

LDC Report		09/05/2012
Officer		Application Number
Neil Zaayman		2012/1480/P
Application Address		Drawing Numbers
Fairhazel Gardens Site at rear of 40 Canfield Gardens London NW6 3EB		Refer to decision notice.
PO 3/4	Area Team Signature	Authorised Officer Signature
Proposal		
Erection of single-storey building with basement for use as a single dwelling house (Class C3).		
Recommendation: Grant Lawful Development Certificate		
Assessment		
<p>An application for a Lawful Development Certificate has been made to the Council to establish commencement of works on a planning permission granted for the erection of a single-storey building with basement for use as a single dwelling house (C3).</p> <p>Planning permission for the above mentioned development was granted on 11/06/2008 (Ref: 2007/4109/P). A time limit condition meant that the application would have expired on 11/06/2011. The permission also included two pre-commencement conditions:</p> <p>Condition 2 – material samples Condition 3 – detailed drawings of the door and garage door facing Fairhazel Gardens</p> <p>Details in respect of the above pre-commencement conditions were submitted on 17/01/2011 and granted on 18/02/2011.</p> <p>The applicants submitted details and supporting material to the Council on 11 August 2011 notifying the Council that works on the site have commenced. The Council was however of the opinion that the works did not constitute commencement of the development for the following reasons:</p> <ul style="list-style-type: none"> - the work undertaken is de minimis; - obligations precedent in the S106 legal agreement had not been complied with. <p>The purpose of this application for a Lawful Development Certificate is therefore to establish whether the works undertaken on the site does constitute implementation of the planning permission Ref: 2007/4109/P.</p>		

Commencement of works:

Legal advice has been sought both by the applicant (written feedback from Senior Council) and the Council (written feedback from Legal Services).

The relevant advice is set out in S56 of the Town and Country Planning Act 1990 (as amended). A planning permission may be kept alive if a “material operation” is commenced within the relevant time period and is “comprised in the development” (S56(2) Town and Country Planning Act 1990 (as amended) (the Act)).

Section 56(4) of the Act 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.”*

Case law suggests that the threshold for works constituting implementation is not particularly high and the courts have adopted a liberal approach to construction. For example, the Court of Appeal in 1982 (*Malvern Hills DC v Secretary of State for the Environment* [1982] JPL 439) upheld a finding that the making out of the line and width of a road with pegs amounted to an “operation”.

From the advice given, it appears to be sufficient to begin any of the material operations, that the beginning of any work of construction is sufficient and that several of the works listed in S56 of the Act are preparatory to actual construction works.

As evidence that the planning permission (2007/4109/P) has been implemented, the applicant submitted the following details:

- Michael Alexander Consulting Engineer’s structural Design Statement & Calculations Part 1 - Substructure (dated May 2011);
- Drawings:
 - o 03 Rev P1 Roof General Arrangement and Section A-A;
 - o 01 Rev P2 Lower Ground Floor General Arrangement;
 - o 02 Rev P2 Ground Floor General Arrangement;
 - o 912/S-2.01 Survey
- GEA Borehole Record (dated 25 May 2011);
- Canon Piling Tension Pile Design Rev A (dated 9 June 2011);
- JM Partnership Building Regulations compliance report;
- JM Partnership (Surveyors) Ltd Site Inspection Sheet (dated 25 May 2011);
- Correspondence from Camden Building Control sent 18 May 2011.

In light of the evidence submitted, the Council is satisfied that a tension pile has been driven into the ground on 25th May 2011. This has also been confirmed in a letter from Michael Alexander Consulting Engineers, dated 27th February 2012, various photographs taken on 25th May 2011 and a site inspection sheet by JM Partnership (Surveyors) Ltd.

Further, in respect of the legal advice and case law, officers are of the opinion that the tension pile relates to the construction of the proposed dwelling as it forms a fundamental element of the foundations. Whilst only 1 of the total 33 piles has been driven in on the site, case law indicates that any part of the works, even just preparatory, constitutes a material operation and can therefore be considered as implementation of the planning permission.

As such, based on the above guidance and the evidence submitted, officers are of the opinion that planning permission Ref: 2007/4109/P was implemented on 25th May 2011, prior to the permission's expiry date on 11/06/2011.

