

Development Management
Planning and Transport
Regeneration and Neighbourhoods
Southwark Council
PO BOX 64529
London, SE1P 5LX

Our ref: MM-3307

01 December 2023

Dear Sir /Madam

2-4 Melior Place, London, SE1 3SZ
Application for a Lawful Development Certificate.

We enclose on behalf of our client, Moritz Melior Street GmbH & CoGK, an application under S.191 of the TCPA [as substituted by the Planning and Compensation Act 1991, s. 10(1)], for a certificate of lawfulness in respect of the site at 2-4 Melior Place, London, SE1 3SZ. This application seeks to confirm that operational development has been lawfully implemented under planning permission ref: 18/AP/3229, and thus that the approval remains extant and can be completed in accordance with the approved details.

Application documentation

This covering letter is provided in support of an application for a certificate of Lawfulness of Existing Use or Development (CLEUD) pursuant to section 191(1)(b) of the Town and Country Planning Act 1990 (the "TCPA"), together with the following:

- Completed application forms and ownership certificates
- Site Location Plan ref: 1511-P-001
- Statutory declaration of Michael Wurzel
- Statutory declaration of Nick Baker
- Statutory declaration of Koli Buzhiq
- Digital photographs showing building works completed on 4 and 5 July 2022
- Appeal decision letter ref: APP/X5210/X/12/2186628 (86-88 Delaney Street, London, NW1 7SA).

For clarification, the application fee of £766 (£702+£64 admin fee) has been paid by secure online payment by the applicant.



Facts

Planning permission was granted on 30 July 2019 for redevelopment of the site involving the construction of a 6-storey plus basement building, comprising a retail art gallery (Class A1) on the ground floor and 3 x 2 bed, 2 x 3 bed and 2 x 4 bed residential units on the upper floors, under LPA reference 18/AP/3229.

The decision notice included one condition requiring submission and approval of details prior to commencement of works (other than demolition) to implement the planning permission. For clarification condition 3, stated:

“3. Before and work hereby authorised begins, excluding demolition, the applicant shall:

- a) secure the implementation of a programme of archaeological watching brief works, in accordance with a written scheme of investigation, which shall be submitted to and approved in writing by the Local Planning Authority. A suitably qualified archaeologist is to be present during the undertaking of any ground disturbing works within the development area, to observe, excavate and record any archaeological finds and deposits.*
- b) submit a copy of the watching brief report to the Local Planning Authority, for approval in writing, within six months of the fieldwork being completed on site.”*

An application to discharge Condition 3 (Part a) was submitted together with a Written Scheme of Investigation for an Archaeological Watching Brief (prepared by Museum of London Archaeology) on 21 October 2021. Subsequently, a decision notice (ref: 21/AP/3687) was issued on 21 December 2021 confirming that Part a of Condition 3 had been discharged. This approval allowed for excavation works below the existing slab level to be undertaken.

A contract was agreed with KAB Contractors Limited to undertake the first stage of building works on site and implement the planning permission ref: 21/AP/3687, with this work including ground excavation works, facilitated by the discharge of Condition 3 (Part a) by this time.

A completed Community Infrastructure Levy (CIL) Form 6: Commencement Notice (the “CIL Commencement Notice”) was then issued to LB of Southwark on 24 June 2022. This identified the ‘Development Commencement Date’ as 4 July 2022.

KAB Contractors Limited started work to break the existing concrete slab and dig the new basement level on 4 July 2022 – in accordance with the date identified in the CIL Commencement Notice. This building work involved 4 employees of KAB Construction and the use of specialist equipment, including a jackhammer, as well as a manual pick-axe and spades.

Photographs of showing the building works being undertaken were taken over 4-5 July 2022 and are attached. (As the original files have been provided electronically it is possible to view the metadata for each photograph which confirms the date and time each photograph was taken).

On 6 July 2022 excavation works below the existing slab revealed there to be issues with the structural integrity of the party wall to the west of the site. Accordingly, works were put on hold immediately to avoid the risk of collapse. As the quantity surveyor for the project identified that the cost of underpinning the party wall would have significant cost implications, it was decided that the best course of action would be to review a series of alternative options to overcome this issue.



Blackbird Development and Management Limited agreed to pay KAB Contractors for the extent of works completed up to 6 July 2022, but with the intention that they would return to site once an acceptable solution to the issue of the wall had been secured.

Also on 6 July 2022, Southwark Council issued a demand notice for the total CIL liability generated from implementing the scheme granted planning permission ref: 18/AP/3229, which stated that CIL amount is payable in two instalments – the first of which was due by 2 September 2022 and the second of which was payable by March 2023.

