

LDC Report		03/12/2012	
Officer		Application Number	
Aysegul Olcar-Chamberlin		2012/5352/P	
Application Address		Recommendation	
Land at 39-45 Kentish Town Road London NW1 8NX		Refuse	
1st Signature		2nd Signature (if refusal)	
Proposal			
Commencement of development approved by planning permission granted at appeal on 23/06/2006 (ref: 2005/0530/P) for erection of a new four storey building with accommodation within the roof space to provide a new public house with ancillary residential accommodation and office space (Class B1).			
Assessment			
<p>The application site is located to the north of the Regent's Canal on the western side of Kentish Town Road. The site is currently vacant and has no buildings or any other structures. The site used to have derelict one to three storey buildings which were used for light industrial purposes (under Class B1 use) and residential use (lock keepers cottage).</p> <p>The building is not listed and is located in the Regents Canal Conservation Area.</p> <p>The application seeks to demonstrate that the commencement of development approved by planning permission dated 23/06/2006 (our ref: 2005/0530/P, appeal ref: APP/X5210/A/05/1183439) started lawfully on 22/06/2011.</p> <p>Relevant Planning History</p> <p>2011/2812/P -Approval of details for condition 2 (external surface materials) and condition 4 (hard and soft landscaping) of planning permission (2005/0530/P) was received on 02/06/2011 and was registered on 20/06/2011. Permission was refused on 28/07/2011. An appeal was logged on on 07/02/2012 and dismissed on 06/08/2012. The inspectorate acknowledged that some work was carried out on site prior to the five year deadline, but he did not comment on whether the permission is extant as it did not fall to be considered under the appeal.</p> <p>This application was determined within the statutory deadline.</p> <p>2011/1209/P – Planning permission was refused on 29/06/2011 for the renewal of planning permission granted on 23/06/2006 (ref: 2005/0530/P) for the redevelopment of the site involving demolition of existing buildings, erection of a new four storey building with accommodation to provide a new public house with ancillary residential accommodation (Class A4) and office space (Class B1a).</p>			

2006/3556/P – Permission was granted on 11/10/2006 for the variation of condition 8 of appeal decision (APP/X5210/A/05/1183439) dated 23 June 2006, to increase the hours that food and drink can be served on Sundays from 09.00-20.30 to 09.00-22.30.

2005/0530/P – Planning permission was granted at appeal (ref: APP/X5210/A/05/1183439) on 23/06/2006 for the redevelopment of the site involving demolition of existing buildings, erection of a new four storey building with accommodation within the roof space to provide a new public house with ancillary residential accommodation and office space (Class B1). This was a renewal of planning permission (ref: P9601198) granted on 27/04/2000. This planning permission expired on 23/06/2011.

Condition 2 (details of materials) and condition 4 (details of hard and soft landscaping) of this planning permission required details to be submitted and approved by the local authority before any development takes place. In addition condition 7 of the planning permission requires access arrangement to be afforded at reasonable times to any archaeologist nominated by the local planning authority to allow that person to observe excavations and record items of interest and finds.

2005/3226/C – Conservation area consent for the demolition of the existing buildings on site was granted at appeal (ref: APP/X5210/A/05/1183439) on 23/06/2006. This consent has already been implemented.

Applicant's Evidence

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

- Site photos taken on 22nd June 2011 confirming that the drainage pipes to the ground floor toilets for the offices and the public house were laid and a trench was dug along the western boundary of the site on 20th June 2011.
- Copy of a letter from the Council's Building Control Section dated 24th June 2011 confirming the acceptance of the notice of the proposed works involving erection of new five storey mixed use building, including offices and public house with ancillary flat.
- Copy of a letter from HCD Group (Approved Inspectorate) to the Council's Building Control Section dated 16th June 2011 confirming they had been employed by the application.
- Copies of e-mails between the Case officer (Aysegul Olcar-Chamberlin) of renewal of planning permission application (ref: 2011/1209/P) dating from 04 May 2011 to 28th June 2011.
- Copy of e-mail from the case officer, Charles Rose who was dealing with approval of details application (ref: 2011/2812/P) dated 20th July 2012; and
- Copies of decision notices for 2011/2812/ P application

The applicant has also submitted the following plans:

- A site location plan outlining the application site in red;
- Drawings showing the details of the approved scheme (P101, P102, P103, P104/A and P105/A).

