

PLANNING STATEMENT



76 Fitzjohn's Avenue,
NW3 5LS

Certificate of
Lawfulness of Existing
Development (CLEUD)

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Reviewed by: Jeff Field MA MRTPI MRICS

Director: Jeff Field

Review Date: 22 April 2024

Report Issue Date:

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Signed: *Jeff Field*

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For and on behalf of Lambert Smith Hampton

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1.0 Introduction

1.1 This Planning Statement has been prepared by Lambert Smith Hampton (LSH) on behalf of the property owner, Mr Naqi, in relation to an application for a Certificate of Lawfulness of Existing Development (CLEUD) concerning development at 76 Fitzjohn's Avenue, which triggered the implementation of planning permission 2017/1047/P.

1.2 The said Planning Permission was granted on (reference: 2017/1047/P) 10 June 2019 for:

'Creation of a single storey basement with lightwell to front and rear, installation of 1 x AC unit within front garden, installation of 3 x rooflights, removal of 1 x palm tree from front garden, alterations to side elevation fenestration, alterations to rear ground floor patio doors and erection of a new fence in the front garden.'

1.3 Under Section 191 of the Town and County Planning Act (TCPA) (1990), a Certificate of lawfulness of existing use or development can be granted if sufficient evidence has been provided confirming that an existing use of land, or some operational development, or some activity being carried out in breach of a planning condition, is lawful for planning purposes.

1.4 The purpose of this Statement is to set out the existing planning position, case law and evidence, which supports the conclusion that application reference: 2017/1047/P has been lawfully implemented in compliance with S191 of the TCPA (1990). In doing so, the sections of the Statement are as follows:

- Section 2 provides the site context;
- Section 3 outlines the relevant Pre-commencement Conditions;
- Section 4 summarises the evidence of lawful implementation; and
- Section 5 sets out the conclusions.

1.5 The Statement is to be read in conjunction with the following supporting documents as follows:

- Application form;
- Site location Plan; and
- Opinion prepared by barrister Emma Dring of Cornerstone Barristers in Support of Application Under s191 Town And Country Planning Act 1990.

2.0 Site Context

- 2.1 The site is located within the London Borough of Camden and comprises a single residential dwelling on a 0.083 acre (334.84 sqm) plot. Built in circa 1930, this semi-detached property currently stands at ground plus 2 storeys high.
- 2.2 The site is bound to the north by No. 78 Fitzjohn's Avenue, to the east by Spring Path, to the south by No. 74 Fitzjohn's Avenue, and to the west by Fitzjohn's Avenue (the road).
- 2.3 This four-bedroomed family dwelling is located on the east side of Fitzjohn's Avenue, from which pedestrian as well as vehicular access is gained. There is a separate pedestrian access from the east from Spring Path.
- 2.4 The site is located approximately 600m north-east of Finchley Road and Frognal National Rail Station, providing access to London Overground services. Hampstead Underground Station is located approximately 530m to the north of the site. The closest bus stop is located approximately 60m to the south of the site, improving the site's wider accessibility. Accordingly, the site has an excellent public transport accessibility level ('PTAL') of 5, on a scale of 1-6, where 6b is the highest.
- 2.5 The site falls within Food Zone 1 (low risk), which comprises land assessed as having a less than 1 in 1,000 annual probability of river or sea flooding.
- 2.6 The site is located within the Netherhall Conservation Area. The site is not locally or statutory listed.

3.0 Pre-commencement Conditions

3.1 This planning permission (2017/1047/P) was granted subject to 10 Conditions, one of which have been amended via a subsequent Non-Material Amendment (NMA) application. Condition 1 is the standard implementation Condition, which requires development to be begun no later than three years from the date of the decision (i.e 10 June 2022).

3.2 Returning to the Decision Notice itself, it comprised various works:

- *Creation of a single storey basement with lightwell to front and rear*
- *Installation of 1 x AC unit within front garden*
- *Installation of 3 x rooflights*
- *Removal of 1 x palm tree from front garden*
- *Alterations to side elevation fenestration, alterations to rear ground floor patio doors and*
- *Erection of a new fence in the front garden.*

3.3 There were originally three Pre-commencement Conditions (Conditions 4, 6 and 8). Condition 6 was amended subsequently by an NMA application, changing the trigger from 'prior to construction' to 'prior to below ground works'. Therefore Condition 6 is no longer a Pre-commencement Condition.