As building works had commenced development on 4 July 2022 (as identified in the commencement notice), the first of the two instalments in respect of the requisite Community Infrastructure Levy (CIL) of £411,287.85 was then paid on 26 August 2022 (within the 60 day period for payment). Following consultation with the adjoining occupiers, it is understood that an acceptable strategy with respect to the party wall is close to being reached, which will allow works to take forward the development to completion, expected to resume in early 2024 .

For clarification statutory declarations from the following individuals are provided (together with supporting evidence identified above) to confirm the above information to be fact.

- Michael Wurzel of Moritz Melior Street GmbH & CoGK and Blackbird Development and Management Limited
- Koli Buzhiq of KAB Construction Limited
- Nick Baker RIBA of Nick Baker Architects

Statutory Framework and case law

An application for a certificate of lawfulness of existing use (or development) can be made under s. 191 of **The Town and Country Planning Act 1990** [as substituted by the Planning and Compensation Act 1991, s. 10(1)], which provides:

“(1) If any person wishes to ascertain whether –

- (a) any existing use of buildings or other land is lawful; or*
- (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.

(2) For the purposes of this Act uses and operations are lawful at any time if –

- (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and*
- (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.*



(3) For the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if –

- (a) the time for taking enforcement action in respect of the failure has then expired; and
- (b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.

(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

National Planning Practice Guidance (NPPG) provides guidance on Lawful Development Certificates. In the case of applications involving existing use or development, 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.

Indeed, if the activity in question is shown to be lawful, the Council has no discretion other than to grant the application: they “shall” issue a certificate to that effect [Section 191(4), the TCPA].

By virtue of Section 56(1) development of land is taken to be initiated when one or more of the following are undertaken:

- (a) if the development consists of the carrying out of operations, at the time when those operations are begun;
- (b) if the development consists of a change in use, at the time when the new use is instituted;
- (c) if the development consists both of the carrying out of operations and of a change in use, at the earlier of the times mentioned in paragraphs (a) and (b).

Section 56(2) provides that development shall be taken to be begun on the earliest date on which any material operation “comprised in the development” begins to be carried out. These “material operations” are listed at Section 56(4) and include one or more of the following:

- a) any work of construction in the course of erection of a building;
- aa) any work of demolition of the building;
- b) the digging of a trench which is to contain the foundations, or part of the foundations of any building;
- c) the laying of any underground main pipe to the foundations or part of the foundations of a building, or to any such trench mentioned in para.(b).
- d) any operation in the course of laying out or constructing a road or part of a road;
- e) any change in the use of the land which constitutes material development.

Relevant case law demonstrates the wisdom of the words of Lord Scarman in the Pioneer Aggregates judgment (Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] A.C. 132), where he stated that planning permissions with only a meagre part implemented were “hardy beasts with a great capacity for survival”. Lord Scarman determined that all that is required to demonstrate material



operations is that the works must comprise part of the development authorised by the planning permission and must be more than de minimis. There is no need for the developer to have any genuine intention to complete the development.

In practice, very minor works are sufficient to commence a planning permission. These may include pegging out a road and works that could have been carried out under the Town and Country Planning (General Permitted Development) Order.

It is evident in our view that for “material operation” rights under Section 56 to apply, commencement works must be “comprised in the development”. They must also have been properly authorised in the first place and pre commencement conditions complied with.

In light of Section 56(4) above we are firmly of the view that both works associated with “any work of construction in the course of erection of a building” and “any work of demolition of the building” are sufficient to implement the permission.

This is also supported in **case law**.

In **Malvern Hills DC v Secretary of State for the Environment [1982] J.P.L. 439**, the Court of Appeal by a majority upheld a finding that simply marking out the line and width of a road with pegs amounted to an “operation” as defined in subsection (4)(d). Substituting the relevant provisions of the 1990 Act, Eveleigh L.J. commented:

“Sections [91 and 92 – the statutory time limit on planning permissions] seek to ensure that land will not be held undeveloped for an indefinite period in the hands of speculators whose only intention is to sell the land at some future propitious date at the enhanced value that development permission attracts. Section [56] seeks some earnest of intention to develop. The specified operations are not necessarily very extensive. Very little need be done to satisfy the section. That which is done, however, must genuinely be done for the purpose of carrying out the development. Section [56] is a benevolent section which aims at avoiding hardship to a developer who is genuinely undertaking the development.”

In **Riordan Communications Ltd v South Buckinghamshire DC (2001) 81 P. & C.R. 8**, the judge agreed with earlier case law that:

“The test of whether there has been a material operation comprised in a development pursuant to section 56 ... is an objective one. The subjective intention of the developer is irrelevant to the question of whether the development has commenced. The objective test is satisfied by the court first considering whether the work has been done in accordance with the relevant planning permission and, secondly, whether it is material in the sense of not being de minimis.”

