

LDC (Existing) Report		Application number	2023/1065/P
Officer		Expiry date	
Tony Young		08/05/2023	
Application Address		Authorised Officer Signature	
Barrie House 29 St Edmund's Terrace London NW8 7QH			
Conservation Area		Article 4	
n/a		Yes (basements)	
Proposal			
Commencement of works in accordance with condition 1 (within three years from date of planning permission 2018/0645/P allowed on appeal ref. APP/X5210/W/19/3240401) dated 19/03/2020, for the redevelopment of porter's lodge and surface level car park to construct a part four, part five storey extension, including excavation of a basement level, to provide 9 self-contained residential flats and associated works.			
Recommendation:		Grant Certificate of Lawfulness	

Planning permission (ref. 2018/0645/P) was allowed on appeal (ref. APP/X5210/W/19/3240401) dated 19/03/2020 subject to a Section 106 Legal Agreement and a number of conditions. The approved scheme is for the redevelopment of existing two-storey porter's lodge and surface level car park to construct a part four, part five storey extension (lower ground, ground and 3/4 storey's) to Barrie House including excavation of a basement level, to provide 9 self-contained residential flats (1 x 1 bed, 6 x 2 bed and 2 x 3 bed units), cycle parking, refuse and recycling stores, hard and soft landscaping and relocated off-street car parking spaces.

The certificate seeks to establish that works to implement the approved scheme commenced before the permission expired on 19/03/2023, and that the implementation of the scheme is therefore lawful and such development can continue as approved under this permission.

Applicant's Evidence

The applicant has submitted the following information in support of the application:

- Cover Letter from Town Legal LLP (ref. BRO005/0001) dated 13/03/2023, in support of the application;
- Statutory Declaration from Szymek Sowa (GS Construction & Design Ltd.) dated 03/03/2023, stating the company's involvement in regard to works carried out in February 2023 at the application site, pursuant to planning permission being granted on appeal (ref. APP/X5210/W/19/3240401);
- Site Inspection Report from Thames Building Control (ref. 2022/IN/19504) dated 03/03/2023, confirming inspection at the site on 28/02/2023 and stating that works had commenced with piling to the retaining walls;

- Photographic record of works from Carbogno Ceneda Architects (Images 1-7) dated between 14/02/2023 and 24/02/2023, showing works carried out at the site;
- Community Infrastructure Levy (CIL) Acknowledgement Notice from London Borough of Camden (ref. CCL3824-LP18001) dated 22/02/2023
- Letter from Town Legal LLP (ref. BRO005/0001/4151-1094-8420/3/) dated 17/01/2023, sent to Camden Council in regard to a number of discharge of conditions applications;
- Various Section 106 Discharge Notices numbered 1-5 (re. Planning Approval ref. 2018/0645/P); and
- Various Discharge of Conditions Decision Notices (re. Planning Approval ref. 2018/0645/P).

The applicant has also submitted the following plans:

- Site location plan outlining the application site in red (ref. E_00)
- Ground floor plan (ref. P_21 Rev A)

Council's Evidence

There are 13 pre-commencement conditions attached to the approval allowed on appeal (ref. APP/X5210/W/19/3240401) which require details to be submitted and discharged prior to the commencement of works at the application site. These are:

- Condition 8 (Landscaping)
- Condition 10 (Ground investigation)
- Condition 15 (Air quality)
- Condition 16 (Blue-green roof)
- Condition 19 (Appointment of engineer)
- Condition 21 (Sustainable drainage system)
- Condition 22 (Tree protection measures)
- Condition 23 (Ground source heat pumps)
- Condition 25 (Piling method statement)
- Condition 26 (Lighting)
- Condition 27 (Bird & bat nesting)
- Condition 28 (Bird nest inspection)
- Condition 29 (Biodiversity)

All conditions are confirmed as having been discharged under various approval of details applications prior to the expiration of planning permission on 19/03/2023 as set out in Condition 1 of the relevant approval (as listed in Appendix A attached to the Cover Letter from Town Legal LLP (ref. BRO005/0001) dated 13/03/2023).

Liability to pay the Community Infrastructure Levy (CIL) arises on the commencement of development in accordance with the terms of the relevant approval. The applicant has provided a copy of a (CIL) Acknowledgement Notice from London Borough of Camden (ref. CCL3824-LP18001) dated 22/02/2023 which confirms receipt of payment for the required amount on 07/02/2023 to the Council as collecting authority in respect of the approved development. This followed the submission of a CIL Commencement Notice to the Council on 07/02/2023.

An associated Section 106 (S106) Legal Agreement has a number of planning obligations which are also required to be satisfied on or prior to implementation of the planning permission (ref. 2018/0645/P). These include:

- Clauses 4.1.1 and 4.1.2 requiring the payment of the Affordable Housing Contribution in full prior to implementation
- Clauses 4.3.1 (i) and 4.3.2 (i) requiring the payment of the Construction Management Plan Implementation Support Contribution in full prior to implementation
- Clauses 4.3.1 (ii) and 4.3.2 (ii) requiring the submission and approval of the Construction Management Plan prior to implementation
- Clause 4.4.3 in respect to the Owner's acknowledgement and agreement that the Council will not approve the Detailed Basement Construction Plan subject to certification by a suitably qualified engineer that the Development can be constructed safely
- Clauses 4.5.1 and 4.5.2 requiring the submission and approval of the Energy Efficiency and Renewable Energy Plan prior to implementation
- Clauses 4.6.1 and 4.6.2 requiring the payment of the Highways Contribution in full prior to implementation
- Clauses 4.7.1 and 4.7.2 requiring the submission and approval of the Sustainability Plan prior to implementation

The Council's Planning Obligations Team have confirmed that the above planning obligations have been satisfied and discharged in advance of any works taking place and prior to the expiration of planning permission on 19/03/2023 as set out in Condition 1 of the relevant approval.