3.4 The progress of the two key Pre-commencement Conditions is outlined in the table below:

Condition Number	Discharge of Condition Application Reference No.	Condition Wording	Date of Submission	Date of Approval
Condition 4	2022/1577/P	<i>"Prior to commencement of any works on site, a written program of ground investigation for the presence of soil and groundwater contamination shall be submitted to and approved by the local planning authority in writing".</i>	11 April 2022	28 Sep 2022
Condition 8	2022/2440/P	<i>"Prior to commencement of the relevant works, full details of hard and soft landscaping, means of enclosure of all un-built, open areas, and details of replacement tree, shall have been submitted to and approved by the local planning authority in writing Such details shall include</i>	11 April 2022	28 Sep 2022

		<i>details of any proposed earthworks including grading, mounding and other changes in ground levels. The relevant part of the works shall not be carried out otherwise than in accordance with the details thus approved".</i>		
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3.5 These two Pre-commencement Conditions were submitted prior to the expiry of the permission on 10 June 2022.

3.6 Returning to Condition 6, this stated in its original form:

"No construction shall take place until a detailed design and method statement for all foundations and other development proposed below ground level which takes account of the nearby Network Rail asset, has been submitted to and approved by the local planning authority in consultation with the relevant rail infrastructure undertaker. The development shall thereafter be carried out in accordance with the approved design and method statements."

3.7 The use of the term 'No construction' was seen as relating to construction works – 'no development' is usually the term applied for Pre-commencement Conditions. Consequently, a S96a NMA application was proposed to aid clarity to the Decision. This was approved on 19 December 2022 (ref: 2022/4985/P). The approved replacement wording for the Condition states (underlining is our emphasis):

"No below ground works shall take place until a detailed design and method statement for all foundations and other development proposed below ground level which takes account of the nearby Network Rail asset, has been submitted to and approved by the local planning authority in consultation with the relevant rail infrastructure undertaker. The development shall thereafter be carried out in accordance with the approved design and method statements."

3.8 The Condition is therefore no longer a Pre-commencement Condition, as it only relates to works relating to the basement portion of the permission (prior submission of a method statement).

4.0 Evidence

- 4.1 Planning Practice Guidance (Reference ID: 17c-006-20140306) outlines that *'the applicant is responsible for providing sufficient information to support an application'* and that *'in the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.'*
- 4.2 In line with the PPG, this section provides a summary of the submitted evidence that supports the conclusion that a material operation took place prior to the expiry of the planning permission and therefore the planning permission has been legally implemented and a Certificate of Lawfulness issued.
- 4.3 Prior to the expiry date 10 June 2022, a material start was made on site during the week of 22 May 2022. The Officer's report for the determination of application reference 2022/4985/P acknowledges that rooflights had been installed prior to expiry of the planning permission (see Appendix 1). The actions included the erection of scaffolding, creation of openings in the roof and the installation of rooflights. These were all works, which were approved as part of the application.
- 4.4 These works were observed by LSH Planning Director, Jeff Field, when he visited the site on Friday 27 May. Mr Field, at the time was working as Head of London Planning at BNP Paribas Real Estate. Mr Field subsequently provided photographic evidence to the Council, which was acknowledged and will be retained on the property file.
- 4.5 Section 56 subsection (2) of the Town and Country Planning Act (1990) states that *'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 subsection (4) states 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.

- 4.6 The installation of the rooflights are considered to be a material operation under criterion a) and therefore the proposals were implemented prior to the expiry date on 10 June, 2022. Details of the Contract Contact were also provided to the Council.

Conditions 4 and 8

- 4.7 It is important that applications to discharge Conditions 4 and 8 were submitted to the Council prior to the expiration date. The fact that these were not fully discharged until 28 September 2022, after the expiry date, is not significant in this case.
- 4.8 The Opinion prepared by Cornerstone Barristers, cites relevant case law that works carried out prior to the approval of conditions can be regarded as having validly commenced the permitted development.
- 4.9 Such situations occur where:
- a. The Condition requires submission of details and their approval by a particular date, and the details are submitted before that date but the approval is not received until after it, then works carried out before the deadline and in accordance with the details which are subsequently approved can validly commence the development (FG Whitley & Sons Co Ltd v Secretary of State for Wales [1992] 3 PLR 72).
 - b. The Condition had been complied with in substance, but the formalities (including written notice of approval) had not been completed before work started on site (R v Flintshire CC ex p. Somerfield Stores Ltd [1998] P & CR 336).
- 4.10 In this case when assessing the relevant permission, both of these matters occurred. This conclusion is supported by LB Camden officers, as detailed in the Officer's Report for the approval of NMA application reference (2022/4985/P). Further detail on case law and the legal precedents are set out in the supporting statement prepared by Cornerstone Barristers.

