

**Appeal Against Refusal of Certificate of
Lawfulness (Existing)**

Statement of Case

58 Doughty Street, London, WC1N 2JT

25th May 2016

LPA: London Borough of Camden

Decision Notice Ref: 2015/3880/P (16/02/2016)

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1.0 Introduction

- 1.1 This Statement of Case has been prepared on behalf of our client, Mr Roger Keeling, in support of the provision of the installation of a moveable planter in the rear garden of No. 58 Doughty Street, London WC1N 2JT (hereafter referred to as 'the site'). Site photographs are provided at Appendix 1.
- 1.2 This appeal has been submitted against the refusal of a Certificate of Lawfulness (Existing) (Ref: 2015/3880/P) which was refused by the London Borough of Camden (LBC) on 16th February 2016. A copy of the Decision Notice is provided at Appendix 2.
- 1.3 The Certificate of Lawfulness for the moveable planter was submitted by our clients' solicitors, Farrer & Co and despite the subsequent refusal of this application by LBC we consider that the provision of a moveable planter in the rear garden at the site does not constitute 'development' Under Section 55 of the Town and Country Planning Act 1990. However, we have submitted this appeal in order to seek confirmation of this view by the Planning Inspectorate.
- 1.4 The moveable planter is located in the shared rear garden and provides a degree of separation between No.58 Doughty Street and No.28 Brownlow Mews. The moveable planter enables both properties to benefit from enhanced privacy and amenity. Both properties are owned by the appellant and No.58 Doughty Street is rented out.
- 1.5 The format of the report is set out as follows:
 - Section 2 describes the site and its' context;
 - Section 3 details the relevant planning history;
 - Section 4 provides a summary of the Decision Notice;
 - Section 5 provides an assessment of the planter; and
 - Section 6 contains our conclusions.

2.0 The Site

- 2.1 No.58 Doughty Street is a four storey, plus lower ground, mid terrace Georgian Building located on the Eastern side of Doughty Street. It forms part of a Grade II listed terrace constructed during 1807-09. The property is located within the Bloomsbury Conservation Area and is rented out by the appellant.
- 2.2 The property shares a garden with No.28 Brownlow Mews which lies immediately to the east. Both properties are owned by the appellant and the moveable planter was placed between two raised planting beds to provide a degree of separation to aid privacy and amenity, which will engender the use of the garden by the occupants of both properties.
- 2.3 A further description of the site is included within the LDC Officer's Delegated Report (dated 02/09/15) by LBC, which has been submitted as part of the appeal documentation as Appendix 3. Photographs of the site and moveable planter are provided at Appendix 1.

3.0 Planning History & Background

- 3.1 In September 2012 the council issued an Enforcement Notice against a 2m high steel wire mesh support, used to support ivy planted in raised beds and a wooden planter that was subdividing the rear garden of the property. The appellant complied with this notice.
- 3.2 In consultation with LBC the appellant then erected bamboo cane and twine to hold up the ivy plants to create a screen, with the same planter box on the pathway holding up the bamboo canes. Contrary to previous advice, LBC advised that this may also be considered development and in consultation with LBC the appellant replaced the bamboo and twine, with a row of yew bushes forming a hedge. Under pressure from a neighbour LBC then advised that the wooden planter may be considered development. Again in consultation with LBC the appellant replaced the wooden planter with a planter on wheels.
- 3.3 The LDC Report by LBC is relevant with regards to the above and states:
- 'The Council did not originally consider this development but a neighbour supplied Counsel's opinion which concluded that this was in fact development and the Council changed its position. The owner removed this construction rather than be the subject of a further enforcement notice. They have now installed this 'moveable' planting box which the applicants consider is not development as defined by s.55 of the Town and Country Planning Act 1990 (T&CPA).'* Please see Appendix 4 for a copy of Counsel's Opinion (Richard Harwood QC, dated 21st July 2015).
- 3.4 The applicant then submitted a Certificate of Lawfulness for the moveable planter in July 2015, which was subsequently refused on 16th February 2016. It is this refusal which is the basis of our appeal.

