

# LDC (Existing) Report

Expiry date: 05/12/2023

## Officer

Sam FitzPatrick

## Application Number

2023/4329/P

## Application Address

Mercure Hotel  
130-134 Southampton Row  
London  
WC1B 5AF

## Recommendation

Grant Certificate of Lawfulness (Existing)

## 1<sup>st</sup> Signature

## 2<sup>nd</sup> Signature (if refusal)

## Proposal

Confirmation of the lawful implementation of planning permission 2018/3876/P dated 28/02/2020 (Alterations and extensions to the existing building comprising multiple extensions ranging from 2 to 7 storeys and roof extension, all in association with the creation of 18 additional bedrooms to the existing hotel).

## Assessment

The application site is located on the east side of Southampton Row, at the junction with Cosmo Place. The application relates to a part seven, part six storey late Victorian/Edwardian hotel. The building is not listed but lies within the Bloomsbury Conservation Area.

Planning permission was granted on 28 February 2020 under reference 2018/3876/P for:

“Alterations and extensions to the existing building comprising a 7 storey side extension (from 1st to 7th floor levels) with a 5 storey rear extension (from 1st to 5th floor levels); erection of a roof extension and alterations to provide an additional storey; erection of 6 storey rear infill extension (from 1st to 6th floor levels); and two storey rear extension (5th and 6th floor levels) and two storey rear extension (5th and 6th floor levels) all in association with the creation of 18 additional bedrooms to the existing hotel.”

The permission was subject to the standard condition requiring the commencement of the development within three years from the date of permission, meaning that the permission would expire were it not implemented before 28/02/2023 (“the Expiry Date”).

This application for a Certificate of Lawfulness seeks to demonstrate that the application 2018/3876/P has been lawfully implemented such that the development may be completed without the requirement for further consent. This would mean the permission would remain extant and the full implementation of the scheme would therefore be lawful.

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

- Cover letter including:
  - Appendix 1: Implementation Works Photographs;

- Appendix 2: London Building Control Confirmation of Inspection’;
- Site Location Plan;
- Implementation Works Plan;
- Letter to LB Camden concerning remaining conditions of 2020/3876/P to be discharged;
- Decision Notice and Documents for discharge of Condition 5;
- Decision Notice and Documents for discharge of Condition 9;
- Decision Notice and Documents for discharge of Condition 10.

### 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 means that if works are carried out in the implementation of a planning permission, but they contravene conditions precedent of that planning permission, in general, they do not lawfully “commence” the development authorised by that permission.

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 begun. Section 56(4)(aa) states that “*any work of demolition of a building*” constitutes a ‘material operation’.

The works undertaken involve the demolition of internal walls, removal of a slab, and installation of a foundation detail. It is accepted that the works undertaken on the site amount to material operation, and the submitted pictures shown in Appendix 1, as well as the email presenting confirmation from the London Building Control inspection in Appendix 2 confirm this. The photographs from Appendix 1 are clearly dated 14/02/2023, and the email from Appendix 2 clearly shows that the inspection took place on 15/02/2023. Both of these dates are prior to the Expiry Date, and there is no evidence in council records to contradict 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 works detailed above commenced prior to 28th February 2023.

The evidence is sufficient to demonstrate that, on the balance of probabilities, 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.

The planning permission 2018/3876/P was granted subject to four numbered Conditions: 3, 5, 9, and 10. The Condition 3 requires details to be submitted to and approved by the Council prior to the relevant part of the work commencing, whilst the Conditions 5, 9, and 10 all required details to be submitted to and approved by the Council prior to the commencement of development.

Applications to discharge the three pre-commencement Conditions (5, 9, and 10) were submitted to the Council with the required details for validation prior to the Expiry Date (all three were submitted on 23/01/2023), despite being validated and approved after this date. It is worth noting that Condition 10 required the submission of a Dust Monitoring Report, which was provided with the submission of the application to discharge the condition, although did not cover a satisfactory period. As such, a revised Dust Monitoring Report was provided at a later

date following officer comments, but regardless of whether the period initially detailed in the Dust Monitoring Report was incorrect, the required details were submitted prior to the Expiry Date. The resubmission of the Dust Monitoring Report was at the agreement of the LPA, and there is no evidence on file with the LPA to contradict this.

The application to discharge Condition 5 was approved by the Council on 07/07/2023, the application to discharge Condition 9 was approved by the Council on 11/05/2023, and the application to discharge Condition 10 was approved by the Council on 26/07/2023. These conditions were therefore all discharged after the Expiry Date of the permission 2018/3876/P. However, as noted above, works were carried out at the site in purported implementation of the planning permission 2018/3876/P prior to the Expiry Date. Therefore, those works were carried out in breach of Conditions 5, 9, and 10.

It is only Condition 10 (details of air quality monitors) that is a “condition precedent” going to the heart of the permission given that what was approved could have a material bearing on the type and location of the works undertaken to commence development.

There are exceptions of the Whitley principle 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 of process had not been completed before work started on site (for example, the issuing of a written notice of approval), this substantive compliance will be sufficient to constitute the lawful implementation of the permission, as established in *R v Flintshire County 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. Any delay in the discharging of the pre-commencement conditions appears to have resulted from the administrative process. Therefore, on the balance of probabilities, the works undertaken constituted works to lawfully implement the planning permission 2018/3876/P, meaning that the planning permission remains extant and full implementation of the scheme would therefore be lawful.

### 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 that 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 the determining of 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 been 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)**