Condition 6

- 4.11 Turning to Condition 6, this now only relates to 'below ground works' and its discharge is not required prior to the installation of the rooflights.
- 4.12 The Legal Opinion states that the installation of the rooflights was not in breach of Condition 6, notwithstanding that the details required under Condition 6 had not been submitted or approved.
- 4.13 The supporting statement argues that the original wording of Condition 6, does not prevent 'development' or 'works' taking place but rather prevents 'construction' and therefore works that fall short of 'construction' could take place without the need for submitting details to discharge the Condition. As set out in the Opinion, in order to determine what is meant by 'construction' in this context, it is important to consider the wording of the Condition as a whole.
- 4.14 The Condition required the submission of a design and method statement for "*all foundations and other development proposed below ground level*". The stated reason is to address any potential impact on "*existing strategic transport infrastructure*". To that end the submitted details must be approved "*in consultation with the relevant rail infrastructure undertaker*". It is clear that the purpose of the Condition, and the reason why it was considered necessary, was to control below ground works and in particular to prevent works which might have an impact on rail infrastructure until the design and construction method had been assessed and approved by the Council. The installation of rooflights could not conceivably have any bearing on the rail infrastructure and would not need to be covered by the required method statement. It is clear that no planning purpose would be served by consulting with the rail infrastructure undertaker on the design and installation method for the rooflights or other elements of the proposals aside from the basement. Therefore, it is reasonable to conclude that the installation of rooflights did not amount to "*construction*" for the purposes of Condition 6 and did not trigger the requirement to submit details for discharge prior to the works.
- 4.15 The NMA application proposed replacing "*No construction*" with "*No below ground works*" and was approved by LB Camden in November 2022. This approval confirms that the purpose of the Condition 6 was to prevent construction works on the basement element of the proposal rather than all elements of the approved scheme.
- 4.16 The Opinion states there is a very strong case for the above interpretation of the meaning of "*construction*" within the wording of Condition 6. In addition, however, there is a very strong argument that Condition 6 does not 'go to the heart of the permission'. Therefore, even if work had been carried out in breach of that Condition, development could still validly commence as the primary purpose of the said Condition is to prevent the commencement of below ground works, rather than other elements of the scheme, such as the installation of rooflights.

- 4.17 The above conclusion is accepted by LB Camden officers, as detailed in the Officer's Report for the approval of NMA application reference (2022/4985/P). Further detail on case law and the legal precedents are set out in the Legal Opinion provided.
- 4.18 The relevant Pre-commencement Conditions have therefore been discharged and the permission is deemed to have been lawfully implemented.

5.0 Conclusions

- 5.1 Planning permission 2017/1047/P contained development which included the installation of rooflights. These works were undertaken in May 2022, prior to the expiry of the planning permission on 10 June 2022. Evidence was provided to the Council at that time.
- 5.2 The applicant also submitted details to satisfy Pre-commencement Planning Conditions 4 and 8, before the expiry date of the 2019 permission. These were subsequently approved by the Council and did not relate to the rooflights (contamination and landscaping). This situation engages the *Whitley* principle and case law, that supports the conclusion that the implementation of a scheme can be considered to be lawful if the relevant details are submitted but not approved before the permission expiration date.
- 5.3 The material operation was not in breach of further Condition 6, on a proper interpretation; the installation of the rooflights was not “construction” for the purposes of Condition 6, so the requirements of the Condition were not triggered. It is also contended that it is clear that Condition 6 does not go the heart of the 2019 permission, and therefore the installation of the rooflights, even if in breach of Condition, is not to be regarded as wholly unauthorised and incapable of beginning the permitted development. This is reflected by the fact that the wording of Condition 6 was also amended.
- 5.4 The body of evidence submitted as part of this application demonstrates that the installation of three rooflights works amount to a material operation in relation to a s.56(2)-(4) of the Town and Country Planning Act. In line with the requirements of S191 of the TCPA (1990) and Planning Practice Guidance, the evidence and information provided clearly shows that the planning permission has been lawfully implemented and on this basis a Certificate of Lawfulness of Existing Development should be granted.

