

16 January 2019

Planning Department  
London Borough of Camden

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Dear Sirs

**Planning Advice: 3 Fitzroy Square, Fitzrovia, London**

**Lawful Development Certificate Application: 2018/4683/P**

We are instructed to respond, on behalf of the applicant, to two letters of objection submitted by Trinity Planning on behalf of the owners of 2 Fitzroy Square.

Trinity Planning have submitted two separate letters of objection dated November 2018 and December 2018 and we comment on the content of the letters below.

**1. November 2018 letter (the "First Letter")**

- 1.1. The First Letter was submitted by Trinity Planning following the submission of the Application and prior to the submission of the additional evidence submitted in December 2018. A number of the points raised are dealt with by the submission of the additional evidence and are commented on at paragraph 2 of this letter.
- 1.2. The First Letter refers to objections previously submitted in relation to the original applications 2011/4445/P and 2011/4485/L (the "Permissions") such objections are not relevant to applications of this nature. The current application is a legal argument to determine whether, on the balance of probabilities, the works carried out to implement the Permissions were carried out prior to the expiry of the Permissions. The current application is not concerned with planning merits.
- 1.3. Paragraph 1.5 of the First Letter provides that the "very submission of this LDC application now confirms the Council continues to not accept the planning applications were "lawfully implemented" prior to the expiry". This statement is incorrect. The application was submitted by our client to seek confirmation that the works carried out to implement the Permissions were carried out lawfully. Our client is a responsible property owner and in submitting this application is seeking confirmation from the Council that they can continue with the development, as permitted. The Council did not request that the application was made and it is incorrect to say that the Council do not accept that the Permissions were lawfully implemented at this stage.
- 1.4. The letter goes on to provide that the application, as submitted, does not demonstrate that "authorised development" took place prior to 29 February 2015, providing that the application largely relies on the photographs submitted. The photographs show the excavation works that took place and a separate photograph shows the date that the photograph was taken. The Council have accepted that the

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photograph was taken on 13 February 2015 at 9.05am. A date prior to the expiry of the Permissions. In an application of this nature photographs showing the works are reliable evidence.

- 1.5. The dates referred to at paragraph 2.2 of the First Letter are incorrect and should refer to 2015. The Council have not raised concerns regarding the timing for submission or the content of the response to the PCN and it should be noted that the applicant in the current application was not the owner of the property at the time the PCN response was submitted to the Council.
- 1.6. The additional points raised in the letter relate to the works and the location and significance within the permitted development. These points have been covered by the submission of additional evidence. We comment on Trinity Planning's representations on the additional evidence, below.

## **2. December 2018 letters (the "Second Letter")**

- 2.1. The Second Letter (which was submitted as two separate pieces of correspondence) also makes reference to the incorrect year in paragraphs 2.1-2.3 (in the first of the letters submitted in December) when referring to the timeline for various site visits and correspondence. The works carried out to implement the Permissions required planning and listed building consent and form part of the development permitted. The fact that the Council issued a PCN following their visit to the property in 2015 indicates that it was of the view that the works amounting to development had been carried out. The response to that PCN resulted in no further action being taken by the Council. Whilst it may not be sufficient to indicate that the Council accepted that the works were carried out lawfully, the lack of any further action does suggest that the Council considered the works to be lawful. This application is submitted to obtain a definitive response from the Council on that point.
- 2.2. The Second Letter further provides that the First Letter demonstrated the failure of the current application. Again, this point is disputed, neither the First Letter or the Second Letter provide any additional evidence to rebut the evidence put forward in the application. Instead, the Second Letter simply states that the additional evidence provided "simply reinforces the conclusion that development commenced after the permission expiry date".

The letter from AJA Brothers Limited dated 3 December 2018 provides confirmation that the works were carried out on 12 February 2015 which accords with the date of the photograph submitted. The letter confirms that AJA Brothers "attended site to begin works for the excavation of foundations" again this accords with the photographs.

- 2.3. The sub-contractor's invoice corroborates the date that the works were carried out. In relation to the comments about credibility these are completely unfounded. The evidence that has been provided is sufficient to demonstrate that the instructions to carry out the works and the works themselves were carried out prior to the expiry of the permissions. The importance of the dates for the purposes of this application require that we are able to demonstrate that works took place prior to the expiry of the Permissions and the evidence provided demonstrates this
- 2.4. The four additional drawings were requested by the Council to show the location of the works within the development. The drawings were submitted with a letter from our client's architect explaining the works locations and their purpose in the development.

## **3. Determination of the LDC**

- 3.1. For the purposes of the Town and Country Planning Act 1990 (the "Act") development is defined in section 55 as "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 land".

3.2. The Permissions required development to have commenced on or before 29 February 2015. Section 56 (2) provides that development shall be taken to be begun when a 'material operation' is carried out. A 'material operation' is defined in Section 56 (4) and for the purposes of this application sub paragraphs (a) to (c) apply and provides as follows:

- (a) any work of construction in the course of the erection of a building
- (b) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b)
- (c) the digging of a trench which is to contain the foundations, or part of the foundations, of a building

3.3. In the case of *High Peak Borough Council v Secretary of State for Environment* [1981] J.P.L. 366 the digging of a trench was sufficient to keep a permission alive even though the intention was not to proceed with the whole development immediately and the trench was subsequently backfilled.

In the case of *Thayer v Secretary of State for Environment* [1992] J.P.L. 264 the Court of Appeal held that the question to consider is whether or not the works undertaken were referable to the planning permission, in the *Thayer* case works to an access had been started but the works carried out were half the size of the access permitted. In the current application we have demonstrated through the evidence provided that the works relate to the Permissions and their location and role within the development has also been explained.

In the case of *Malvern Hills District Council v The Secretary of State for the Environment* (1983) 46 P & CR 58 the pegging out of the line of the road was an "unequivocal manifestation of the intention of the builders to begin development within the permitted time". The evidence submitted as part of this application clearly shows that the works were commenced prior to the expiry of the Permissions.

It is clear from these cases that the level of works required to implement a planning permission can be minimal and provided that they constitute a material operation the actual works required can be de minimis.

3.4. The legal test to be applied by the Council when determining this application is on the balance of probabilities. The works carried out to implement the Permissions are "material operations" as defined by the Act. The legislation and case law should leave the Council in no doubt that the works undertaken are "material operations". The second question for the Council to consider is the date on which those material operations took place. Photographic evidence has been submitted and that evidence has been provided with electronic dating. Additional evidence has also been provided, however, based on the photographic evidence alone, it is an undisputable fact that the works in question did take place before the expiry of the Permissions.

On the basis of the facts and the law, the Council must reach the conclusion that the works undertaken were material operations as permitted by the Permissions and that they were carried out before the expiry date for the Permissions.

Yours faithfully

**Ashfords LLP**