

**CERTIFICATE OF LAWFULNESS  
APPLICATION FOR  
EXISTING USE  
OR DEVELOPMENT  
(CLUED)**

**Foley House Treehouse 11 East Heath Road NW3 1DA**

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## SECTION 1 INTRODUCTION

- 1.1 Leith Planning Limited were instructed in September 2017 to review the planning title of Foley Treehouse and ensure that it is fit for purpose. This application for a Certificate of Lawfulness of Existing Development simply regularises a number of minor amendments to the approved drawings which came to light in carrying out repair/maintenance works.
- 1.2 Foley Tree House was approved on 31<sup>st</sup> March 2010 (Application Reference 2009/2777/P). The description of development reads as follows:

“Erection of a two storey ancillary building for works/studio space in connection with the main dwelling following the demolition of the existing garage.”
- 1.3 A copy of the Decision Notice and signed Section 106 Agreement has been included within the Schedule of Supporting Documents (Evidence Document 1). A copy of the Approved drawings are included at Evidence Document 2.
- 1.4 A detailed survey of the Treehouse was undertaken in August 2017 with a view to undertaking repair/maintenance works. In completing the survey and comparing the survey with the approved plans, it has come to light that a number of minor alterations were made during the construction of the Treehouse. These minor amendments are as follows:
  - a) The Treehouse has been constructed 200mm wider and 250mm higher than the approved plans.
  - b) Creation of a ground floor terrace of 24 square metres
  - c) One roof light was approved in 2009; however, the Treehouse has been constructed with 2 roof lights in different positions
  - d) Creation of a basement storage room. GIA 26 square metres
  - e) East elevation: window location on 1st floor different; ground floor window approved as normal casement window but installed as folding door.
  - f) West elevation: narrow window approved on ground floor but installed on 1st floor
  - g) South elevation: casement window approved but sliding door installed leading to Juliette balcony which has not been approved.
- 1.5 This application for a Certificate of Lawfulness seeks to regularise operational works associated with the Treehouse as detailed within this submission and evidenced in the supporting documentation.
- 1.6 There has been no attempt to conceal the works. The Council Officers were invited on site to inspect the works and to certify that they were complete as part of the Building Regulations Application. Subsequently, the Completion Certificate was issued on 2<sup>nd</sup> February 2012. The Appellants conduct did not amount to deliberate deceit or concealment, in fact he was open and

transparent in all of his dealings with the Council and as such, should be entitled to a certificate.

- 1.7 It is evident from the supporting documentation that the works associated with the construction of the Treehouse were completed in February 2012, more than four years ago, and as such, we would ask that Officer's issue a Certificate for Lawfulness for the Treehouse.

## SECTION 2 PLANNING HISTORY

- 2.1 An application was approved on 31<sup>st</sup> March 2010 for the erection of a two storey ancillary building for works/studio space in connection with the main dwelling following the demolition of the existing garage (Application Reference 2009/2777P).
- 2.2 The approved drawings are detailed on the Decision Notice but they do not form part of the three conditions.
- 2.3 There are three Conditions attached to the above Grant of Consent which read as follows:

*Condition 1: The development hereby permitted must be begun not later than the end of three years from the date of this permission.*

- 2.4 The evidence submitted in support of this application for Certificate of Lawfulness confirms that works were completed by February 2012. We would draw particular attention to the Certificate of Completion of Works issued by Camden Council dated 2<sup>nd</sup> February 2012 (Evidence Document 4). As such, the works associated with the construction of the Treehouse were completed in accordance with Condition 1.

*Condition 2: A sample panel of all external materials shall be provided on site and approved by the Council before the relevant parts of the works are commenced and the development shall be carried out in accordance with the approval given. The sample panel shall be retained on site until the work has been completed.*

- 2.5 Included at Evidence Document 3 is Decision Notice Reference 2010/5249/P which approved the discharge of Condition 2 detailed above. All building works have been completed in accordance with the materials approved in writing with the Council. As such, the works associated with the construction of the Treehouse were completed in accordance with Condition 2.

*Condition 3: The ancillary building hereby approved shall be used only for the purposes incidental to the residential use and shall not be used as a separate independent Class C3 dwelling or Class B1 business unit.*

- 2.6 The Treehouse provides ancillary accommodation to the main dwelling, Foley House. The Treehouse provides ancillary storage, a gym and informal recreation room. For the avoidance of doubt, the Treehouse is used wholly in accordance with Condition 3.
- 2.7 The Treehouse was constructed on site with works completed by February 2012, a copy of the Certificate of Completion of Works dated 2<sup>nd</sup> February 2012 issued by Croydon Council is included at Evidence Document 4.

