

LDC Report	02/09/2015
Officer	Application Number
Gary Bakall	2015/3880/P
Application Address	Recommendation
58 Doughty Street London WC1N 2JT	Refuse and warn of enforcement action.
1st Signature	2nd Signature (if refusal)
Proposal	
Installation of movable planter in rear garden	
Assessment	
<p>58 Doughty Street is a four storey, plus lower ground, mid terrace Georgian Building on the west side of Doughty Street (the Property). The Property forms part of a Grade II listed terrace constructed during 1807-9. The Property is in residential use and lies within the Bloomsbury Conservation Area.</p> <p>This application concerns a large planting box in the rear garden that effectively subdivides the rear garden in half between this Property and 28 Brownlow Mews, which at one time was a stables for the Property but is now a separate residential dwelling with its main frontage on Brownlow Mews; 28 Brownlow Mews has no windows on its rear elevation but has a rear door that opens onto the garden of 58 Doughty Street. 28 Brownlow Mews and 58 Doughty Street are in the same ownership but 58 Doughty Street is rented out. The garden has two raised beds behind low brick walls in the centre of the garden with a garden path running between them and the subdivision of the garden occurs here.</p> <p>Consent has been refused at both 28 Brownlow Mews and neighbouring 30 Brownlow Mews (which backs onto neighbouring 60 Doughty Street) to add fenestration to the rear elevation because it would be considered detrimental to the setting of the adjacent listed buildings. An appeal against this refusal at 30 Brownlow Mews was dismissed with the Inspector commenting; <i>'....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.'</i> As the properties are listed, planning permission is required to erect walls and fences that are usually permitted development for other householders.</p> <p>In September 2012 the Council issued an Enforcement Notice against a 2m high steel mesh fence that was subdividing the rear garden of the Property. An appeal against this enforcement notice was dismissed. The applicant then erected a bamboo cane and twine fence to hold up ivy plants to create a screen, with a smaller planter box on the pathway holding up the bamboo canes. 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</p>	

its position. The owner removed this construction rather than be the subject of a further enforcement notice. They have now installed this 'movable' planting box which the applicants consider is not development as defined by s.55 of the Town & Country Planning Act 1990 (T&CPA). Section 55 provides as follows:

55 Meaning of "development" and "new development".

(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.

[F1(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.]

The planting box is 1270mm wide, 800mm deep and 721mm high and has four caster wheels that allow it to be moved. It has been designed to fit in the pathway between the two raised beds in the middle of the garden. It has been viewed on site where it has been filled with earth and contains three yew bushes. Filled with earth the planting box weighs about a ton and cannot be moved by one person.

The yew bushes and planting in general is not development and does not require consent from the Council. The matter under consideration is whether the planting box is considered development requiring planning permission;

Applicant's Evidence

The applicant has submitted a site location plan, drawings of the planter box, photographs showing the empty planter box being moved into position, its wheels and written justification dated 25/09/2014 and 18/09/2015 from Messrs Farrer & Co, that relies on the interpretation of development contained above and relevant case law, this is summarised below;

- The planter is not fixed to the ground and can be moved;
- *Cardiff Ratings Authority v Guest Keen Baldwins Iron & Steel Co. Ltd.* (1949) and *Skerritts of Nottingham Ltd. V Secretary of State for the Environment, Transport in the Regions* (2009) identifies three primary factors as being relevant to the question of what requires planning permission: size, permanence and physical attachment;
- *Hall Hunter Partnership v First Secretary of State* (2006) discusses these three factors and it was found that agricultural polytunnels sitting on stilts that penetrated 1metre into the ground was operational development because of the degree of attachment to the land and because they took 430 hours to erect and 300 hours to dismantle;
- That when enforcement action was taken previously (Ref: EN11/1123) against the subdivision of the garden by a steel mesh fence there was a planting box forming part of the fence and that as this was not part of the enforcement notice against the steel mesh fence the planting box was under enforced as section 173 (11) allows and planning permission was granted for the planter box by virtue of section 73A

Council's Evidence

Advice has been provided by Richard Harwood QC on the planning law surrounding the previous subdivision and the current planting box and include;

