
PLANNING AND CONSERVATION

THE TOWN HALL HORNTON STREET LONDON W8 7NX

Executive Director M J FRENCH FRICS Dip TP MRTPI Cert TS

Mr. D. Postins RIBA
69 Selwyn Avenue
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TW9 2HB

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**KENSINGTON
AND CHELSEA**

18 May 2005

My reference: DPS/DCN/SM/PP/
99/00704/LB/99/00
705

Your reference:

Please ask for: Sarah Madyausiku

Dear Sir,

Town and Country Planning Act 1990
35 Lansdowne Road, London W11

Thank you for your letter dated 19 April 2005 regarding the validity of planning permission and listed building consent at the above mentioned property.

Your query relates to the validity of both permissions despite them both being granted more than five years ago. As you explained in your letter, works have already been carried out to construct the porch. However, your attention is drawn to Condition 5 of the planning permission dated 02/11/99 which states that *Before the commencement of the development hereby permitted a protective fence (in accordance with BS:5837:1991) shall be constructed in a radius of not less than 3.8 metres from the base of the London Plane tree and maintained for the duration of the development and no equipment or materials shall be stored within the fenced area*.

Your question is whether the commencement of development by constructing a porch keeps the permission 'alive'. The main aspect for us to consider is whether the works undertaken without compliance with Condition 5 would invalidate the permission.

A number of issues must be considered in drawing a conclusion, these being:

- 1. Have any "material operations" been undertaken?** You have advised that the works to the Porch have been carried out, which would amount to material operation(s) for the purposes of Section 56 of the Act.
- 2. Were any of the conditions not complied with when those works were carried out?** Condition 5 was not complied with (construction of a protective fence) at the time of the material operation(s).



INVESTOR IN PEOPLE

3. What is the significance of the commencement of development in breach of planning control?

There is a well established general principle, as stated in the case of *Oakimber Ltd v Elmbridge Borough Council (1991)*, that works carried out in breach of condition cannot be relied on as material operations capable of commencing development. However, there are a number of recognised exceptions to this general principle:

- (a) where the developers have clearly done all they can to meet the condition;
- (b) where a condition requires an approval before a given date and the developer has applied for such approval by the deadline, which approval is subsequently granted (essentially an example of (a) above);
- (c) where the local authority have agreed that development could commence without full compliance with the relevant condition (although only in very limited cases); and
- (d) where a condition has in substance been complied with but the formalities have not been completed in time.

It appears that none of the above exceptions apply in this case. It is considered that the planning permission of November 1999 lapsed after the passing of 5 years and for this reason, your clients would not be in a position to implement the remainder of the permission.

You are advised to make a new planning application and apply for listed building consent if you wish to carry out further works to the property. If you have any further queries please contact the above named officer.

Yours faithfully

Michael J. French
Executive Director, Planning and Conservation

DAVID POSTINS RIBA
 Architect & Conservation Consultant
 69 Selwyn Avenue
 Richmond
 TW9 2HB
 Telephone
 020 8940 4877
 Fax
 020 8940 6266

① PC + CB
 ② SM
 for reply
 JK
 2/14

Royal Borough of Kensington & Chelsea
 Department of Planning & Conservation
 The Town Hall
 Hornton Street
 LONDON
 W8 7NX

April 19 2005

Dear sirs,

35 LANSDOWNE ROAD
 Planning permission PP/99/00704/CHSE/14/265
 Listed Building Consent LB/99/00705/CLBA/25/266

Further to the consents granted by the Council on November 2 1999 for *basement areas beneath the front forecourt,.... reinstatement..... and minor elevational alterations to include the formation of a covered open front porch*, I write to inform you that my clients intend to undertake the second phase of the works, namely construction of the underground rooms and reinstatement of the forecourt to include hard and soft landscaping in accordance with the approved drawings with a start date in June of this year.

The purpose in writing is to clarify the position in relation to the date of the original granting of the consents and unexercised permissions.