S106 requirements:

Upon granting planning permission (Ref: 2007/4109/P), the applicant's entered into a S106 Legal Agreement with the Council. The legal obligations required the development:

- to be car-capped;
- pay the Council a Highways Contribution (prior to implementation);
- submit plans to demonstrate compliance with Lifetime Home Standards (prior to implementation);
- to submit for approval details of in respect of a Sustainability Plan (prior to implementation);

None of the pre-implementation requirements have been submitted and the applicant is therefore in breach of all of the above legal obligations.

Notwithstanding, legal advice to the Council indicates that the S106 agreement is a contractual agreement with special enforceability against land, and does not form part of the planning permission. Advice from Senior Council (as appointed by the applicant) states: *"Breach of a provision of a S106 agreement is not a breach of planning control and cannot be the subject of enforcement action. The remedy for a breach of a S106 agreement is by an action on the contract for damages or an injunction."* The Council's legal services confirm this advice as accurate.

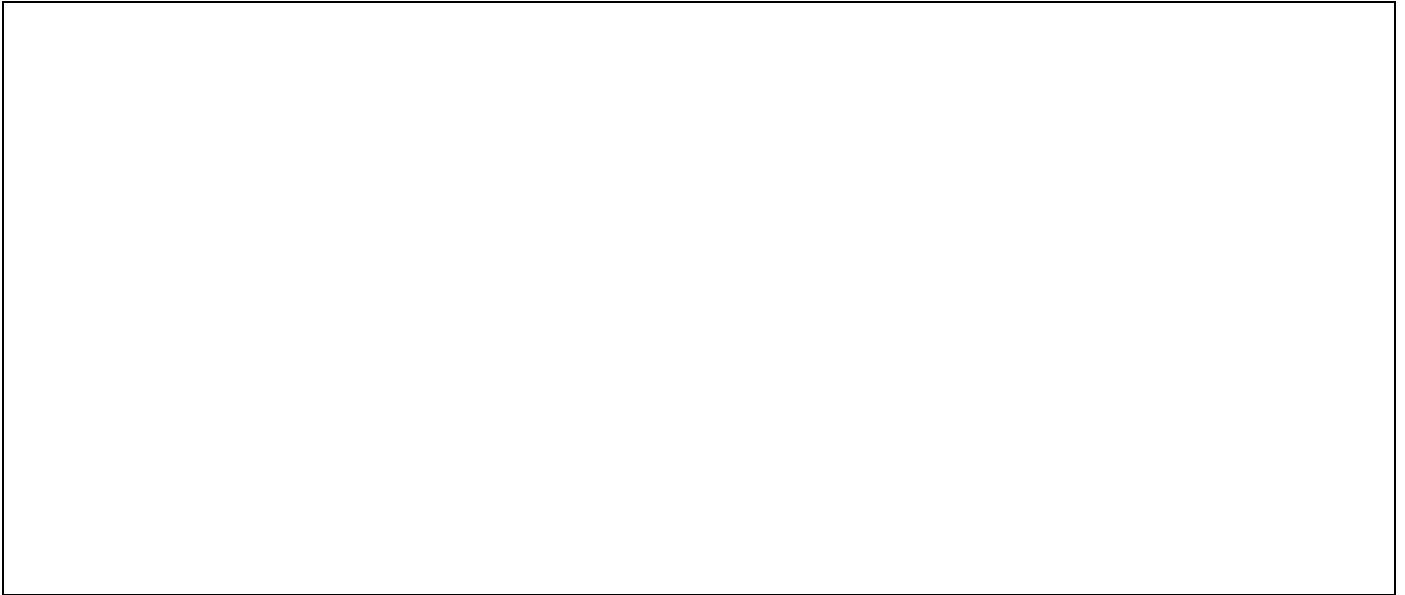
As such, although the applicants are in breach of their S106 legal requirements, the terms of this agreement cannot prevent the installation of the pile constituting a valid commencement of the development.

Conclusion:

The Council is satisfied that the supporting information submitted are sufficient demonstrate commencement of works on the site. Failure to comply with the S106 legal obligations cannot compromise commencement of works. Planning permission 2007/4109/P has therefore been implemented and therefore remains a valid permission. A Lawful Development Certificate can be issued as confirmation.

Recommendation:

Grant Lawful Development Certificate



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