4.0 The Decision Notice

- 4.1 The Decision Notice (Ref: 2015/3880/P) was issued by LBC on 16th February 2016. The Decision Notice refused the application for a Certificate of Lawfulness (Existing) for the following reason:

‘1. On the basis of the information provided the Council is not satisfied the planting box in the centre of the rear garden is not development requiring planning permission and consider, on the balance of probabilities, that the planting box is development under section 55 of the Town and Country Planning Act 1990.’

- 4.2 The Decision Notice also includes an informative and goes on to state:

‘Informative(s):

- 1. The Council is minded to issue an enforcement notice against the retention of the planting box as it adversely affects the setting of a Listed Building.’*

- 4.3 We consider that the provision of a moveable planter in the rear garden of No.58 Doughty Street does not constitute development and we have submitted this appeal on behalf of our client on this basis. This assertion is explored further in Section 5 ‘Assessment’ of this report. However, we would also like to draw the attention of the Inspector to the two letters that were sent to LBC in relation to this case by our clients’ solicitors, Farrer and Co, dated 25th September 2014 (see Appendix 5 for a copy of this letter) and 18th September 2015 (see Appendix 6 for a copy of this letter), which have been provided as part of this appeal submission.

5.0 Assessment

5.1 The council asserts that the provision of a moveable planter in the rear garden at the site constitutes development. However, we do not agree with this view. We consider that no development has been carried out which requires planning permission.

5.2 Section 55 of the Town & Country Planning Act 1990 defines the meaning of “development” and “new development” as follows:

‘(1) 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 the use of any buildings or other land.

(1A) For the purposes of this Act “building operations” includes

(a) demolition of buildings;

(b) rebuilding;

(c) structural alterations of or additions to buildings; and

(d) other operations normally undertaken by a person carrying on business as a builder.’

5.3 The council did not originally consider that a former planter at the site constituted development. However, LBC changed this view when Counsel’s Opinion (Richard Harwood QC) was provided by the adjacent occupier (No.59 Doughty Street) dated 21st July 2015. It is important to note that this Opinion was not sought by the council.

5.4 The Opinion concluded that the moveable planter was operational development either as a building operation or other operation due to its permanence. However, it is fair to conclude that whether a structure constitutes development must be considered on a case by case basis.

5.5 Key case law such as the judgements in *Cardiff Rating Authority v Guest Keen Baldwins Iron and Steel Co Limited (1949) 1 K.B. 385* and *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No.2) (2000) 2 P.L.R. 102* identified three primary factors as being relevant to the question of what was a building requiring planning permission. These are ‘size, permanence and physical attachment’ and were discussed in *Hall Hunter Partnership v First Secretary of State (2006) E.W.H.C 3482 (Admin)*. In this decision the Court ruled that agricultural polytunnels sitting on top

of stilts that penetrated one metre into the ground amounted to operational development because of their degree of attachment to the land.

- 5.6 In reaching this decision the Court was particularly swayed by the evidence that *“it took teams of ten men 45 man hours to fully erect 1 acre and 32 man hours to dismantle the same”*. Machines were also required to screw the legs into the ground and to bend length of material into arcs to create hoops. The polytunnels took over 430 hours to construct and over 300 hours to dismantle them. In comparison the planter does not require any special equipment to move it and like most gardening operations it was extremely straightforward to plant the yew bushes (which are approximately 2.5 m high) into the planter and to either side of it. In addition, there is no legal authority to support the view that the planting of a bush amounts to development.
- 5.7 With reference to *Hall Hunter Partnership v First Secretary of State (2006) E.W.H.C 3482 (Admin)* it should be noted that the moveable planter rests on four wheels, one at each corner and can be moved by one person when empty. When filled, it is realistic to assume that 3-4 people would be required to move the planter, due to the weight of the soil and bushes within it.
- 5.8 However, emptying the planter is likely to be equivalent to 1-2 hours of work and moving it with 4 people can be, and has been, done in minutes. It would not be 300-430 hours of work, as noted above in *Hall Hunter Partnership v First Secretary of State (2006) E.W.H.C 3482 (Admin)*. The work associated with moving the planter would not be considered to be *‘operations normally undertaken by a person carrying on business as a builder.’* Furthermore, the moveable planter is similar in size to many planters or large flower boxes found in gardens across the country, being only 1.27 m in length, 80 cm wide and 72 cm high (see Appendix 7 – Plans of the Moveable Planter).
- 5.9 Furthermore, we would like to add that the provision of a moveable planter does not change the physical characteristics of the land and is not an unexpected piece of apparatus to be found in a garden. The only unusual aspect of the moveable planter is that it is more easily moved than planters normally are.
- 5.10 With reference to determining the materiality of effect on external appearance the decisions of Inspectors in appeal cases and the judgements made by the courts over the years has given rise to some definition of the relevant factors against which to assess whether works impact sufficiently upon the external appearance of a building to be judged as having material effect.

