

# ROYAL BOROUGH OF KENSINGTON AND CHELSEA

## BASEMENT POLICY REVIEW

---

### OPINION

---

#### INTRODUCTION

1. I have been asked to advise Mrs Zipporah Lisle-Mainwaring in connection with the Partial Review by the Royal Borough of Kensington and Chelsea (“RBKC”) of the Council’s Core Strategy. In particular, I have been asked to advise on the extent to which emerging policy CL7 (the Basements Planning Policy) seeks to regulate proposals for the construction or extension of basements which are in fact already covered by existing permitted development rights.
2. The background to this matter is well known to those instructing me. In the interests of brevity, I will not repeat it here. This Opinion begins by setting out the legal framework, before turning to the extent to which it is possible to construct or extend a basement under permitted development rights. Against that backdrop, I turn to consider:
  - a. the extent to which the emerging policy seeks (or apparently seeks) to control basement development which is already the subject of permitted development rights;
  - b. the implications of this for the soundness and validity of the policy itself.

#### LEGAL FRAMEWORK

3. Under section 57 Town and Country Planning Act 1990, planning permission is required for “any development of land” where “development” is defined by section 55 to include “the carrying out of building, engineering, mining or other operations in, on, over or under land”.
4. Under Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 (“the GPDO”), there is a deemed grant of planning permission for various classes of development. Of particular relevance to the Basement Policy review, Part 1 of Schedule 2 deals with “development within the curtilage of a dwellinghouse”; within which Class A provides that “the

enlargement, improvement or alteration of a dwellinghouse” is permitted development.

5. Class A is subject to a number of detailed restrictions, set out in para A.1 as follows:

“Development is not permitted by Class A if—

- (za) ...
- (a) as a result of the works, the total area of ground covered by buildings within the curtilage of the dwellinghouse (other than the original dwellinghouse) would exceed 50% of the total area of the curtilage (excluding the ground area of the original dwellinghouse);
- (b) the height of the part of the dwellinghouse enlarged, improved or altered would exceed the height of the highest part of the roof of the existing dwellinghouse;
- (c) the height of the eaves of the part of the dwellinghouse enlarged, improved or altered would exceed the height of the eaves of the existing dwellinghouse;
- (d) the enlarged part of the dwellinghouse would extend beyond a wall which—
  - (i) fronts a highway, and
  - (ii) forms either the principal elevation or a side elevation of the original dwellinghouse;
- (e) subject to paragraph (ea), the enlarged part of the dwellinghouse would have a single storey and—
  - (i) extend beyond the rear wall of the original dwellinghouse by more than 4 metres in the case of a detached dwellinghouse, or 3 metres in the case of any other dwellinghouse, or
  - (ii) exceed 4 metres in height;
- (ea) until 30th May 2016, for a dwellinghouse not on article 1(5) land nor on a site of special scientific interest, the enlarged part of the dwellinghouse would have a single storey and—
  - (i) extend beyond the rear wall of the original dwellinghouse by more than 8 metres in the case of a detached dwellinghouse, or 6 metres in the case of any other dwellinghouse, or
  - (ii) exceed 4 metres in height;
- (f) the enlarged part of the dwellinghouse would have more than one storey and—
  - (i) extend beyond the rear wall of the original dwellinghouse by more than 3 metres, or

- (ii) be within 7 metres of any boundary of the curtilage of the dwellinghouse opposite the rear wall of the dwellinghouse;
  - (g) the enlarged part of the dwellinghouse would be within 2 metres of the boundary of the curtilage of the dwellinghouse, and the height of the eaves of the enlarged part would exceed 3 metres;
  - (h) the enlarged part of the dwellinghouse would extend beyond a wall forming a side elevation of the original dwellinghouse, and would—
    - (i) exceed 4 metres in height,
    - (ii) have more than one storey, or
    - (iii) have a width greater than half the width of the original dwellinghouse; or
  - (i) it would consist of or include—
    - (i) the construction or provision of a veranda, balcony or raised platform,
    - (ii) the installation, alteration or replacement of a microwave antenna,
    - (iii) the installation, alteration or replacement of a chimney, flue or soil and vent pipe, or
    - (iv) an alteration to any part of the roof of the dwellinghouse.”
6. Additional restrictions that apply only to developments within article 1(5) land (including conservation areas) are set out in para A.2.

## ANALYSIS

### **A. *Can Basements be Permitted Development?***

7. There does not appear to be any dispute that the construction or extension of a basement falls within the definition of “development” for which planning permission is needed. The relevant issue is the extent to which a basement could be constructed under existing development rights, and in particular Class A of Part 1, Schedule 2 to the GPDO.
8. The starting point is to ask whether the creation or extension of a basement falls within the general grant of permission, i.e. whether it is “the enlargement, improvement or alteration of a dwellinghouse”. Since the creation of a basement will generally result in an increase in both volume and floorspace, a basement would in my view qualify as the “enlargement” of a dwellinghouse. However, even if that were not the case, the words “enlargement, improvement or alteration” are clearly expressed to be alternatives, and it would suffice for a basement to be an “improvement” or “alteration”. As a matter of ordinary language, I cannot see any reason why the creation or extension of a basement would not fall within either or both of those terms.

