

Date: **09/01/2015**
Your ref: **APP/X5210/X/14/3000342**
Our ref: 2014/4172/P
Contact: Obote Hope
Direct line: 020 7974 2555
Email: obote.hope@camden.gov.uk

Advice and Consultation Team
Regeneration and planning
Culture & environment directorate
London Borough of Camden
Town Hall
Argyle Street
London
WC1H 8EQ

Tel: 020 7974 2555
Fax: 020 7974 1680
planning@camden.gov.uk
www.camden.gov.uk/planning

The Planning Inspectorate
3/10a Wing
Temple Quay House
2 The Square
Bristol BS1 6PN

Dear Craig Maxwell,

Town and Country Planning Acts 1990 (as amended)
Re: Appeal by Dru Masters. 20 Mackeson Road, London NW3 2LT

I refer to the above appeal against the Council's non-determination of an application for a certificate of lawfulness (proposed) for "excavation of basement to provide ancillary room for existing single dwellinghouse". I should be grateful if you would accept this letter and attached documents as comprising the Council's statement in this respect.

The application was received as valid on 30th June 2014 and its 8 week statutory determination period expired on 25th August 2014.

The property is a single dwelling house with "permitted development rights" (PD). The excavation of a basement for which, a Lawful Development Certificate is sought, would be beneath the footprint of the existing dwellinghouse. The proposed length of the basement (front to back of house) would be no more than 4.2m; with the width (side to side of the house) a maximum of 5.3m and the overall ancillary floorspace being created would be 22.68sqm. A single internal staircase is proposed to link the existing ground floor with the proposed basement.

Numerous concerns were raised by neighbouring residents prior to the application being registered and due to the level of interest the application was publicised by site notice displayed on 4th July 2014. Letters were also sent to adjoining owners dated 3rd July 2014. The application received 46 comments of which 43 were objections, a summary of these being included in the officer's "members briefing report" attached as **appendix 1**.

The application was initially considered by officers for approval under delegated powers. Under the Council's existing procedure, applications receiving 3 or more relevant objections, are referred to the Council's "Members Briefing Panel" before they can be approved. The panel consists of a small group of Members from the Council's Development Control Committee whose function is to advise upon whether the application should be reported to the full committee. The application was therefore duly reported to the Members Briefing Panel of 8th September 2014.

The Members Briefing Report assessed the application in terms of whether the proposed basement would be lawful as defined by the criteria set out in the Town and Country Planning (General Permitted Development) (Amendment) (No2) (England) Order 2008 (“GPDO”).

It was also assessed on whether or not it constituted “development” under S55 of the TCPA 1990 which sets out the meaning of “development”. Given the nature of the proposed works the part of the GPDO that the proposed works are considered against were Class A, which involves the enlargement, improvement or other alteration of a dwellinghouse within the curtilage of a dwellinghouse.

At around the same time as the 20 Mackeson Road application, there were at least four other certificate of lawfulness applications being considered by the Council for similar basement schemes. One such application, relating to a site at 24 Quadrant Grove, had already been reported to an earlier meeting of the Panel. Residents objecting to the 24 Quadrant Grove application had obtained a legal opinion from Gwion Lewis of Landmark Chambers that the “engineering” component involved in the proposed basement extension could not be properly brought within the permitted development right bestowed by Class A when the permitted development right relied upon only considers “building operations”. Members had advised that the 24 Quadrant Grove application should be reported to the full Development Control Committee

When 24 Mackeson Road was reported to the Members Briefing Panel, the Members considered that many of the issues raised by the application were very similar to those applying to 24 Quadrant Grove. As such it was decided to postpone any decision on 24 Mackeson Road at least until the outcome from the relevant committee considering 24 Quadrant Grove was known.

For comparison, the full details of the 24 Quadrant Grove case and related opinion by Gwion Lewis are described below.

24 Quadrant Grove (2014/2070/P)

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.

The officer’s approach to the 24 Quadrant Grove application had been the same as in the case of the 20 Mackeson Road 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”

The full Gwion Lewis opinion is attached as **Appendix 2** to this statement.

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.

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

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 GPDO, 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.

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”*.

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).

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)

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.

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.”

20 Mackeson Road (the appeal scheme)

The proposed basement at 20 Mackeson Road involves an excavation of approximately 4.2m x 5.3m, which is slightly smaller than the proposal at Quadrant Grove (4.5m x 7.5m). The depth of excavation being 1.55m utilises an existing void (depth 0.96m) under the existing house and therefore is less deep than the 2.5m proposed basement at Quadrant Grove. However this is still considered by the Council to be more than *de minimis* in character, being substantial enough to have its own impacts in terms of noise, traffic movements and potential effects on ground stability or the water environment. Therefore in line with the Gwion Lewis opinion discussed in connection with the Quadrant Grove case above, it is considered that the excavation works involved to enable the basement construction would constitute an engineering operation to be considered separately from the built structure itself.

To support this view the advice of the Council’s own Building Control officers was sought who confirmed that an engineer would be required to ensure the structural integrity of adjoining properties was not endangered.

Furthermore the Council’s adopted policy (Policy DP27) on basements requires all such proposals to take into account the impacts of the basement upon the geology, hydrology and ground water of the site and the structural stability of neighbouring and retained buildings. This policy is backed up by a guidance document produced by Arup titled “Camden geological, hydro-geological, and hydrological study, guidance for subterranean development” which identifies areas of specific concern within the Borough where a full basement impact assessment is required.

The site of 20 Mackeson Road is located in one such area where the geological and physical ground conditions may give rise to land stability issues in connection with basement proposals. Related supplementary planning document CPG4 (Camden Planning Guidance 4) states that evidence will be required to show that the structural

stability of adjoining or neighbouring buildings is not put at risk. The Council will expect this work to be undertaken by a person or persons of the necessary qualifications, namely a qualified civil or structural engineer with knowledge of geotechnics and structural analysis and design (CPG4 2.11 and 2.39-2.40).

Whilst no assessment of basement impact has been submitted, nor indeed may be required for the purposes of this lawful development certificate application, the policy and its supporting background guidance does support the Council's stance that the proposed development is of an engineering operation in nature and has impacts requiring consideration via an application for planning permission.

The above policy documents are attached at **appendix 3**.

Relevant appeal decisions

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 20 Mackeson Road:

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).

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.

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.”*

These decisions, or in the case of Wycombe the relevant JPL commentary extract, are attached at **appendix 4**.

Conclusion

It is considered that there are a number of parallels between the issues relating to the 20 Mackeson Road case (i.e. the appeal scheme) 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 the Council would have refused the application for a certificate of lawfulness at 20 Mackeson Road had it still be empowered to do so.

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.

Other matters

In addition to the information sent with the questionnaire I would be pleased if the Inspector could take into account the following information as well as the comments above, before deciding the application for non-determination.

- Appendix 1 – Officer 'Members Briefing' Report
- Appendix 2 – Legal Opinion by Gwion Lewis
- Appendix 3 – LDF Policy DP27 and CPG4 (Basements & Lightwells)
- Appendix 4 – Relevant appeal decisions

On the basis of information available and having regard to the entirety of the Council's submissions, including the content of this letter, the Inspector is respectfully requested to dismiss the appeal.

If any further clarification of the appeal submissions is required please do not hesitate to contact Obote Hope on the above direct dial number or email address.

Yours sincerely

Obote Hope
Planning officer
Culture and Environment Directorate