5.11 The leading court case on this subject is *Burroughs Day v Bristol City Council* (1996) and is often cited in considerations of material effect on external appearance. The court held that changes in external appearance had to be judged in relation to the building as a whole in order to determine the materiality of their effect. Here it was also stated that any change to external appearance must be visible from a number of normal vantage points and that visibility from the air or a single building would not suffice. Thus part of the test for “*material effect*” must depend on the degree of visibility. In the *Burroughs Day* case the works involved the creation of lift shaft housing and alterations to roof and window. The court considered that while these works affected the appearance of the building, the building was not “*materially*” affected thereby. The works were not visible from any street or from any window, except from the top two floors of an office building or from the air. There was no development.

5.12 In summary, the judgement listed factors to be taken into account in deciding that alterations to a building were material. It must be seen from outside the building; roof alterations must be seen from the ground or from within a neighbouring building; the degree of visibility must be material and materiality must take into account the nature of the building and be judged in relation to the building as a whole. With this in mind, we consider that the following points are of relevance in this instance:

- The moveable planter and the plants it contains cannot be seen from outside Doughty Street or Brownlow Mews;
- The planter is only visible from the upper floors (above ground) of immediately adjacent properties, due to the height of the garden wall and its surmounting fence (so it is not visible when the occupants of No.59 Doughty Street are in the garden);
- The metal moveable planter is brown in colour and its materiality and colour is sympathetic to the garden and does not stand out or detract from the properties;
- Judged in relation to the building as a whole (No.58 Doughty Street), which is substantial, we do not consider that the degree of visibility of the moveable planter is such that it would constitute development.

5.13 We also consider that the moveable planter should be judged as it is, as planning permission is clearly not required for plants, bushes or soil, which may be visible from adjacent properties. We would also like to highlight that the bushes in the planter are only 2.5 metres in height and are not considered to be ‘trees’.

5.14 Furthermore, we do not consider that the works constitute development as noted in Section 55 of the Town and Country Planning Act and we do not consider that the

insertion, movement or removal of the moveable planter would be unduly time consuming or difficult and would certainly not require a builder to undertake such actions.

- 5.15 With regards to the size, permanence and physical attachment considerations or tests, which were discussed in *Hall Hunter Partnership v First Secretary of State (2006) E.W.H.C 3482 (Admin)* we consider that the moveable planter is not significant and is not larger than many planting boxes in gardens across the country, especially given that the context of the garden at the property is of a decent size.
- 5.16 The moveable planter (and earlier iterations of the planter) have been moved, changed or replaced over the past few years. Furthermore, if the owner ever sold the property it would be expected that the moveable planter would be either taken and retained by the current owner or would be disposed of, given that it is not physically attached to the ground or the walls.
- 5.17 With reference to 'physical attachment' the moveable planter is on four wheels, which form part of the planter box and it is not physically attached to the ground or any adjoining walls. It is also comparable to many other planters in terms of general size, which can be found in garden centres across the UK. Examples of other planters are provided at Appendix 8- 'Comparable Planters'. None of the adverts or legal disclaimers associated with these products appear to indicate that planning permission is required for these items.
- 5.18 The delegated Officer's Report refers to the '*Beronstone case*' where the installation of small wooden stakes to mark out plots constituted development which required planning permission. However, the delegated report does not highlight that the case involved the erection of 554 wooden stakes, which is a significant number and was a factor in the determination. The appellant has only provided one planter in this instance and we do not consider that this case is relevant in this instance. Additionally, the proposals comprise plants and bushes in a planting box in a garden. If the moveable planter was judged to be 'development' we consider that it would set a dangerous precedent.
- 5.19 Furthermore, it is generally considered that caravans do not require planning permission even if they are located in the driveways of homes for a relatively long period of time without movement. Additionally, if the movable planter requires planning permission it would suggest that any cars, which are located on driveways and are not moved (perhaps because it is a restoration project or an old vehicle that has been left to decay by the owner for a prolonged period of time) would also require planning permission, which does not seem to be a logical conclusion given the fact that caravans do not normally require planning permission or constitute development.

