

LDC (Proposed) Report		Application number	2024/0862/P
Officer		Expiry date	
Brendan Versluys		6/05/2024	
Application Address		Authorised Officer Signature	
38 - 40 Windmill Street London W1T 2BE			
Conservation Area		Article 4	
Charlotte Street		Article 4 Direction (basements) Article 4 Direction (land use)	
Proposal			
Siting of a shipping container, for use incidental to the lawful residential use of the land, at the fourth-floor level.			
Recommendation:		Refuse Certificate of Lawfulness	
Introduction			
<p>The application site accommodates a six-storey building (plus basement level) located on the northern side of Windmill Street. The property located with the Charlotte's Street Conservation Area, and the host building is not described as either a positive or negative contributor.</p> <p>The officer's report for planning application 2016/0397/P describes the building as having retail space at ground floor level with vacant B8 (Storage or distribution) space on the first and second floors, and office space at the third floor. The existing ground floor retail unit is understood to be vacant.</p> <p>The fourth and fifth floors are each occupied by a flat. The fourth floor includes a roof terrace at the front elevation.</p> <p>An image of the application site as viewed from the intersection of Whitfield Street and Windmill Street is included in Figure 1 below.</p> <p>An objection from the Bloomsbury CAAC was received on planning merits grounds, but the assessment is one of fact rather than merit.</p>			
Proposal			
<p>The applicant seeks a certificate of lawfulness for the siting of a shipping container at the fourth floor, on the terrace. It would be used for residential purposes, claimed to be incidental to the use of the existing fourth floor flat.</p> <p>The shipping container would be located on the fourth-floor terrace and would be accessed from the fourth floor flat.</p>			



Figure 1: The application site (centre) as viewed from the intersection of Whitfield Street and Windmill Street. The proposed caravan would be set behind the frosted glass balustrade.

Relevant planning history:

2010/5167/P - Change of use of third floor offices (class B1a) and vacant first and second floors (Class B8) to create 6x two-bedroom flats (class C3), including rear extensions at first, second, third and fourth floors and associated external alterations. **Granted Subject to a Section 106 Legal Agreement 05/05/2011.**

2016/0397/P - Change of use of third floor offices (class B1a) and vacant first and second floors (Class B8) to create 3x three bedroom flats. **Granted Subject to a Section 106 Legal Agreement 22/06/2017.**

2023/4907/P - Siting of a caravan for use, incidental to the lawful residential use of the land, at the fourth floor. **Granted 12/01/2024**

This certificate was relating to the use of the land for stationing a “caravan”. The decision notice made clear that the use of the terrace for purposes incidental to the dwelling is lawful. However, it went on to state that it *“includes no determination of lawfulness as to any future physical structure that may accommodate that use”*.

Assessment:

The certificate is submitted on the basis that putting the container on the roof, without a change of use, does not constitute development and so does not require planning permission.

The definition of 'development' is defined by the Town and Country Planning Act 1990, section 55, as follows:

Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

The scope of "development" is therefore broadly split into two limbs – operational development, and material changes of use. The terms of the certificate application are clear that it relates to the physical structure. It is therefore the first limb – operational development – that is relevant to this certificate.

In the High Court case of Skerritts of Nottingham Ltd v Secretary of State for Environment, Transport & Regions & Anor [2000], the Court endorsed the approach in Barvis v Secretary of State for the Environment [1971] in setting out the three-fold test for a building (resulting from a building operation): size, permanence, and attachment to land. This case emphasises that the consideration of permanence is a highly material factor when deciding whether a structure constitutes a building operation.

The onus of proof in a LDC application is firmly on the applicant to demonstrate on the balance of probabilities, to show that operations specified in the application are lawful. The applicant has provided minimal evidence to demonstrate the lawfulness of the container, with the only evidence provided being a site plan, and floor plan and very basic elevations of the shipping container. There are no drawings or documentation showing the container sited in context, its proposed physical relationship to the existing building, or showing the presence or lack of any fixings or connections.

Despite the lack of information to support the application, at more than 12.5m long, almost 3m across, and more than 3m in height, the container would be a substantial structure with volume in excess of 113 cubic metres. It would require assembly and construction on site, or otherwise significant large equipment and logistics to put into place (and this is not even considering any requirements that may or may not exist to prepare the terrace for its siting, connection to any utilities, or fixing it in place). The substantial size in its context, and permanence of the shipping container, means it is a building and constitutes a "building operation".

The applicant later provided an appeal decision for reference (APP/V0728/W/23/3314720). The circumstances of that case are clearly different. It related to containers for self-storage on a large open area of land with industrial character. Information was provided in that case around fixings and utilities and so on. The Inspector also considered they could be quickly and easily removed by crane and lorry, without the same complexities afforded on this site on an upper floor of a building in a dense urban area. Adding a large container in this urban context clearly has a very different character.

None of the three tests on their own need be determinative and it is a matter of fact and degree in each case – something acknowledged in the cited appeal. Considering all the tests together in this particular case, it is clear the overall character of the structure is of a building, and this is how a normal person would interpret it. The *Skerritts* case is clear that character can relate to all three

parts of the three-fold test.

Therefore, the works for siting the container at roof level on this particular building constitute “building operations”, and so it will fall within the scope of s55.

The shipping container clearly materially affects the external appearance of the building, so is not within the exclusions to development set out in s55.

The proposed siting of the shipping container at the roof of the building, therefore constitutes “development” and it requires permission.

There is no express planning permission for the development, and it does not benefit from permission granted by a development order (the GDPO for example).

As such, planning permission is required, has not been granted, and so the lawful development certificate must be refused.

As was made clear on the decision for the previously granted certificate, use of the terrace, and any **lawful** structures that may be provided on it, for residential purposes incidental to the flat to which it relates would be lawful. However, there is no information on the use of the building/container, so it cannot be determined whether the shipping container would also constitute a material change of use from the existing Class C3 use.

3. Recommendations

3.1. Refuse Lawful Development Certificate for the following reason:

The proposed siting of the shipping container would be a building operation and so would meet the definition of ‘development’ under the Town and Country Planning Act 1990, section 55. It does not benefit from any planning permission and would therefore not be lawful.