In **Staffordshire County Council v Riley [2001] EWCA Civ 257**, Pill LJ said:

“26. ... the question must be approached objectively. That approach has been approved in the Court of Session (Inner House) in East Dunbartonshire Council v. Secretary of State for Scotland [1999] 1 P.L.R. 53 . Planning permission had been granted for the residential development of a 44-acre site. The “specific operation” relied on under the relevant Scottish legislation, which was similar in effect to the corresponding English legislation, was the setting out and excavation of an access



road. The local authority contended that an operation was not “specified” unless it was carried out with the intention of carrying out or completing the development. Giving the judgment of the court, Lord Coulsfield stated, at 60:

“It would be particularly undesirable, in our opinion, to attempt to introduce into the statutory code requirements which were not capable of reasonably precise definition. As was submitted on behalf of the second respondent, the requirement that the specified operation should be undertaken with some sort of intention in regard to the carrying out of the development would be one extremely difficult to define and apply. ... Where the developer has or may have mixed motives and purposes, the application of any tests of genuine intention becomes even more complicated. If there were any such test, it might have been expected that it would, by this time, have been clearly defined by authority. ... the statute prescribes time-limits and the circumstances in which planning permissions are to continue in force beyond those time-limits, and does so without any requirement as to intention. It seems to us therefore that to add a requirement as to intention would clearly go beyond what the statute prescribes.”

27. At 64G Lord Coulsfield stated:

“Having considered all the authorities, it is our conclusion that there is nothing in them that compels us to adopt the approach urged on us on behalf of the appellants. It is, no doubt, natural to feel that it would be unsatisfactory if the person entitled to the benefit of a planning permission could keep it in being by carrying out some work that could be regarded as a mere token or pretence. It seems to us, however, that the solution to that problem, if it is a problem, is more likely to be found by applying an objective approach and considering, first, whether what has been done has been done in accordance with the relevant planning permission, and, second, whether it is material, in the sense of not being de minimis ... In our view, as we have indicated, there is no justification in the terms or in the structure of the legislation for the imposition of an ill-defined requirement that the specified operation should be carried out with some particular intention. In our view, the proper test is an objective one ...”

28. *I respectfully agree with that approach and the submissions of Mr Purchas on this aspect of the case involve a consideration of motives and intentions which are incompatible with it.”*

Numerous appeals determined in the context of this case law have provided further understanding as to the nature and extent of works needed to comprise a “material operation” - including Appeal Ref: APP/X5210/X/12/2186628, in respect of 86-88 Delaney Street, London, NW1 7SA.

In the 86-88 Delaney Street appeal case, London Borough of Camden had failed to approve application for a certificate of lawful use or development that sought confirmation that commencement of the development authorised by a planning permission took place before it was due to expire. Following the rigors of an appeal determined via the inquiry process, the inspector (in the attached decision letter dated 26 March 2013) determined that the break up the concrete ground floor slab together with excavation totalling 0.9m in depth, was a “material operation” as set out in Section 56(4) of the 1990 Act. As the inspector was satisfied that these works “were genuinely done for the purpose of carrying out the development approved” he allowed the appeal and granted the lawful development certificate.



Assessment of the facts against the above legislation and case law.

It is evident that for “material operation” rights under sec.56 to apply, commencement works must be “comprised in the development”. They must also have been properly authorised in the first place.

Part (a) of Condition 3 attached to Planning permission ref: 18/AP/3229 was discharged on 21 December 2021, thus allowing for building works (other than demolition) to be undertaken to implement the planning permission.

A Community Infrastructure Levy : Notice of Commencement form was duly issued to Southwark Council on 24 June 2022 (with confirmation of receipt provided on 1 July 2022). This identified a commencement date of 4 July 2022 demonstrating the intention to ensure that the planning permission would be implemented prior to time-expiration on 30 July 2022.

KAB Contractors Limited were instructed by Blackbird Development and Management to implement works approved by planning permission ref: 18/AP/3229 with the architectural and structural drawings issued to KAB Contractors Limited on 1 June 2022, to ensure that the works would be comprised in the approved development.

The statutory declarations confirm that the building works to break the existing concrete slab and start excavation works to dig the new basement level were indeed started by KAB Contractors on 4 July 2022. These works (as shown on dated photographs from 4 and 5 July 2022) amounted to a material operation and involved works ‘comprised in the approved development’ and in accordance with the approved drawings and thus represented a ‘meaningful start’ to deliver the approved development.

As these building works were undertaken prior to 30 July 2022 - the expiry date of planning permission ref: 18/AP/3229 - we are therefore of the clear view that Planning Permission ref: 18/AP/3229 has been lawfully commenced within the conditioned timeframe of three years from the date of approval, in accordance with Condition 2 of the permission. As such the planning permission remains extant and can be completed in accordance with the approved details.

Accordingly, the applicant respectfully requests that the Lawful Development Certificate is granted for the terms sought at the Council’s earliest opportunity, to allow development to continue construction works and complete the approved development.

Yours sincerely

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Encs.