9. Consequently, a basement will only fall outside the permitted development rights under Class A if it is contrary to any of the specific limitations imposed under Class A.1; or Class A.2 if the property is in a conservation area. In that regard, I note the following:
- a. There is nothing in Class A.1 or A.2 which expressly seeks to preclude the creation or extension of a basement, or even to limit the depth of any basement which can be constructed;
  - b. Para A.1(b) seeks to limit the height of the part of the dwellinghouse enlarged to “the height of the highest part of the roof of the existing dwellinghouse”. Those instructing me have asked whether this could be interpreted as imposing a “top-to-bottom” restriction on the “height” of any basement. I do not think it can: in simple terms, I consider it clear that the purpose of A1(b) is to ensure that any enlargement, improvement or alteration does not protrude over the ridge-line of the existing dwelling. However, even if that were not the case, the most that para A.1(b) could mean, in the context of a basement, is that a basement cannot extend any further beneath the ground than the existing building does above it. Hence, a single storey basement could be constructed beneath a bungalow, and a three storey basement beneath a three storey building. In other words, A.1(b) would at most operate to restrict the scale of any basement, rather than to exclude basements from the scope of Class A;
  - c. Although para A.1(d) restricts development which extends beyond a wall which fronts a highway, and forms the principal elevation or a side elevation of the original dwellinghouse, this does not preclude a basement constructed entirely beneath the footprint of the original building;
  - d. Paras A.1(e) and (f) restrict the right to extend beyond the rear wall of a dwellinghouse. Assuming subterranean development can still be counted in storeys, these paragraphs would constrain the extent of any basement under a rear garden, but would not preclude basements which were within the applicable limits;<sup>1</sup>
  - e. Para A.1(g) only precludes development within 2m of the boundary of the curtilage of a dwellinghouse if “the height of the eaves of the enlarged part

---

<sup>1</sup> Footnote 2 to para 2.2 of RBKC’s April 2012 publication “Basement Extensions: Issues” states that: “Under Schedule 2, Part 1, Class A of the Town and Country Planning (General Permitted Development) Order 1995 single storey basement extensions that project no more than 3 metres into the rear garden of a single family dwelling are usually considered to be permitted development.” No explanation is given for restricting this to single storey extensions, which is inconsistent with the express wording of para A.1(f). This statement may refer to the para A.2(c) restriction on multi-storey extensions in conservation areas that extend beyond the rear wall of the original house. However, if so, it should have been made clear that this restriction only applies in conservation areas (and other article 1(5) land).

would exceed 3 metres". It is difficult to conceive of any basement which had eaves that exceeded 3 metres. In most (if not all) cases A.1(g) will simply not apply;

- f. The para A.1(h) restriction on extension beyond side elevations of a dwellinghouse only applies where the extension would exceed four metres in height, have more than one storey or have a width greater than half the width of the original dwellinghouse. The 4m height restriction should logically be measured from ground level, in which case it will not affect basements at all. However, even if it did not, then – like the limit to one storey – would only apply only to basements which extend beyond the existing side elevations. Once again, para A.1(h) does not prevent basements beneath the existing footprint;
- g. Para A.1(f) is not relevant;
- h. Para A.2(a) is not relevant;
- i. Para A.2(b) restricts development in conservation areas from extending beyond side elevations of the original house; and
- j. Assuming subterranean development can still be counted in storeys, the para A.2(c) restriction would limit basements in conservation areas that are greater than one storey from extending beyond the rear wall of the original house. However, there is no restriction on multi-storey basements beneath the existing building.

- 10. Drawing these points together, I would summarise the position as follows:
  - a. Construction of a basement extension falls within in the general grant of permitted development rights under Class A;
  - b. This does not mean that all basements are permitted development. The restrictions in Class A.1 and (if relevant) A.2 must still be satisfied;
  - c. Subject to satisfying the restrictions in Class A.1 and (if relevant) A.2, a basement extension is permitted development.
- 11. The foregoing analysis represents my opinion, based simply on the natural meaning of the legislation. However, my conclusions are entirely consistent with the position of both the Department for Communities and Local Government ("CLG") and RBKC:
  - a. In 2007, CLG consulted on proposals to replace Parts 1 and 2 of the GPDO with a new Householder Permitted Development Order. In November 2008,

CLG published a Supplementary Report dealing specifically with basement extensions. Paras 1.13 - 1.14 of the Supplementary Report observed:

“1.13 Part 1 of the GPDO does not refer to underground extensions to dwellinghouses. Class A, which permits ‘the enlargement, improvement or other alteration of a dwellinghouse’, is capable of being interpreted as covering basement extensions, provided they do not exceed the tolerances laid down for extensions, namely volume and proximity to a highway. Given that roof extensions are covered by a specific category, it is arguable whether basement extensions were simply overlooked when the GPDO was formulated.<sup>2</sup> Whilst there is a case that the silence of the GPDO implies that all basement extensions require planning permission, the overwhelming majority of local authorities interpret Part 1 of the GPDO to include underground extensions.

