 'Proposed Ground Floor Plan' Ref. P_21 Rev A marked 2.

Photographs 4 – 5 in the photo pack show the retaining wall works.

Any work of construction in the course of the erection of a structure comprised in the development constitutes a 'material operation' under the statutory framework set out in this note.

We therefore submit that the works to form the concrete retaining wall are a material operation comprised in the development permitted pursuant to the Planning Permission.

(b) Demolition works

At the time the Planning Permission was granted, there was a two storey porter's lodge located on the Property. The demolition of the porter's lodge is necessary in order to carry out the development and this is made clear in the Inspector's Appeal Decision letter at paragraph 6 "it is proposed to demolish an existing 2 storey porter's lodge". The demolition, and thus resulting redevelopment of the area on which the porter's lodge was located, is therefore a material operation comprised in the development. Moreover, such works are expressly included in the description of development.

Demolition is a 'material operation' under the statutory framework set out in this note. The demolition works to the porter's lodge commenced on 9 February 2023 and were completed on 24 February 2023. The location of the works is shown on marked up 'Proposed Ground Floor Plan' Ref. P_21 Rev A marked 3.

Photos 1 – 3 included in the photo pack show the demolition works in progress and as completed.

We therefore submit that the demolition works are a material operation comprised in the development permitted pursuant to the Planning Permission.

(c) Piling works

In the present case, the piling works are connected to the laying of the foundations for the extension at the Property pursuant to the Planning Permission and are in the locations shown 1 on marked up 'Proposed Ground Floor Plan' Ref. P_21 Rev A. This is clearly a material operation under the statutory framework set out in this note. The works have also been carried out in accordance with the approved documents and plans (where applicable), including the piling method statement approved by the Council pursuant to condition 25. The development permitted by the Planning Permission must as necessity include foundational support and cement piling (indeed this is expressly contemplated as the reason for inserting condition 25) and also description for the works to the lower ground level, so is clearly a "material operation comprised in the development".

The piling works were commenced on 22nd February 2023 and completed on 24th February 2023. Condition 25 was deemed discharged on 2 February 2023 in accordance with the deemed discharge application (made

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pursuant to the DMPO 2015) which was made by Town Legal on behalf of the Applicant on 17th January 2023. Notwithstanding this deemed discharge, the Council issued an express discharge notice on 22 February 2023.

Photos 6 – 7 of the photo pack show the piling works.

Building control have inspected the piling works on 28 February 2023 and confirmed the works pursuant to the Planning Permission were generally satisfactory. A copy of that report is included with the application.

We therefore submit that the piling works are a material operation comprised in the development permitted pursuant to the Planning Permission.

Conclusion on material operations

In respect of all of the works carried out at the Property pursuant to the Planning Permission, a statutory declaration is provided by Szymek Sowa of GS Construction & Design Ltd to confirm what works have been carried out and when.

Accordingly, by virtue of Section 56 of the TCPA 1990 these works (whether individually or together) can be characterised as a “material operation in the development”, and therefore the Planning Permission has been lawfully implemented. The means that the Planning Permission remains extant and, as a result, the Applicant may continue to implement the operational development permitted thereunder.

Section 106 Agreement

Obligations contained in a Section 106 Agreement are not directly relevant to the question of lawful implementation. Nevertheless, we felt it appropriate for the sake of completeness to include herein a summary of the obligations and compliance with the same.

There is a Section 106 Agreement relating to the Property dated 13 January 2020. There are obligations therein to:

- (a) A notification of anticipated commencement pursuant to the Section 106 Agreement was sent to the Council on 7th February 2023.
- (b) Pay the affordable housing contribution, construction management plan implementation support contribution and highways contribution prior to implementation. These have all been paid to the Council.
- (c) Submit and have approved a construction management plan on or prior to implementation. The CMP has been approved by the Council and complied with.
- (d) Submit and have approved a energy efficiency and renewable energy plan on or prior to implementation. The energy efficiency plan has been approved by the Council and complied with.
- (e) Submit and have approved a sustainability plan on or prior to implementation. The sustainability plan has been approved by the Council and complied with.

The Applicant has complied with all of the above obligations and did so in advance of any works taking place at the Property. The Council and the Applicant are liaising in respect of the Detailed Basement Construction Plan and finalising its terms but the third-party assessors, on behalf of the Council, have broadly agreed to its contents. Nevertheless, the works carried out to date do not include any works in respect of the basement. The Applicant will not carry out any works directly relevant to the implementation of the basement unless and until formal approval for the DBCP has been provided.

CIL

Payment of CIL is also not directly relevant to the question of lawful implementation. Nevertheless, a CIL Commencement Notice was submitted to the Council on 7th February 2023. This is included as part of the

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evidence package for this application. Payment of CIL was also made on 5th February 2023 and its receipt has been confirmed by the Council.

Conclusion

We consider that the evidence produced has discharged the onus on the Applicant to prove, on the balance of probabilities, that the application made for the certificate of proposed lawful works under Section 192 TCPA 1990 is correct and the certificate should be issued by the Local Planning Authority.

Yours faithfully

Town Legal LLP

Encs.

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Appendix A
Pre-commencement conditions

<u>Application</u>	<u>Conditions</u>	<u>Date of discharge</u>
<u>2022/1340/P</u>	<u>Condition 21 (SUDS)</u>	<u>31 January 2023</u> <u>(Decision notice included with application)</u>
<u>2022/1541/P</u>	<u>Condition 10 (Ground investigation)</u> <u>Condition 15 (Air Quality)</u> <u>Condition 26 (Lighting)</u> <u>Condition 27 (Bird & Bat Nesting)</u> <u>Condition 28 (Bird Nest Inspection)</u> <u>Condition 29 (Biodiversity)</u>	<u>31 January 2023</u> <u>(Decision notice included with application)</u>
<u>2022/2991/P</u>	<u>Condition 16 (Blue-Green Roof)</u> <u>Condition 19 (Appointment of Engineer)</u> <u>Condition 22 (Tree Protection)</u> <u>Condition 23 (GSHP)</u>	<u>3 February 2023</u> <u>(Decision notice included with application)</u>
<u>2022/3879/P</u>	<u>Condition 8 (Landscaping)</u>	<u>31 January 2023</u> <u>(Decision notice included with application)</u>
<u>2022/4768/P</u>	<u>Condition 25 (Piling Method Statement)</u>	<u>Deemed discharge on 2 February 2023</u> <u>Express discharge 22 February 2023</u> <u>(Decision notice included with application)</u>

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Evidence submitted in respect of the application

Tab	Name of document
1.	Application for certificate of proposed lawfulness for 2018/0645/P (appeal ref APP/X5210/W/19/32040)
2.	Site plan for permission 2018/0645/P (appeal ref APP/X5210/W/19/32040)
3.	Planning permission 2018/0645/P (appeal ref APP/X5210/W/19/32040)
4.	Title for the Property
5.	Town Legal's deemed discharged of conditions application dated 17 th January 2023
6.	Discharge notices of pre-commencement planning conditions
7.	Discharge notices/approval notices for s.106 obligations.
8.	Proof of payment of the s.106 obligations.
9.	Proof of payment of the CIL liability.
10.	Statutory declaration
11.	Plan marked with the location (and clear annotations) of all works carried out.
12.	Relevant approved plans
13.	Photographs of works 4-5 – Retaining Wall 1-3 – Demolition Works 6-[7 – Piling Works
14.	Building Control Notice dated 28 February 2023