Council's Evidence

- Samuel Smith (the applicant) informed the Council's Building Control Section that HCD Building Control (Approved Inspector) would be in charge for the implementation of the

proposed development on 16/06/2011.

- Site photos dated May 2011.
- Charles Rose's notes during the site visit on 23 June 2011.

Assessment

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 issues are whether the trenches on site could be considered as material operations and the lawfulness of starting development before discharging conditions that required approval of details pre-commencement of the development.

A planning permission may be kept alive if a "material operation" is commenced within the relevant time period and is "comprised in the development" (s 56(2) Town and Country Planning Act 1990 (as amended) (the Act)).

Section 56(4) of the Town and Country Planning Act 1990 (as amended) provides a definition of a "material operation"; (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 out 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." Also of relevance is whether the works relate to the planning permission.

"Material operation" is defined as including any work of demolition of a building and the digging a trench which is to contain the foundations, or part of the foundations, of a building. It is understood from that very little needs to be done to implement permission, but what is done must be more than *de minimis* and actually related to the development.

The Council's Conservation Area and Heritage officer, Charles Rose made the following observations during his site visit dated:

"An excavation of the shallow trench in the north east corner of the site: Given its location the trench could not have been for the foundations of the building. The trench was in the area of the approved 'pavilion' in the far west of the site. The trench has since been covered over."

"Laying Pipe Works: Sewage pipe works were laid roughly in the centre of the widest part of the site. This area does contain w.c for the use by patrons of the bar. However the area also contains a basement cellar which would need to be excavated thereby rendering the pipes ineffectual and not constitute a material operation relating to the approval. In this regard exact positions of the laid pipe works is necessary."

The carried out works on the site before the expiry date of the planning permission (ref: 2005/0530/P) appear to be minor and do not relate to the development. The proposed building

would also have a cellar which is shown on the drawing P101 and drawing KTL1/P110 which was submitted with planning application, 2011/1209/P. The cellar would be approximately 2.5m below the ground floor level of the new building and would require an approximately 100sqm area below the proposed bar and seating areas on the ground floor level of the proposed pub. The depth of the excavation works for the proposed cellar need to be at least 2.5m. There was no sign of such excavation works on site.

The Council considers that the works were de minimis and not related to the development and so therefore implementation of permission 2005/0530/P has not taken place.

Notwithstanding this position there are concerns about the applicant not having discharged pre-commencement conditions prior to the application expiring.

The applicant's agent argues that the Council took longer than it is necessary to determine the approval of details application and no opportunity was given to amend the details submitted with this application. The agent in his supporting statement acknowledged that pre-commencement conditions prevent implementation of any works on site and commented the applicability of Whitley principle (1992) to his case as the Council had no good reason not to determine the approval of details application before 23/06/2011. According to the agent that delay caused the applicants to undertake further "material operations" to protect their position.

According to the Council's records the approval of details application was determined within the statutory deadline and the applicant lost the appeal against the refusal of this application. The inspectorate did not consider that the Council was unreasonable. It is also important to note that the inspector did not make a judgement on whether the applicant has done enough to implement the permission, and so the judgement on the conditions themselves should not be seen as an endorsement of this.

The Council considers that the Whitley Principle would be highly relevant in this case. In the case of *Whitley & Son v Secretary for Wales* (1992), Lord of Justice Woolf considered that operations which contravene conditions precedent were not to be properly described as commencing the development authorised by the permission and were thus unlawful. The Council has noted the information submitted by the applicant but considers that conditions 2 (details of materials) and condition 4 (details of hard and soft landscaping) are conditions precedent which should have been discharged before the application expired. The type of materials used in the development together with the means of enclosure would have an important impact on the development to be constructed. These conditions have not been complied with.

In conclusion, the first thing to consider is whether the works done on site are sufficient to implement the planning permission. In this instance they are not considered directly relevant to the development approved. Therefore, the issue of the conditions and whether they are true condition precedents in practical terms falls away. Notwithstanding that it is considered that even if this position is disagreed with the conditions are pre-commencement conditions that were not discharged prior to the planning application expiring and so any works carried out cannot be lawful material operations undertaken to commence the development.

For those reasons it is considered that on the balance of probabilities insufficient evidence has been provided by the applicant to show that permission 2005/0530/P has been implemented.

Recommendation: Refuse

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