

<b>LDC (Proposed) Report</b>		<b>Application number</b>	2014/5922/P
<b>Officer</b>		<b>Expiry date</b>	
Raymond Yeung		14/11/2014	
<b>Application Address</b>		<b>Authorised Officer Signature</b>	
17 Wadham Gardens London NW3 3DN			
<b>Conservation Area</b>		<b>Article 4</b>	
Elsworthy		No	
<b>Proposal</b>			
Single storey basement extension under the footprint of the original building to the rear of the original building line.			
<b>Recommendation:</b>		Refuse Certificate	

## 1.0 Proposal

1.1 The application seeks to ascertain whether the proposed excavation of a basement falls under permitted development Class A Part 1.

1.2 The proposed works comprise the excavation of a basement beneath the footprint of the existing dwellinghouse and an additional 4m deep extension at basement level beyond the existing rear wall of the dwellinghouse. There is an existing basement under the dwellinghouse which measures approximately 2.7m deep, 3.7m wide and 8.5m in length. The depth of the proposed basement is approximately 3.12m (at a maximum), with the width (side to side of the house) a maximum of 11m and length (front to back of house) a maximum of 21m. A single internal staircase is proposed to link the existing ground floor with the proposed basement. The proposed basement does not include any lightwells or associated works which would allow natural light to this space.

1.3 This application has been assessed in relation to the recent Committee refusal for a Class A basement at 24 Quadrant Grove.

## 2.0 24 Quadrant Grove (2014/2070/P)

2.1 The proposed scheme at 24 Quadrant Grove was for the excavation of a basement beneath the footprint of the existing dwellinghouse. The proposed depth of the basement is approximately 2.85m, with the width (side to side of the house) a maximum of 4.5m and length (front to back of house) a maximum of 7.5m. A single internal staircase is proposed to link the existing ground floor with the proposed basement.

2.2 The officer's approach to the 24 Quadrant Grove application had been the same as in the case of the 17 Wadham Gardens application, being assessed against the criteria

set out in the Town and Country Planning (General Permitted Development) (Amendment) (No2) (England) Order 2008 ("GPDO") and whether the proposal constitutes "development" under S55 of the TCPA 1990 which sets out the meaning of "development". However a legal opinion, on behalf of local residents from Gwion Lewis considered that the proposal could not be considered as Permitted Development for the following reasons:

- The proposal is considered an "engineering operation" that does not benefit from any permitted development right.
- The proposed basement does not fall under Class A of GPDO as it involves excavation and taking away a substantial volume of ground and soil to make space for the basement
- The excavation would not be de minimis and the excavation works required to create the proposed basement are sufficient as a matter of fact and degree to comprise an engineering operation that requires a separate grant of planning permission
- Planning permission is required for the works as it would have its own material planning impacts in terms of noise, visual impact on the streetscene and associated traffic movements.
- Planning permission is required for carrying out any "development" of land: section 57
- "The permitted development right granted by Class A ("the enlargement, improvement or other alteration of a dwellinghouse" is apt to cover "building operations" as defined by s.55 (1A) of the TCPA 1990 but cannot properly be interpreted as including any other types of operations."
- "Reading the paragraphs in Class A as a whole, the various exclusions and conditions can only sensibly be applied in relation to proposals to add more built development, or to improve or alter existing built development"

2.3 The full Gwion Lewis opinion is attached as Appendix 1 to this report.

2.4 The application was referred to the Members Briefing Panel on the 18th August 2014 whereupon it was decided to refer the application to the Development Control Committee for decision. It was subsequently heard at the 23rd October 2014 committee at which it was decided to refuse the application for a certificate of lawfulness.

2.5 Key to the Committee Members' consideration of the proposal was the opinion by Gwion Lewis, in particular that the proposed basement involved engineering works could not be considered under Class A of the GPDO.

2.6 Whilst the Council had obtained its own advice from external Counsel who noted that engineering operations did not form part of the exceptions and qualifications listed in the GDPO, Gwion Lewis felt that "reading the paragraphs in Class A as a whole, the various exclusions and conditions can only sensibly be applied in relation to proposals to add more built development, or improve or alter existing built development" (Gwion Lewis para. 8). The basement works included within the Quadrant Grove proposal, it was held, would fit within neither category, being to excavate and take away a substantial volume of ground and soil from the site.

2.7 Gwion Lewis continues that whilst “the (permitted development) right might extend to the building works themselves once the ground and soil has been excavated... I am not satisfied that it covers the excavation unless, possibly, it is de minimis in character”.

