LDC (Existing) Report	Application number	2022/4576/P
Officer	Expiry date	
Josh Lawlor	16/12/2022	
Application Address	Authorised Officer Signature	
14 Blackburn Road London NW6 1RZ		
Conservation Area	Article 4	
Na		
Proposal		
The boring of two piles permitted pursuant to planning permission PWX0202103 granted on 6 January 2004, in accordance with section 56(4) of the Town and Country Planning Act 1990 constituting a material operation for commencement of planning permission PWX0202103, in accordance with the “standard condition” for that permission..		
Recommendation:	Grant	

Planning permission (ref. PWX0202103) was granted on 6 January 2004 (“the Planning Permission”) for:

“Redevelopment of the whole site by the erection of a 4 storey eastern block comprising two Class B8 and eight Class B1 units with associated service yard, together with a 4-storey plus basement western block comprising 8 dwellinghouses and 6 self-contained flats with associated underground car parking”

The Planning Permission was subject to the following standard condition requiring commencement of the development within 5 years, meaning that the permission would expire if it were not implemented before 6 January 2009 (“the Expiry Date”):

“The development hereby permitted must be begun not later than the expiration of five years from the date of this permission.”

The certificate seeks to establish that existing works involving the boring of two piles in the yard of the Builder Depot are lawful because they constituted works to lawfully implement planning permission PWX0202103 before 6 January 2009. This would mean the permission would remain extant and full implementation of the scheme would therefore be lawful.

Officers have visited the site to look at the works for commencement, and checked other records available. In addition, the applicant has submitted the following information in support of the application:

- Covering Letter accompanying Lawful Development Certificate
- Statutory Declaration of Michael Aaronson
- Statutory Declaration of Jim Pool

- Statutory Declaration of David Morgan
- Evidence Analysis – Time of the Works
- Evidence Analysis – Conditions Precedent and LDC
- Site Location Plan

ASSESSMENT

Leading caselaw on the matter is *Whitley & Sons Co Ltd v Secretary of State for Wales (1992) 64 P. & C. R. 206*, and *Bedford BC v Secretary of State for Communities and Local Government [2008] EWHC 2304 (Admin)*, also informed by *R (Hart Aggregates) v Hartlepool BC [2005] EWHC 840 (Admin)*.

The principle in Whitley principle means that if works are carried out in implementation of a planning permission, but they contravene conditions precedent of that planning permission, in general, they do not lawfully "commence" the development authorized by that permission.

The "material" works

Section 56 of the Town and Country Planning Act 1990 sets out that a planning permission can be taken to have been implemented at the time when material operations are begun. Section 56(4) says that a "material operation" includes digging of part of the foundations of a building.

The works undertaken were two piles which formed part of the foundations for the approved building. It is accepted that the works undertaken on the site (sinking of two foundation piles on the site) amount to material operation which is more than de minimis. A site visit has been recently undertaken by the Council's officers and the two foundation piles are in the right place to provide the foundations for the proposed development and clearly relate to implementing the Planning Permission. This is reinforced by evidence submitted with the application, for example the declaration of David Morgan of Elliott Wood Engineers. The evidence provided indicates that those works were undertaken prior to the Expiry Date with several pieces of submitted evidence indicating this happened in or around December 2008, such as the declaration of Jim Pool and accompanying evidence. The site visit revealed that the works were clearly old had had been undertaken some time ago, consistent with the submitted evidence and there is no evidence in council records that contradicts this.

Although there is not a single item of evidence that conclusively proves that these works were done when claimed, the available evidence must be assessed cumulatively as a whole. The following evidence, taken as a whole, shows that it is more likely than not that the two piles in question were bored before 5 January 2009:

(1) In his statutory declaration in support of the LDC application, Mr Michael Aaronson, director of Hampstead Asset Management Ltd since June 2000, states "with certainty" that the works in question "took place before 6 January 2009" (para. 10).
(2) Mr David Morgan, director of the firm of civil engineers instructed by the applicant, exhibits contemporaneous emails to his statutory declaration stating that the piles were ready to be implemented in December 2008.
(3) In his statutory declaration supporting the LDC application, Mr Jim Pool, founding partner and Board Director of the planning consultants, DP9, states that he recalls "advising Michael Aaronson of Hampstead Management of the steps needed to implement the Planning Permission before its expiry" and that he recalls Mr Aaronson confirming that "works were being undertaken" (para. 9).
(4) Mr Pool also refers in his statutory declaration to the letter that DP9 sent to the Council on 5 January 2009, stating that the 2004 Planning Permission was implemented on 15 December 2008 through the sinking of foundation piles on site. There is no evidence to

suggest that this statement of fact in the letter was challenged by the Council at the time, or since then.

The evidence is sufficient to demonstrate on the balance of probabilities that these works were undertaken prior to the Expiry Date. The question is then whether the planning application was capable of lawful implementation at that time.

Planning conditions
The 2004 Planning Permission was granted subject to 19 numbered conditions. The conditions numbered 1, 3, 8, 9, 17 and 18 required details to be submitted and approved by the council.

Applications to discharge all of the above conditions (i.e. conditions 1, 3, 8, 9, 17 and 18) were validated by the Council on 19 November 2008, before the Expiry Date.

