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Via Planning Portal Only

24th July 2024

Dear Sir/Madam

CERTIFICATE OF LAWFUL DEVELOPMENT (EXISTING) WITH RESPECT TO THE EXISTING LAWFUL USE OF THE PROPERTY AS A SINGLE DWELLING HOUSE (USE CLASS C3) – 13 DALEHAM GARDENS, LONDON, NW3 5BY

This is an application under Section 191 (1) of the Town and Country Planning Act 1990 to obtain a Lawful Development Certificate to confirm that the lawful existing use of the property as a single dwelling house (Use Class C3).

The Site

The site is located on the west side of Daleham Gardens and comprises a large two-storey detached dwelling with a basement and accommodation in the roof, set in a spacious plot. The site lies within the Fitzjohns Netherhall Conservation Area.

Planning History

On the 13th February 1939, planning permission was refused (ref: TP/704/2955/54730) for the erection of a temporary potting shed.

On the 16th August 1962, planning permission was granted (ref: TP/704/W/6114) for the sub-division of existing dwelling house at 13, Daleham Gardens, into two flats.

There have also been two approvals relating to works on trees on site (refs: 2021/5341/T and 2021/5356/T).

Legislative Background and Guidance

Section 57 of the Town and Country Planning Act 1990

Section 57(1) of the Town and Country Planning Act 1990 (as amended) ('the 1990 Act') sets out that subject to the provisions of this section, planning permission is required for the carrying out of any development of land.

Section 55 of the Town and Country Planning Act 1990

Section 55(1) of the 1990 Act sets out that 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 use of any buildings or other land.

Section 191 of the Town and Country Planning Act 1990

Section 191(1) of the 1990 Act allows applications to a local planning authority for the issue of certificates of lawfulness for an existing use or development. This provides a statutory mechanism for obtaining confirmation that an existing use of land, operational development, or activity in breach of a planning condition, is lawful and therefore immune from enforcement action.

Section 171 of the Town and Country Planning Act 1990

Prior to amendments made under Section 115 of the Levelling-up and Regeneration Act 2023, Section 171B(2) of the Town and Country Planning Act 1990 set out the 'four year rule' in respect of change of uses to use as a single dwelling house that have resulted in a breach of planning control. It provided that:

(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

Section 115 of the Levelling-up and Regeneration Act 2023 amends Section 171B(2) of the Town and Country Planning Act 1990 to extend the time period in which local planning authorities can take enforcement action against unauthorised development in England from 4 to 10 years. In terms of the transitional provisions for enforcement time limits, this amendment will not apply where the change of use to a dwelling occurred before 25 April 2024. These transitional provisions are set out within the Planning Act 2008 (Commencement No.8) and Levelling-up and Regeneration Act 2023 (Commencement No.4 and Transitional Provisions) Regulations 2024.

Therefore, the 'four-year rule' still applies to buildings which have been subject of a change of use to a single dwelling house prior to 25 April 2024.

Planning Practice Guidance Paragraph 009

Planning Practice Guidance at paragraph 009 (Reference ID: 17c-009-20140306), states:

"A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process."

In light of the above, a certificate of lawful use or existing development is not a planning permission. The planning merits of the use, operation or activity in the application are not therefore relevant and planning policies are thus not applicable. The issue of a certificate depends entirely on factual evidence about the history and planning status of the building or other land and the interpretation of any relevant planning law or judicial authority. The test in this instance is whether 'on the balance of probability' the applicant has demonstrated that the development was carried out and substantially completed more than four years prior to the submission of this certificate application.

The Lawful Existing Use

On the 16th August 1962, planning permission was granted (ref: TP/704/W/6114) for the sub-division of existing dwelling house at 13, Daleham Gardens, into two flats.

Notwithstanding the above, the property is used and laid out as a single dwelling house and there is no evidence to suggest a subdivision ever occurred. From a review of the available Council Tax Records, only one property has ever been listed at this address (Appendix 1). As such, it seems that permission ref: TP/704/W/6114 was never implemented and thus a change of use never occurred. On this basis, it is argued that the lawful existing use of the building is a single dwelling house.

Notwithstanding the above, in any event, it is clear that the property has been used as a single dwelling for a period in excess of 4 years prior to the date of this application with regard to Council Tax Records (Appendix 1) and Google Street View Images that date back to 2008 (Appendix 2). The Google Street View Images between 2008-2022 show no change of circumstances. Notably, all images show single house number sign on the pedestrian access gate which reads '13' and only one refuse bin is present outside the property on collection days. It is therefore clear that the well-established and lawful use of the property is a single dwelling house.

In addition, it is noteworthy that Section 57(1) and Section 55(1) of the 1990 Act stipulates that permission is required for "development", which includes either building operations or making a material change of use of land. In this connection, if the property was historically subdivided into two residential units, it is argued that the amalgamation of these units into a single dwelling would not have constituted a material change of use and thus there would not have been a breach of planning control in any event.

In line with the provisions of relevant case law¹ the amalgamation of two dwellings into one is not considered to constitute a material change of use. There are numerous examples in the borough where this has confirmed both under delegated authority and at appeal. This includes appeal reference APP/X5210/X/17/3172201 and application references 2019/0002/P, 2019/1399/P, 2019/3652/P and 2019/4264/P.

As such, if permission ref: TP/704/W/6114 was implemented, it is argued that the reversion back to a single dwelling was lawful without requiring planning permission in any event.

¹ East Barnet UDC v British Transport Commission [1962]; London Borough of Richmond upon Thames v The Secretary of State for the Environment, Transport and the Regions and Richmond upon Thames Churches Housing Trust [2000]; Royal Borough of Kensington and Chelsea v Secretary of State for Communities and Local Government [2016].

Summary & Conclusion

While the planning permission was granted for the subdivision of No.13 Daleham Gardens into two flats in 1962, the evidence indicates that this permission was never implemented and thus a change of use never occurred. On this basis, it is argued that the lawful existing use of the building is a single dwelling house.

Notwithstanding the above, the available evidence indicates that the property has been used as a single dwelling for a period in excess of 4 years prior to the date of this application.

Nevertheless, if the property was historically subdivided into two residential units, it is argued that the amalgamation of these units into a single dwelling would not have constituted a material change of use and thus was lawful without requiring planning permission in any event.

Accordingly, the existing lawful use of the property is a single dwelling house.

It is therefore respectfully requested that a certificate is issued. I trust the commentary above is clear but please do not hesitate to contact me if you have any queries or if I can offer any further points of clarification.

Yours faithfully

Danielle Shaw
Planner
SM Planning