However, it is noted that Clauses 4.4.1 and 4.4.2 requiring the submission and approval of a Detailed Basement Construction Plan (DBCP) on or prior to implementation have not yet been discharged.

- Clause 4.4.1 – On or prior to the Implementation Date to provide the Council for approval the Detailed Basement Construction Plan.
- Clause 4.4.2 – Not to Implement nor allow Implementation of development until such time as the Council has approved the Detailed Basement Construction Plan as demonstrated by written notice to that effect.

The S106 Agreement associated with the permission specifically defines the date of implementation in Paragraph 2.15 as being '*the date of implementation of the Development by the carrying out of a material operation as defined in Section 56 of the Act [the Town and Country Planning Act 1990 as amended] and references to 'Implementation' and 'Implement' shall be construed accordingly*'.

Section 56 (2) of the Town and Country Planning Act 1990 states that:

'For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.'

Section 56 (4) further clarifies that in subsection (2) 'material operation' means-

- (a) any work of construction in the course of the erection of a building;

- (aa) any work of demolition of a building;*
- (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building;*
- (c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);*
- (d) any operation in the course of laying out or constructing a road or part of a road;*
- (e) any change in the use of any land which constitutes material development.*

As such, the wording of Clauses 4.4.1 and 4.4.2 as defined within the S106 Agreement and Section 56 of the Act is clear in regards to the meaning of 'implementation', and as such, the specific requirement to discharge the obligation on or prior to the earliest date on which any material operation begins to be carried out.

Further, it is noted that in allowing the appeal, the Planning Inspector states in Paragraph 24 of the appeal decision, *'The proposed scheme includes the provision of a basement which would require careful implementation to ensure no adverse impact on the existing Barrie House. The submission of a Basement Construction Plan therefore meets the test of the Framework and the CIL Regulations.'*

The Inspector, therefore, recognised the importance and need for a planning obligation of this kind in regard to the provision of a basement as set-out in Clauses 4.4.1 and 4.4.2 (and indeed a number of planning conditions), and also specifically highlighted the need for its careful implementation. Additionally, the Inspector confirmed that the obligation meets the specific 3 'tests' for seeking planning obligations as set-out in Paragraph 56 of the National Planning Policy Framework (NPPF or Framework); namely, that they must be necessary to make the development acceptable in planning terms, be directly related to the development and fairly and reasonably related in scale and kind to the development.

Overall, therefore, the need for such an obligation is clear in order to mitigate the effects of unacceptable basement development, as well as, the requirement for it to be discharged in a timely fashion on or prior to the date of implementation.

However, while the obligation as set-out in Clauses 4.4.1 and 4.4.2 has not been discharged as yet, it is noted that the outstanding DBCP is fairly close to being concluded following discussions between the Council and the applicant, and that the third-party assessors on behalf of the Council, have broadly agreed to its contents.

Additionally, the applicant has confirmed that no works have been carried out directly relevant to the implementation of approved basement development and that none will be carried out unless and until a formal written approval notice for the DBCP has been provided and the relevant obligation discharged.

In light of this, the fact that the obligation remains outstanding at present is not considered in itself to render the commencement of development unlawful in this instance, especially given that all other pre-commencement planning conditions and implementation obligations have been fully discharged, and the necessary CIL liability requirements have been complied with. Under these particular circumstances, therefore, the opportunity is provided under planning permission (ref. 2018/0645/P) as allowed on appeal (ref. APP/X5210/W/19/3240401) for works to commence.

Assessment

In regard to applications for a Certificate of Lawfulness, 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, nor any from others, to contradict or otherwise make the applicant's version of events less probable, 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.

From the evidence provided, the works of demolition of an outbuilding which are shown to have taken place are above ground only and its removal is noted as forming part of the approval. These works commenced on 09/02/2023 and were completed on 24/02/2023. The area where a concrete retaining wall has been formed as shown on the submitted plan and photographs indicates works of construction comprised in the approved development which do not affect the basement proposals. These works were carried out in February 2023. The location of the piling as shown in the submission indicates that ground has been broken, though no works of excavation appear to have taken place to a degree that might constitute significant basement works. These works commenced on 22/02/2023 and were completed on 24/02/2023. A Building Control officer inspected the piling works on 28/02/2023 and confirmed the works to be generally satisfactory.

Having reviewed the application submission, therefore, the evidence provided by the applicant is considered sufficient to demonstrate that the relevant works commenced in a timely fashion, consistent with the approved permission, and do constitute a '*material operation*' as defined in Section 56 of the Town and Country Planning Act 1990 (as amended).

Conclusion

The information provided by the applicant is deemed to be sufficiently precise and unambiguous to demonstrate '*on the balance of probability*' that the works constitute a material start and commenced prior to the expiry of 3 years in compliance with Condition 1 of the planning permission (ref. 2018/0645/P) as allowed on appeal (ref. APP/X5210/W/19/3240401). The fact that an obligation attached to the associated S106 Legal Agreement remains outstanding is not considered in itself to render the commencement of development unlawful in this instance. As such, the implementation of the scheme would be lawful, and any work approved under this permission and yet to commence can be completed at any time in the future.

Furthermore, the Council's evidence does not contradict or undermine the applicant's version of events, and as such, a Certificate of Lawfulness can be issued.

Recommendation: Grant Certificate of Lawfulness