In February 2000, I gave notice in writing to the Council that it was intended to carry out the works in two separate phases. The porch works was to be carried out immediately and the basement *excavation* to be postponed to a later date. Notice was also so given at the same time of a proposed alteration to the keystone over the arched opening in the new porch. Letters were received from the Borough in September and October 2000 agreeing the changes.

The porch was completed by December 2000.

I enclose copy of the following documents as referred to above :

- 1 Planning permission PP/99/00704/CHSE/14/265
- 2 Listed Building Consent LB/99/00705/CLBA/25/266
- 3 Method Statement dated June 1999
- 4 My letters dated February 15 2000 addressed to RBKC
- 5 RBKC letter dated September 14 2000 in response to my letter.
- 6 RBKC letter dated October 11 2000 also in response to my letter.

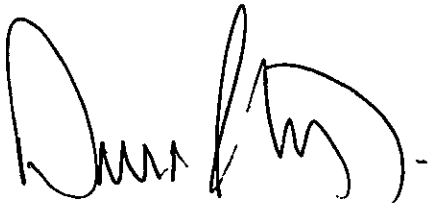
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My belief is therefore that the two consents remain valid, despite the expiry of five years since the date of consent, by virtue of a substantial part of the approved works having been completed in accordance with condition 1.

I am currently completing working drawings and specifications for the works and will be submitting information as required in relation to the conditions 3 of the Listed Building Consent and condition 6 of the Planning Permission shortly.

Yours faithfully,



DAVID POSTINS

Copy: Mr & Mrs M Spencer
Frank Van Loock Associates
Day Building Ltd

EX DIR	HDC	TP	CAC	AD	CLU	AO AK
R.B.	21 APR 2005				PLANNING	
K.C.						
N	C	S/W	SE	APP	IO	REC
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Madyausiku, Sarah: PC-Plan

From: McMahon, Xavier: CP-Legal
Sent: 17 May 2005 14:18
To: Madyausiku, Sarah: PC-Plan
Subject: RE: 35 Landsdown Road

Sarah,

If the developer was of the opinion that the condition was unreasonable then it should have appealed against the condition under Section 78. I do not think that we can simply agree with the developer in this case that compliance with this condition is not essential in order to commence development. As Sullivan J said in *Henry Boot Homes Ltd v Bassetlaw District Council (2002)*, "the courts should be very slow to permit extra-statutory flexibility or agreements that conditions need not be observed". "Town and country planning is not a private matter for agreement between the developers and local planning authorities". The statutory planning code provides for flexibility by making express provision (Section 73) for a local planning authority to modify a condition if it becomes appropriate to do so and this process ensures that the interests of all parties are taken into account at the relevant stage.

Of course this does not mean that we may not form the view that it is not expedient to take enforcement action and we could always cooperate with a further application for permission (given that the developer is out of time for a Section 73 application).

Kind Regards,

Xavier

-----Original Message-----

From: Madyausiku, Sarah: PC-Plan
Sent: 16 May 2005 10:57
To: McMahon, Xavier: CP-Legal
Subject: RE: 35 Landsdown Road

Dear Xavier,

Im just going through what you have written and I need to check something with you.

You say that 'although it has been hinted that the category of permissible exceptions are not closed', my concern is that the works to the porch did not affect the adjoining tree? if so, does this mean that Condition 5 was unreasonable? I question this because of Mr Postins comments in paragraph 5 of the letter dated 15 Feb. 2000 where he states that in a phone conversation with Ms Kingston (who used to work here), she advised that submission of the full method statement would not be needed because of the remoteness of the works from the tree?

could the architect argue this point?

Thanks Sarah

-----Original Message-----

From: McMahon, Xavier: CP-Legal
Sent: 13 May 2005 15:09
To: Madyausiku, Sarah: PC-Plan
Subject: RE: 35 Landsdown Road

Dear Sarah,

I have been asked to advise in relation to the above property and, in particular, as to whether works undertaken at the property in breach of conditions attaching to the planning permission could be relied upon as constituting the commencement of development so as to keep the permission alive.