### **SECTION 3                      SUPPORTING DOCUMENTATION**

- 3.1 This application is supported by comprehensive documentation that evidence the construction of Foley Treehouse which was substantially completed by 2<sup>nd</sup> February 2012.
- 3.2 The demolition of the former garage and the erection of Foley Treehouse as ancillary accommodation to the main house was approved on 31<sup>st</sup> March 2010 (see Evidence Document 1). Copies of the approved plans are included in Evidence Document 2.
- 3.3 As set out in Section 2 above, the development has been constructed wholly in accordance with the Conditions attached to the Grant of Consent, a copy of the Discharge of Condition 2 is included at Evidence Document 3.
- 3.4 The works were substantially completed by 2<sup>nd</sup> February 2012, a copy of the Certificate of Completion of Works issued by the Council is included at Evidence Document 4.
- 3.5 In August 2017 a measured survey was undertaken on site in preparation of undertaking some maintenance/repair works, a copy of the measured survey drawings are included at Evidence Document 5.
- 3.6 Included at Evidence Document 6 are a number of signed Statutory Declarations prepared by the Applicant's and the Builder (Barry Liles, Buildline Construction Limited) confirming that the Treehouse was completed on site by February 2012.
- 3.7 Included at Evidence Documents 7 to 9 are invoices relating to the Treehouse including connectivity of the Treehouse for gas and electric and the installations of the foundations.
- 3.8 Included at Evidence Document 10 are a number of invoices between 20<sup>th</sup> April 2010 and 30<sup>th</sup> November 2011 from the builder, project manager, interior designer and plumbers. Evidence Document 10.21 includes an invoice dated 21<sup>st</sup> September 2012 for the installation of a TV in the Treehouse.
- 3.9 Also included at Evidence Document 11 is a letter dated 21<sup>st</sup> October 2011 confirming that the Treehouse had been added to the Insurance of the Applicant.
- 3.10 It is evident that Foley Treehouse was completed by 2<sup>nd</sup> February 2012 as evidenced by the above supporting documents. The Treehouse has been constructed for more than four years (February 2012 to December 2017 – over 5.5 years) and as such, it is reasonable to conclude that the building is lawful.

## SECTION 4 CERTIFICATES OF LAWFULNESS

### S191 of the Town and Country Planning act 1990

- 4.1 S191 Certificate of lawfulness of existing use or development reads as follows (CLEUD):

*(1) If any person wishes to ascertain whether—  
(a) any existing use of buildings or other land is lawful;  
(b) **any operations which have been carried out in, on, over or under land are lawful**; or  
(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.*

- 4.2 There is no obligation on a landowner to make an application under either s.191 or s.192; the matter is entirely at his discretion. If the landowner has complete confidence in his planning title then he should supply all the relevant information, if requested, in the form of statutory declarations submitted to the local planning authority showing that the construction works is lawful by virtue of immunity.

- 4.3 It is stated within the Planning Practice Guidance that ‘a local planning authority always needs to co-operate with an applicant who is seeking information that the local authority may hold about the planning status of land’. Furthermore:

*“In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant’s version of events less than probable, there is no good reason to refuse the application, provided the applicant’s evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.*

### **Lawfulness certificates: onus of proof.**

- 4.4 It is understood that the onus of proof in a certificate of lawfulness application is on the applicant. The standard of proof in respect of a certificate is on the *balance of probability*. Paragraph 8.15 of Annex B to Circular 10/97 indicates that the Secretary of State in any appeal will apply that standard. Furthermore, it was held in *F. W. Gabbittas v Secretary of State and Newham London Borough Council* [1985] J.P.L 630 that an applicant’s own evidence is not required to be corroborated by independent evidence in order to be accepted. Further, if the local planning authority or an Inspector have no evidence of their own or from third parties to contradict or otherwise dispute the applicant’s version of events, rendering them less than probable, then there is no good reason to refuse the application, provided the applicant’s evidence alone is sufficiently precise and unambiguous to justify the grant of the certificate on the balance of probability. If, however there are



contradictions in the applicant's evidence on material issues, then the local planning authority would be entitled to refuse the certificate. Further, the local planning authority is entitled to treat hearsay evidence with caution if it is entirely uncorroborated.

- 4.5 In this case it is considered that the evidential documentation submitted in support of the construction of Foley Treehouse, detailed at Section 3 above, is conclusive.

#### **Need for precision in certificates**

- 4.6 There is nothing in Section 191 of the Act to suggest that in issuing a certificate of lawfulness a local planning authority may attach conditions. It follows that someone who commenced a use in breach of planning control and escapes enforcement action for the time limit period could be in a better position than one who applied for planning permission to which conditions were attached. This problem is addressed in paragraph 8.16 of Annex B to Circular 10/97:

"...it will be important for it [the certificate] to state the limits of the use at a particular date. These details will not be equivalent to a planning condition or limitation. There will be a point of reference specifying what was lawful at a particular date against which any subsequent change may be measured. If the use subsequently intensifies or changes in some way to the point where a 'material' change of use takes place the [local planning authority] may then take enforcement action against that subsequent breach of planning control (which a less precise certificate might well preclude)."

