

<b>LDC Report (Existing)</b>	<b>Application Number</b> 2024/1726/P	
<b>Officer</b> Fast Track - Geri	<b>Expiry Date</b> 26/06/2024	
<b>Application Address</b> 76 Fitzjohn's Avenue NW3 5LS	<b>Authorised Officer Signature</b>	
<b>Conservation Area</b> Fitzjohns Netherhall	<b>Article 4</b> Basements	
<b>Proposal</b>		
<p>Confirmation that planning permission 2017/1047/P as amended by 2022/4985/P (dated 10/06/2019 and 19/12/2022) for 'Creation of a single storey basement with lightwell to front and rear, installation of 1x air conditioning unit within front garden, installation of 3x rooflights, removal of 1x 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' were lawfully implemented by the carrying out of material operations prior to the expiry of the permission.</p>		
<b>Recommendation: Grant</b>		
<p>The application site relates to a large three-storey semi-detached dwellinghouse located on the eastern side of Fitzjohn's Avenue setback behind a large front garden.</p> <p>The application building is not listed but is located within the Fitzjohns and Netherhall Conservation Area, where it is described as making a positive contribution to the special character and appearance of the area in the Conservation Area Statement. The site is also located within the Hampstead Neighbourhood Plan Area.</p> <p>Planning permission was granted on 10<sup>th</sup> June 2019 (application ref. 2017/1047/P) for the 'creation of a single storey basement with lightwell to front and rear, installation of 1 x air conditioning 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.'</p> <p>Non-material amendments to planning permission 2017/1047/P was granted on 19<sup>th</sup> December 2022 (application ref. 2022/4985/P) for the 'change to condition 6 trigger.'</p> <p>This certificate of lawful development application seeks to demonstrate that works to implement permission 2017/1047/P as amended by 2022/4985/P have been undertaken.</p> <p><b>Applicant's Evidence</b></p> <p>The applicant argues that the application was implemented by a material start (erection of scaffolding, creation of openings in the roof and installation of rooflights) made on site during the</p>		

week of 22 May 2022 in full compliance with the extant consent and has submitted the following evidence to demonstrate this:

- A Site Location Plan
- A Planning Statement from Lambert Smith Hampton (x 16 pages) dated 22<sup>nd</sup> April 2024
- Counsel Opinion from Cornerstone Barristers dated 24<sup>th</sup> January 2024 (x 20 pages)
- Estimation of works from Philby's Ltd dated 13<sup>th</sup> May 2022
- Email from BB Partnership Chartered Architects dated 27<sup>th</sup> May 2022 confirming that the works were virtually completed on site. This included a photograph of two rooflights in situ.
- Payment for monitoring of the Construction Management Plan (CMP) dated 12<sup>th</sup> June 2022
- Email from the homeowner to BB Partnership dated 16<sup>th</sup> May 2022 instructing payment

## **Assessment**

Section 56(1) of the Town and Country Planning Act 1990 outlines that:

“Subject to the following provision of this section, for the purposes of this Act, development of land shall be taken to initiated:

- a) If the development consists of the carrying of operations at the time when those operations are begun.”

Section 56 (2) also outlines that:

“For the purposes of the provisions of this Part mentioned in subsection (3), development shall be taken to 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.”

## **Planning conditions**

The 2019 Planning Permission was granted subject to 10 numbered conditions. The conditions numbered 4, 6 and 8 required details to be submitted and approved by the Council.

Condition 4 (programme of ground investigation) (2022/1577/P) and condition 8 (landscaping details) (2022/2440/P) were granted on 28<sup>th</sup> September 2022.

Condition 6 (below ground method statement) was amended from 'no construction shall take place' to 'no below ground works shall take place'. The amendment (ref. 2022/4985/P) was granted on 19<sup>th</sup> December 2022 '*to amend the trigger of this condition so that it is not a pre-commencement condition, but instead, so that the information is required to be submitted prior to any excavation or below ground works in association with the basement extension rather than the development as a whole. This would mean that the more minor works including the installation of an AC unit, rooflights, fenestration, changes to fenestration and the removal of a tree could all be commenced prior to the basement works.*'

All of the conditions that were imposed on the planning consent 2017/1047/P which were required to be discharged prior to commencement of development have been discharged and details of these applications have been provided.

The pre-commencement planning obligations, that were attached to the permission 2017/1047/P and secured by Section 106 legal agreement, have also been discharged.

In the Consultation Summary issued in relation to 2022/4985/P on 19<sup>th</sup> December 2022, the case officer states that '*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).*' The officer goes on saying '*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.*'

The officer's report therefore confirms the appellant's sequence of events.

The submission outlines that implementation works at the site commenced prior to the expiration of the original planning permission. Sufficient evidence of these works has been provided as above, demonstrating that the erection of scaffolding, creation of openings in the roof and installation of rooflights took place. The submitted evidence is to the satisfaction of planning officers that a material operation as defined in The Town and Country Planning Act 1990 was carried out, which implements the planning permission in question.

The Council considers that the works carried out and evidence listed above demonstrate the works to implement the planning permission 2017/1047/P, as amended by 2022/4985/P have commenced.

#### Applicants submitted evidence

On the balance of probabilities, that the works relied upon in the application for the Lawful Development Certificate (specifically, all relevant pre-commencement conditions discharged in September 2022 with the erection of scaffolding, creation of openings in the roof and installation of rooflights commencing on in May 2022) were carried out before 10<sup>th</sup> June 2022. The following evidence, taken as a whole, shows that it is more likely than not that the erection of scaffolding, creation of openings in the roof and installation of rooflights were carried out before 10<sup>th</sup> June 2022:

(1) Email from BB Partnership dated 27<sup>th</sup> May 2022 confirming that works were virtually completed including a photograph of two rooflights in situ.

### 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)