The applications to discharge conditions 1 and 17 were approved by the Council on 14 January 2009, and those relating to conditions 3, 8, 9 and 18 were withdrawn by the applicant on 19 January 2009. Fresh applications to discharge conditions 3, 8, 9 and 18 were then made by the same applicant on 20 January 2009, which were then approved on 17 March 2009.

Conditions 1, 3, 8, 9, 17 and 18 all required certain details to be submitted and approved by the Council before any work (or, in the particular case of condition 18, any "development") commenced on the Site. No such approvals were granted before the 2004 Planning Permission expired on 5 January 2009. However, in the applicant's own case works were carried out on the Site in purported implementation of the Planning Permission before the Expiry Date. As such those works were carried out in breach of conditions 1, 3, 8, 9, 17 and 18.

It is only conditions 17 (approval of access for disabled persons) and 18 (approval and implementation of scheme for investigating contamination) that are 'condition precedents' going to the heart of the permission given that, in both cases (especially condition 18), what was approved could have a material bearing on the type and location of the works undertaken to commence development.

The applications that were ultimately approved in relation to conditions 3, 8, 9 and 18 were made on 20 January 2009, *after* the expiry of the 2004 Planning Permission on 5 January 2009. However, the factual distinction is minor as "the same" applications were made, in substance, before 5 January 2009, and then withdrawn on 19 January 2009. The same applications were then "resubmitted" on 20 January 2009 and these were then approved by the Council on 17 March 2009. It appears that this course of events. Including withdrawal and resubmission (of what were the same applications in substance) were at the agreement of the LPA. There is no evidence on file with the LPA to contradict this.

There are exceptions of the Whitely principal such that works that are technically in breach of a condition, may still be capable of commencing a planning permission. The first exception is that, if a condition requires the approval of the local planning authority before a particular date, and the developer applies before that date only to receive approval after it, such that no enforcement action could be taken, work done before the deadline and in accordance with the scheme ultimately approved can amount to a start to development. This was the exception established in the Whitley case itself.

Secondly, if a condition has in substance been complied with but the formalities (for example, a written notice of approval) had not been completed before work started on the site, this substantive compliance will be sufficient to constitute a lawful implementation of the permission: *R v Flintshire Council Council, ex p. Somerfield Stores Ltd [1998] P. & C.R. 336*.

These principles can be applied in this case. On the balance of probabilities, the details required for the discharge of conditions were submitted prior to the Expiry Date, and were ultimately approved albeit after the works of commencement. The delays in discharging the conditions appears to have been subject to administrative processes, including withdrawal and resubmission, agreed between the LPA and applicant. Therefore, on the balance of probabilities, the works undertaken were works for the implementation of the Planning Permission constituted works to lawfully implement planning permission PWX0202103 meaning the Planning Permission remains extant and full implementation of the scheme would therefore be lawful.

Non-material amendment Ref. 2022/0509/P
On 4 May 2022, the Council approved an application made under s. 96A of the Town and Country Planning Act 1990 for a non-material amendment to the 2004 Planning Permission, specifically a non-material amendment to the wording of condition 1 of the 2004 Planning Permission "to alter the trigger for submission".

On 6 December 2002, the Council approved the discharge of condition 1 of the 2004 Planning Permission as amended by the 2022 NM Amendment.

The approval of the 2022 NM Amendment and the subsequent approval of the discharge of the amended condition are also relevant. It would be unreasonable to take enforcement action on the basis that the 2004 Planning Permission expired on 5 January 2009 given the approval of the 2022 NM Amendment which is based upon the premise that the 2004 Planning Permission has been lawfully implemented before its expiry date. Only an extant planning permission can lawfully be the subject of a non-material amendment application under s. 96A of the TCPA 1990.

The applicant for the 2022 NM Amendment is therefore entitled to rely on the 2022 NM Amendment, which had the legal effect of amending condition 1 of the 2004 Planning Permission.

A decision to take enforcement action on the basis that the 2004 Planning Permission was not implemented on time could not be reconciled with the decision to grant the 2022 NM Amendment. It would be tantamount to an unlawful revocation of the 2022 NM Amendment and the underlying 2004 Planning Permission without the Council following the required process for making a revocation order pursuant to s. 97 of the TCPA 1990.

Conclusion

The Secretary of State has advised local planning authorities that the burden of proof in applications for a Certificate of Lawfulness is firmly with the applicant (DOE Circular 10/97, Enforcing Planning Control: Legislative Provisions and Procedural Requirements, Annex 8, para 8.12). The relevant test is the "balance of probability", and authorities are advised that if they have no evidence of their own to contradict or undermine the applicant's version of events, there is no good reason to refuse the application provided the applicant's evidence is sufficiently precise and unambiguous to justify the grant of a certificate. The planning merits of the use are not relevant to the consideration of an application for a certificate of lawfulness; purely legal issues are involved in determining an application.

The information provided by the applicant is deemed to be sufficiently precise and unambiguous to demonstrate that 'on the balance of probability' the works have commenced before the application expired and the full implementation of the scheme would be lawful. Furthermore, the Council's evidence does not contradict or undermine the applicant's version of events.

Recommendation: Grant Certificate of Lawfulness (Existing