- 4.7 Thus the words of the certificate are more appropriately considered as defining what may lawfully take place on site, much as the description of the grant in a planning permission does. Paragraph 8.17-8.21 of Annex B warn that if future problems in interpretation are to be avoided, the description in the certificate must be more than a mere title or label, particularly if a *sui generis* use is involved.

- 4.8 The wording of the Certificate (in accordance with the Description of Development for the original Grant of Consent) as outlined in Section 1 of this statement is considered to be accurate and reflective of the development known as Foley Treehouse which was completed on site by 2<sup>nd</sup> February 2012. The description is clear, concise and unambiguous, and as such is felt to be an acceptable wording. Building works were completed on site by 2<sup>nd</sup> February 2012 and Foley Treehouse has been used as ancillary accommodation to the main house since, over the last five and a half years (2<sup>nd</sup> February 2012 to December 2017).

#### **Certification process under Section 191: obligation to apply**

- 4.9 There is no obligation on a landowner to make an application under either s.191 or S.192; the matter is entirely at his discretion.
- 4.10 If the landowner has complete confidence in his planning title then he should supply the relevant information, if requested, in the form of statutory



declarations submitted to the local planning authority, showing that the construction works or use in question is lawful by virtue of immunity.

- 4.11 As detailed above and within this supporting documentation, in this case it is considered that the evidential documentation submitted in support of the construction of Foley Treehouse, detailed at Section 3 above, is conclusive.

## SECTION 5 IMMUNITY

- 5.1 The most usual cases of an application for a certificate of lawful use and development is that the development in question, be it operational development or a change of use, is immune from enforcement action.
- 5.2 Under s.171B of the 1990 Act, time limit periods are prescribed within which enforcement action may be taken, after which immunity arises. Generally, in respect of uses of land, as from July 1992, the former period from January 1, 1984 is replaced by a “rolling forward” 10-year period; in respect of operational development a four-year rule applies. Immunity may also arise by virtue of *estoppel*. The periods, in brief, are:
1. Operational development – four years beginning with the date on which the operations were substantially completed;
  2. Change of use of any building to use as single dwelling-house – four years beginning with the date of breach;
  3. Any other breach (including unauthorised material change of use and breaches of condition) – 10 years beginning with the date of breach.
- 5.3 In *Newbury DC v Secretary of State for the Environment and Mallaburn* [1995] J.P.L. 329 the operational development concerned was the construction of a tennis court; the alleged change of use in the enforcement notice was the use of land as a tennis court. Applying the four-year rule, no enforcement notice could require the removal of the tennis court; unlike the *Murfitt* case it is not a development ancillary to change of use but operational development in its own right. To hold otherwise would, in effect, extend the four-year rule in respect of operational development to 10 years.
- 5.4 As detailed at Section 2 above, no breach of condition has occurred and the use of the building is operating in accordance with Condition 3. As such, this application for a Certificate of Lawfulness simply seeks to regularise the operational development completed on site.

### Time limits – four year rule

- 5.5 The four-year rule is inter alia relevant to operational development; the four years begins with the date on which the operations were substantially completed; in the case of a change of use of any building to a use as a single dwelling-house, the four year period begins with the date of the breach.
- 5.6 It was held in *Newland v Secretary of State for the Communities and Local Government*, December 22, 2008 Case No. PR82461, CO/9687/2007, that an Inspector had properly found that a site was a single planning unit consisting of a dwelling-house with ancillary garden and paddock. Thus the whole unit would be characterised as a dwelling-house, the garden and paddock being ancillary and therefore not a separate use on their own. The four year rule would apply to the entire unit dwellinghouse and ancillary garden and paddock.

## **SECTION 6                      CONCLUSION**

- 6.1      On the balance of probability, and on the basis of the significant evidence lodged with the Certificate, the operational development to create Foley Treehouse has been in place for in excess of five years from the date of this application and as such is lawful; therefore, we would ask that a Certificate simply replicate the earlier Grant of Consent albeit amended with the drawings detailed below:

“Erection of a two-storey building known as Foley Treehouse for a works/studio space associated with Foley House in accordance with the following as built drawings, namely:

- |                                  |                           |
|----------------------------------|---------------------------|
| • Drawing Number LXA-1367-020-EX | Floor Plans – Survey 2017 |
| • Drawing Number LXA-1367-021-EX | Elevations – Survey 2017  |
| • Drawing Number LXA-1367-0220EX | Sections – Survey 2017”   |