A number of issues arise out of these facts, including:

1. **Have any "material operations" been undertaken?** You have advised that the works to the Porch have been carried out, which would amount to material operation(s) for the purposes of Section 56 of the Act.
2. **Were any of the conditions not complied with when those works were carried out?** Condition 5 was not complied with (construction of a protective fence) at the time of the material operation(s).

3. What is the significance of the commencement of development in breach of planning control? This is the key issue.

There is a well established general principle, as stated in the case of *Oakimber Ltd v Elmbridge Borough Council (1991)*, that works carried out in breach of condition cannot be relied on as material operations capable of commencing development. However, there are a number of recognised exceptions to this general principle:

- (a) where the developers have clearly done all they can to meet the condition;
- (b) where a condition requires an approval before a given date and the developer has applied for such approval by the deadline, which approval is subsequently granted (essentially an example of (a) above);
- (c) where the local authority have agreed that development could commence without full compliance with the relevant condition (although only in very limited cases); and
- (d) where a condition has in substance been complied with but the formalities have not been completed in time.

I do not think there is a question of any of the above exceptions applying and, although it has been hinted that the category of permissible exceptions are not closed, the developer would be hard pressed trying to invent one that was applicable to these facts. Developers have tried to argue in the past that the court should look at all the circumstances of the case and decide whether it was fair that the breach of condition should stand in the way of works being regarded as a start of development, and failed. It should also be irrelevant that we have thus far not enforced against the breach of condition 5.

To answer your question, it appears that the planning permission of November 1999 lapsed after the passing of 5 years and so the developer is not in a position to implement the remainder of the permission.

I hope I have been of assistance. Please let me know if you have any further queries or comments.

Kind Regards,

Xavier

Xavier McMahon
Solicitor
Legal Services
for the Director of Law and Administration

Tel: 020 7361 2723
Fax: 020 7361 2748

Secretary: Sue Billington (020 7361 2610)

www.rbkc.gov.uk

-----Original Message-----

From: Madyausiku, Sarah: PC-Plan
Sent: 06 May 2005 15:53
To: McMahon, Xavier: CP-Legal
Subject: RE: 35 Landsdown Road

Thanks Xavier,

Next week would be fine. Thanks

-----Original Message-----

From: McMahon, Xavier: CP-Legal
Sent: 06 May 2005 15:49
To: Madyausiku, Sarah: PC-Plan
Subject: 35 Landsdown Road

Hi Sarah,

I have received your memo regarding the above and will endeavour to have an advice for you in the course of next week. Please let me know if this is urgent in which case I will try to have a look at it sooner.

Cheers,

Xavier

Xavier McMahon
Solicitor
Legal Services
for the Director of Law and Administration

Tel: 020 7361 2723

Fax: 020 7361 2748

Secretary: Sue Billington (020 7361 2610)

www.rbkc.gov.uk

INTEROFFICE MEMORANDUM

TO: XAVIER MCMAHON
FROM: SARAH MADYAUSIKU
DEPARTMENT: PLANNING AND CONSERVATION
SUBJECT: 35 LANSDOWN ROAD
DATE: 16/05/2005

35 LANSDOWN ROAD

Please could I have your advice on a matter regarding the implementation of planning permission within five years.

The query comes from an applicant who got permission for development and listed building consent in November 1999. The development included basement excavations and minor elevational alterations which included the formation of a covered open front porch.

The works to the Porch have been carried out, but the basement excavations have not been carried out. I believe that a significant amount of work has occurred to keep the permission 'active'. However, there is a Condition attached to the permission which is worded: *Before the commencement of the development hereby permitted a protective fence (in accordance with BS:5837:1991) shall be constructed in a radius of not less than 3.8 metres from the base of the London Plane tree and maintained for the duration of the development and no equipment or materials shall be stored within the fenced area'.*

This make me question the legality of the works the applicant has already carried out to the porch. He wants to implement the remainder of the permission at the end of June, would this be lawful/ok?

Please find a copy of the paperwork submitted by the applicant.

Kind Regards

Sarah Madyausiku