Appendix 1- Officer' Report Planning Permission Reference 2022/4985/P

CONSULTATION SUMMARY

Case reference number

2022/4985/P

Case Officer:

Laura Dorbeck

Application Address:

76 Fitzjohn's Avenue
London
NW3 5LS

Proposal(s)

Amendments (change to condition 6 trigger) to planning permission ref. 2017/1047/P granted 10/06/2019 for the Creation of a single storey basement with light well front and rear, installation of 1 x AC unit within front garden, installation of 3 x roof lights, removal of 1 x palm tree from front garden, alterations to side elevation fenestration, alterations to rear ground floor patio doors and erection of a new fence in the front garden.

Representations

Consultations:			No. of responses	2	No. of objections	1
					No of comments	1
					No of support	0

Summary of representations

(Officer response(s) in italics)

The owner/occupier of 129 South End Close submitted the following comments:

- Support with request: can the Palm tree which is to be removed be taken to 2A Camden estate and replanted? Too often when creating front or rear or rear structures within previously designated Gardens many of the trees and flora are lost. This impacts upon the green footprint of Camden overtime. Southend close is a Camden Estate not too far from this property address. Can the property owners liaise with Camden garden contractors and arrange for the palm tree to be removed, contained and replanted at this Camden Estate? This will form a model for future preservation of established plants with in Camden which can be developed as part of the green agenda. I am happy to liaise with new property owners and Camden to help facilitate this process involving this palm tree. We can report that to Camden planning on the success or challenges this involved.

Officer response

Although not relevant to the current application which seeks to amend the trigger for the submission of information for condition 6, contact was facilitated with the applicant to arrange the re-use of the tree.

One objection was received from a neighbouring resident who objected to the application on the following grounds:

- As mentioned before I am of the view that the Whitley principle should apply here. Therefore, the permission has lapsed.
- This is supported by the Cardiff County Council and Viridor case (17 December 2014). Applying the principles established by that case the Whitley exceptions do not apply because the Applicants did not apply for discharge of ALL the conditions prior to the commencement of the work.
- The Applicants argued that they changed some windows and that therefore the permission had not lapsed.
- Now the Applicants argue that there are two levels of works, above and under ground.
- Applying their reasoning, given only works above ground have started, the under ground permission has lapsed.

Officer response

- *This objection was received following previous correspondence with the neighbour regarding the applicant's submission of applications to discharge pre-commencement conditions after works had already been carried out to implement the approved development (with the installation of rooflights). The applications (references 2022/2440/P and 2022/1577/P) were received prior to the expiry of the original consent (10 June 2022) but were not determined until after this date (on 28/09/2022).*
- *After reviewing relevant case law (including Leisure Great Britain plc v Isle of Wight Council [2000]), officers consider it to suggest that if a developer has applied to discharge the conditions prior to the expiry of the three year end date of the planning permission, has carried out work pursuant to the permission (even though the conditions have not yet been discharged) and approval is subsequently given for the discharge of the conditions (even though the approval itself is after the three year expiry date), then the permission will be deemed to have been validly implemented.*
- *Therefore, given details to discharge those conditions were submitted prior to the expiry of the three year end date of the planning permission (even though that date passed during the determination of*

those applications), the council considered it reasonable to proceed to determine the applications for approval of details for conditions 8 (landscaping details) and 4 (programme of ground investigation).

- It was further considered that the basement excavation constituted only part of the wider development permitted by the planning permission - indeed most of the description permits other works that require no below ground works or excavation. Those conditions that prevent works before details of the below ground works (Condition 6 – below ground method statement), or require submission of details before works (Condition 4 – ground investigation) are of no relevance at all to most of the description of development on the decision notice. For example, the changes to windows do not rely on the outcome of those conditions as they do not involve excavation of the ground. It is therefore not considered that those conditions go to the heart of the permission, so that failure to comply means the entire development (including new windows, insertion of rooflights, an AC unit and so on) must be regarded as unlawful.*
- Therefore, given no further works have been carried out on site apart from the installation of rooflights, officers consider the proposed amendment to the trigger of condition 6 to be acceptable, and for it to be unreasonable to refuse to determine the application. The relevant details would still be required prior to the commencement of any below ground works, and therefore the below ground Network Rail infrastructure would be protected in accordance with the original intentions of the condition.*

Recommendation:-

Grant planning permission