

LDC (Existing) Report		Application number	2023/3104/P
Officer		Expiry date	
Tony Young		24/11/2023	
Application Address		Authorised Officer Signature	
Flat 1 41 Howitt Road London NW3 4LU			
Conservation Area		Article 4	
Belsize		Yes (basements & heritage/conservation)	
Proposal			
Commencement of works in accordance with condition 1 (within three years from date of planning permission 2014/5939/P dated 18/09/2017), as extended under Section 93A of the Town and Country Planning Act 1990, for the excavation of a single storey basement extension including front and rear lightwells and erection of single storey ground floor rear extension.			
Recommendation:		Grant Certificate of Lawfulness	

Background

Planning permission (ref. 2014/5939/P) was granted dated 18/09/2017. The approved scheme was for the excavation of a single storey basement extension including front and rear lightwells and erection of single storey ground floor rear extension.

The certificate application seeks to establish that works to implement the approved scheme commenced before the permission expired, 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:

- Accompanying statement from Evan Ferguson, Architect (agent) received 30/09/2023, setting out the case in support of the applicant's assertion.
- Photographic record of works carried out at the site, showing (1) hand excavation of the foundation of the front retaining wall and reinforcement for the underpin dated from 29/04/2021; and (2) showing stripping out works to Flat 1 dated from 19/07/2021.
- Letter from Laser Surveys (quotation ref. L3287/21) dated 19/07/2021, confirming movement monitoring proposals at the application site in connection with approved works (ref. 2014/5939/P).
- Undated letter from DDA Engineers (ref. 2035) received 31/07/2023, specifying details of engineers engaged to inspect and review the monitoring data for approved works (ref. 2014/5939/P).
- Initial Building Notice, letter and invoice from London Building Control (ref. 21/70566/MYFFBFXFA/JH) dated 27/04/2021, confirming engagement and that initial notice had been served on the Local Authority (LB Camden).

- Letter and revised Initial Building Notice (London Building Control ref. 2170566MYFFBFXFAJH) dated 24/05/2021, confirming engagement and that a revised initial notice had been served on the Local Authority (LB Camden).
- Email from Mr Adrian Burgering (owner of Flat 3) dated 27/04/2021, confirming building control process and works to be carried out.
- Email from Evan Ferguson, Architect (agent) dated 12/10/2023, confirming building control process and that initial uncovering (non-notifiable) works began prior to 01/05/2021.
- Addendum Arboricultural Method Statement from Spacewise Design & Build Ltd. dated 20/09/2023, setting out means by which excavation and construction impacts of Approved works on affected trees would be controlled and any associated mitigation measures necessary.
- Arboricultural Impact Assessment report from Landmark Trees (ref. YGM/41HWT/AIA/01) dated 24/04/2014, in support of proposals as approved (ref. 2014/5939/P) dated 18/09/2017.
- Officer delegated report & approval notice (ref. 2014/5939/P) dated 18/09/2017.

The applicant has also submitted the following plans:

- Site location and block plans outlining the application site in red - 1308.10.A
- Existing drawings (ref. 2014/5939/P) - 1308.14.A to 1308.17.A (inclusive)
- Approved drawings (ref. 2014/5939/P) - 1308.18.A to 1308.21.A (inclusive)

Council's Evidence

There is the following planning history relevant to the subject site:

- **2014/5939/P** - Excavation of single storey basement extension including front and rear lightwells and erection of single storey ground floor rear extension. Planning permission granted 18/09/2017
- **2022/5453/P** - Increase in height of ground floor glazing and doors to rear elevation, in association with raising of ground floor ceiling and raising of floor level of first floor balcony, plus installation of balustrades to existing balcony. Planning permission granted 25/04/2023

There is no planning enforcement history associated with the subject site.

There is the following building control history relevant to the subject site:

- **21/5/05287** - Single storey rear and basement extension with full internal refurbishment of flat. Initial building notice accepted dated 23/06/2021

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.

It is firstly noted that the Business and Planning Act 2020 temporarily modified the Town and Country Planning Act 1990 [hereafter referred to as 'the Act'] to enable certain planning permissions in England which had lapsed or were due to lapse during 2020 to be extended. This was in recognition of the effect coronavirus had on the planning system and the construction sector. The purpose of the modification was to allow the commencement of the planning permissions without the need for new applications during the relevant period.

As such, under Section 93A of the Act, unimplemented planning permissions with time limits for implementation which were due to lapse between 19/08/2020 (when the provisions came into force) and 31/12/2020 were automatically extended to 01/05/2021.

In this particular case, Condition 1 attached to planning permission (ref. 2014/5939/P) imposed a 3 year time limit for implementation of the approved works (to be begun no later than 18/09/2020). The effect of Section 93A was to automatically extend this time limit as set out in Condition 1 to 01/05/2021. As such, this certificate application seeks to establish that works to implement the approved scheme commenced before the permission expired on 01/05/2021.

There are 2 pre-commencement conditions attached to the relevant approval (ref. 2014/5939/P) which require details to be formally submitted and discharged in writing by the local authority prior to the commencement of works at the application site. These are:

- Condition 4 (appointment of qualified chartered engineer)
- Condition 6 (tree protection measures)

It is noted that both of these conditions remain outstanding and details are still required to be formally submitted and approved in writing by the Council. As such, an informative will be added to any certificate issued reminding the applicant of this requirement.

Nevertheless, while both pre-commencement conditions have yet to be formally discharged, in this instance, the particular conditions are not considered to be central to the development or to go to the heart of the permission. In regard to Condition 4, while any basement works to 'implement' development require a material operation to be carried out, in this particular case, they do not necessarily involve fully excavating the site nor critical elements of basement construction works. In regard to Condition 6, the work at the front of the property to 'implement' development has not been located within likely root protecting area and therefore it also does not go to the heart of the matter in this particular case.

Therefore, notwithstanding that details are still required to be formally discharged in writing in relation to both conditions, the failure to comply in a timely fashion with the requirements of both conditions is not considered in itself to render any commencement of development unlawful. Under these particular circumstances, therefore, the opportunity is provided under planning permission (ref. 2014/5939/P) for works to commence.

Turning to Section 56 (2) of the Act, this 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.*

The evidence provided by the applicant is considered sufficient to demonstrate that the works commencing on 29/04/2021 at the front of property, involving initial uncovering works consistent with the approved permission, does constitute a '*material operation*' as defined in Section 56 the Act (as amended).

Furthermore, the Council's evidence does not contradict or undermine the applicant's version of events.

Conclusion

Therefore, having reviewed the application submission, the evidence provided by the applicant is deemed to be sufficiently precise and unambiguous to demonstrate '*on the balance of probability*' that the relevant works constituted a material start and commenced prior to the expiry of 3 years in compliance with Condition 1 of the planning permission ref. 2014/5939/P (as extended under Section 93A of the Act).

As such, notwithstanding that details are still required to be formally discharged in writing in relation to two conditions attached to the permission (Conditions 4 and 6), 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, subject to all conditions attached to planning permission (ref. 2014/5939/P) granted on 18/09/2017.

Recommendation: Grant Certificate of Lawfulness