2.8 Gwion Lewis opines that this interpretation is consistent with the definition of “building operations” in section 55(1A) of the TCPA 1990 as including a series of activities, all of a type ultimately described in s.55(1A)(d) as “operations normally undertaken by a person carrying on business as a builder”. Underground development that requires the instruction of a specialist structural engineer is not “normally undertaken by a person carrying on business as a builder”, hence why s.55(1) distinguishes between “building operations” and engineering operations”. (Gwion Lewis para.10).

2.9 The opinion reasons with reference to s.55(2) of the TCPA that Parliament has distinguished the “engineering” component from the “building” component in terms of development of additional space underground within a building as the former, namely the works of excavation would have their own material planning impacts requiring a separate analysis in terms of noise, visual impact and associated traffic movements. It would therefore be wrong to certify these works as lawful without the need for further planning permission. (Gwion Lewis para. 11)

2.10 Committee members agreed with third parties objecting to the application that since the proposed basement works would require the involvement of a qualified civil or structural engineer, the works would constitute an engineering operation, and in line with the Gwion Lewis opinion, the application should be refused.

2.11 The decision to refuse was taken by a majority vote of 5 – 4 against the officer’s recommendation. The notice of refusal issued on 30th October 2014 stated:

*“The proposed basement, by virtue of it being development involving significant excavation and engineering works necessitating the engagement of a specialist engineer, would as a matter of fact and degree, constitute an ‘engineering operation’ of a scale and complexity requiring a separate grant of planning permission and would exceed the scope of (and hence fall outside) of any permitted development right outlined in the Town and Country Planning (General Permitted Development) Order 1995 as amended.”*

### **3.0 Relevant appeal decisions**

3.1 A number of appeal decisions and a High Court judgement were referred to by third parties objecting to the Quadrant Grove application. Of these two in particular (both concerning lawful development certificates) are considered to be relevant also to 17 Wadham Gardens:

3.2 Hammersmith & Fulham (Aug 2009) relating to a basement extension. The Inspector considered in this case that the proposed development (excavation extending largely into the garden) by fact and degree would be an engineering operation and that there is nothing set out in the GPDO to indicate such an operation is permitted development (para 9).

3.3 Wycombe (1995) – High Court decision relating to the excavation of a sloped site in front of a house to create a level hardstanding. It was found by the judge that the excavation works would constitute a separate engineering operation which went beyond anything which could be reasonably regarded as incidental to the works in regard to the creation of the hardstanding itself. In arriving at this judgement reference was made to the following passage in a previous High Court decision (West Bowers Farm Products v. Essex County Council 1985) stating that “A single process may for planning purposes amount to two activities. Whether it does so or not is a question of fact and degree. If it involves two activities, each of substance, so that one is not merely ancillary to the other, then both require planning permission.”

It was therefore considered that the works of earth removal were not permitted under the GPDO and thus the whole operation was unauthorised. The judge considered that the logical and proper approach under the GPDO was to look first at what the GPDO permitted and then to consider as a matter of fact and degree whether anything done or to be done beyond that specific permission was incidental to what was specifically permitted.

3.4 Chelmsford (2007) – Non determination appeal relating to a proposed gym/games room proposed under Class E in Part 1 of Schedule 2 of the GPDO. It was held that the ‘Wycombe case’ above was authority for Part 1 of Schedule 2 not operating to permit significant engineering operations to be carried out without planning permission in order to bring about development permitted by the Order. It was noted by the Inspector that “although the [Wycombe] case related to Class F rather than Class E, I consider its general application to be the same for this appeal.”

3.5 These decisions are attached at appendix 4.

## **4.0 Conclusion**

4.1 It is considered that there are a number of parallels between the issues relating to the 17 Wadham Gardens case and the committee’s refusal of a certificate of lawfulness for 24 Quadrant Grove. Both the Gwion Lewis opinion put forward by objectors to the Quadrant Grove application and the above mentioned appeal and High Court decisions lend weight to the committee’s argument that a basement excavation should be defined as a separate engineering operation and not considered part of other works that would be covered by the GPDO. In the interests of consistency with the Council’s previous approach as endorsed by its development Control Committee it is recommended that this application be refused.

4.2 The reason for refusal would be the same as that for the 24 Quadrant Grove application, namely:

**The proposed basement, by virtue of it being development involving significant excavation and engineering works necessitating the engagement of a specialist engineer, would as a matter of fact and degree, constitute an ‘engineering operation’ of a scale and complexity requiring a separate grant of planning permission and would exceed the scope of (and hence fall outside) of**

**any permitted development right outlined in the Town and Country Planning (General Permitted Development) Order 1995 as amended.**