- *Parkes v Sec. of State for the Environment* (1978) –Operational development comprises activities which result in some physical alteration to the land, which have some degree of permanence;
- *Beronstone Ltd. V First Sec. of State* (2006) – Where the erection of hundreds of wooden stakes to mark out plots of land and access ways amounted to “other” operations;
- *Save Wooley Valley Action Group Ltd. V Bath and North East Somerset Council* (2012) - where the construction or installation of poultry units could have been other operations if it had not been within building operations. The poultry units were moved periodically around their paddocks;
- “Building” must be considered in its wide definition in the T&CPA as including any structure or erection of any part of a building, which is defined by three factors: size, nature and degree of attachment and the degree of permanence;
- *Skerritts* (see above) defined permanence as, ‘a sufficient length of time to be of significance in the planning context’;
- *Islam v Sec. of State for Communities and Local Government* (2012) – where the setting up of umbrellas and side panels to create a marquee type structure in the rear garden of a shisha lounge was a building operation;
- *R. v Swansea City ex p Elitestone* (1993) - An object may be a building in planning law without being incorporated into the land, as part of the realty;
- Considerable evidence including case law discussing on whether an object has become part of land or when chattels have become fixtures;

Assessment

National Planning Policy Guidance provides that the applicant is responsible for providing sufficient information to support the application (see Para 006 within Lawful Development Certificates). Combined with (the cancelled but useful) DOE Circular 10/97, Enforcing Planning Control: Legislative Provisions and Procedural Requirements, Annex 8, para 8.12, the burden of proof in applications for a Certificate of Lawfulness is firmly with the applicant. The relevant test is the “balance of probability”. 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 Council does not consider that the current planter is lawful by virtue of s173(11) – under enforcement; (11)Where—

(a)an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so; and

(b)all the requirements of the notice have been complied with,

then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.

The enforcement notice dated 21st September 2012 (Ref: EN11/1123) defined the breach of planning control as; ‘The erection of a 2 metre high steel mesh subdividing the rear garden of a

listed building;' and required; 'Within a period of one month of the notice taking effect the steel mesh fence shall be permanently removed from site.' A smaller wooden planter box was positioned between the raised beds and was used to help hold up the steel mesh fence in place when the notice was issued but as it was not recognised in the enforcement notice as part of the breach it did not fall under this provision at the time and certainly does not preclude the Council taking action against any other type of planting box (particularly such a different planting box) in the future.

The applicants argue that the metal planter is not fixed to the ground and when empty is easily movable due to the wheels and should not be assessed when filled with earth and plants as these are not development requiring planning permission; they argue that like many other such garden structures planning permission is not required. However no case law to support the assumption that the planter should be assessed empty is produced. The Council considers that the planter was designed to be filled with earth and as that is the reality of the situation we must assess the planter as it is, filled with earth and in its current location.

The *Skerritts* case recognises three primary factors as being relevant: size, permanence and physical attachment to the land; the size of the planter is not so small as not to be development, In *Beronstone* the installation of small wooden stakes to mark out plots was development requiring planning permission; it is permanent in the sense that it will be there as a physical barrier separating the garden for a significant time, apparently at least for a number of years while the main house is let; although not technically physically attached to the ground the planter cannot really be moved when filled with earth despite its wheels because of its sheer weight, it would take at least four men to drag the fully loaded planter despite its wheels, in any case *Save Wooley Farm Action Group* is authority that large poultry units that were periodically moved around their paddock were buildings.

The applicants refer to *Hall Hunter Partnerships* in which the Court considered the above three points when it found that agricultural poly tunnels sitting on top of stilts was in fact development because of the degree of attachment. In this case it took 430 hours to construct an acre of tunnels and 300 hours to dismantle them. The applicant states that in comparison the planter does not require special equipment to install and it is straightforward to fill with earth. However this is relying on considering the planter empty when it is being moved and, despite the differences, the Court did find the polytunnels development.

In conclusion the Council considers that the planter box is operational development requiring planning permission as defined by s55 of T&CPA taking into account size, degree of permanence and physical attachment to the ground and as such this Certificate of Lawfulness should be refused.

The information provided by the applicant is deemed not to be sufficiently precise and unambiguous to demonstrate that 'on the balance of probability' the metal planter box is not development requiring planning permission. Furthermore, the Council's evidence contradicts and undermines the applicant's version of events.

Recommendation: Refuse and Enforce