5.20 The Officer's Delegated Refusal Report for the Certificate of Lawfulness application refers to a neighbouring planning application which was dismissed at appeal. The works proposed included a proposal to add fenestration to the rear elevation (along with a host of other works). The delegated report states:

'An appeal against this refusal at 30 Brownlow Mews was dismissed with the Inspector commenting; '...the sharing or subdivision of the existing garden would blur that relationship and suggest that the former service building has a more equal status with the main dwelling'. As the properties are listed, planning permission is required to erect walls and fences that are usually permitted development for other households.'

5.21 Although the quote is correct, we consider that it should be noted that the extent of the proposed separation of the garden at No.30 Brownlow Mews appeared to constitute a permanent structure and were clearly building operations, which permanently sought to separate the gardens. Furthermore, paragraphs 8-9 of the appeal decision are relevant and state:

' 8. The rear wall of No.30 Brownlow Mews facing into this garden is currently devoid of windows or doors. It seems to me that this is an important representation of the original functional relationship between the main house (originally No.60 Doughty Street) and its service quarters (No.30). Clearly, it was not intended to provide a view or access into the garden from No.30 and this reflected the status of the two buildings in relation to each other. While it has changed over time, the vestige of this relationship, it seems to me, is an integral part of the setting of the terrace and the character of the conservation area. The introduction of a large, glazed opening, with a door, and the sharing or subdivision of the existing garden (the plans are not entirely clear as to the intention) would blur that relationship and suggest that the former service building has a more equal status with the main dwelling.

9. On top of that, the planning application form suggests that the fenestration proposed to the rear would be framed in aluminium. Notwithstanding other modern additions to the rear of No.61, I take the view that the use of a material of this type would be an unsuitable and alien addition in the context of the rather traditional appearance of No.30.'

- 5.22 It is clear that the proposed works at No.30 Brownlow Mews was dismissed for a wide range of reasons and that the proposed permanent separation of the garden, which is not relevant in this instance, was merely one of many reasons why the Planning Inspector dismissed the appeal. Therefore, we would like to highlight that this example is not relevant and is certainly not conclusive when read in full context. A copy of the Appeal Decision for No.30 Brownlow Mews is provided at Appendix 9.
- 5.23 Additionally, the Officer's Delegated Refusal Report notes that the applicant states that the planter does not require special equipment to install and it is straightforward to fill with earth. We would like to highlight that it is equally simple and straightforward to empty it and does not take much time to do so (e.g. 1-2 hours at most).
- 5.24 Furthermore, the Officer's Delegated Refusal Report considers that the planter should be assessed when full, with soil and bushes. However, as soil and bushes do not require planning permission, we do not consider that the moveable planter should be assessed when filled with earth and bushes.

6.0 Conclusions

- 6.1 In conclusion, we consider that the provision of the moveable planter at the site does not constitute development. The planter is of a similar size to other planters which are commonplace and it is easily moveable by one person when empty. Even when filled, it can be moved by 3-4 people in a relatively short period of time.
- 6.2 The moveable planter did not require the services of a builder to install it and is not visible from the exterior street views of either No.58 Doughty Street or No.28 Brownlow Mews. Should the appellant ever sell the property it would be expected that the moveable planter would be taken or disposed of as it is not physically fixed to the ground or surrounding garden walls.
- 6.3 LBC originally considered that the planter did not constitute development and we consider that this initial conclusion was correct. However, LBC have altered this view in light of the Counsel's Opinion provided by the adjacent occupier at No.59 Doughty Street. Irrespective of this, we consider that each case is considered on its own merits and that in this instance the provision of a moveable planter does not constitute development.