1.14 ... All basement extensions are classified as development, but can constitute ‘permitted development’ under Class A provided they do not exceed the volume limitation or extend closer to a highway than the existing house. No limit is placed on the depth of basement extensions nor how close they can come to a property boundary.”

- b. RBKC’s approach to the issue is demonstrated by two recent decisions on separate applications for Certificates of Lawfulness concerning proposals for basement development at 55 Sloane Gardens and 28 Godfrey Street (Refs. CL/14/06071 and CL/14/04830, respectively). Although the Sloane Gardens application was refused, this was principally on the ground that the property was not a single dwellinghouse,<sup>3</sup> with the result that Class A permitted development rights did not apply. In all other respects,<sup>4</sup> both decisions

---

<sup>2</sup> I have considered whether the specific provision (under Class B of Part 1) of permitted development rights for roof extensions provides any support for the argument that subterranean development is not included under Class A. However, Para A.1(i)(iv) expressly excludes “any alteration to any part of the roof of the dwellinghouse”. This exclusion would not be needed if “vertical” extensions were, by definition, outside Class A. In my view, this confirms that – unless expressly taken out of Class A – vertical extensions (whether up or down) are within the general grant of permission for enlargement, improvement or other alteration.

<sup>3</sup> The decision notice also indicated that the proposals in that case conflicted with part (f)(ii) of A1 and part (b) of A2. However, this merely reinforces the point that RBKC approached the matter on the basis that basement development was *in principle* within Class A permitted development, subject to satisfying A1 and A2.

<sup>4</sup> It is right to note that both applications were for single storey basements. However, there is nothing in either of the delegated reports to indicate that the decisions were in any way contingent upon the depth of the basement proposed.

approached the matter on the basis that development which complied with the restrictions and criteria in parts A1 and A2 was permitted.<sup>5</sup>

- c. At the Basements Consultation Event on 8 April 2013, one of the questions asked related to permitted development rights.<sup>6</sup> The response was that, although RBKC had made no final decision, the Council was minded to make an Article 4 direction to remove permitted development rights. The response therefore acknowledges that permitted development rights exist.

**B. *Does RBKC's Emerging Policy Seek to Regulate Basements which would be Permitted Development?***

12. RBKC's proposed new basement policy makes almost no reference to the fact that it is possible to construct or extend a basement using permitted development rights. The single exception is in requirement (c) of policy CL7, which makes a passing (but otherwise completely unexplained) reference to basements "built through permitted development rights". Otherwise, para 34.3.46 of the submission draft states that the policy "applies to all new basement development". Anyone reading para 34.3.46 would be forgiven for thinking that the document seeks to impose restrictions on proposals which are in fact already permitted development.
13. This conclusion is confirmed by the content of draft Policy CL7 itself. In particular:
  - a. Requirement (a) stipulates that basement development should not "exceed a maximum of 50% of each garden or open part of the site", within which the "unaffected garden area must be in a single area and where relevant should form a continuous area with other neighbouring gardens". The 50% restriction is broadly consistent with para A.1(a) of Part 1, Schedule 2 to the GPDO, but the other parts of requirement (a) go significantly beyond the GPDO limits;
  - b. Requirement (b) states that basements should "not comprise more than one storey". As noted above, provided a basement extension is within the Class A.1 and (if relevant) A.2 limits, there is no limit to how deep it can be. On the face of it, therefore, the policy is seeking to restrict a form of development over which RBKC has no control;

---

<sup>5</sup> It is of some significance that these two decisions were issued on 16 October 2014 and 5 November 2014 – i.e. shortly after the public examination into RBKC's new basement policy. It is far from clear to me whether RBKC has advised the examining Inspector that it takes the view that basements can be permitted development in this way.

<sup>6</sup> Question 63

- c. Requirement (c) suggests that no further extensions will be allowed where a basement has already been permitted (whether by express permission or under the GPDO). I cannot see anything in the GPDO which prevents an additional storey being created beneath an existing basement;
- d. Requirement (h) seeks to control the introduction of light wells and railings to the front or side of the property. Where the front or side of the property fronts onto a highway, requirement (h) may be consistent with the limitation in para A.1(d) of Part 1, Schedule 2 of the GPDO. However, where the front or side elevation does not front onto a highway, the creation of light wells and the erection of railings may well be permitted development.

**C. *Implications for the Emerging Basement Policy***

14. Self-evidently, RBKC's Core Strategy cannot remove existing permitted development rights. In so far as it sets rules or requirements for new basement development, those rules and requirements can only apply to proposals which actually require planning permission. To this extent, one might ask: what does any of the above matter? I make the following points:
- a. It is far from clear whether those responsible for drafting the emerging policy have appreciated the extent to which it is possible to create or extend a basement under permitted development rights. If they have not, this goes to the heart of the rationale behind the Basement Policy Review, and calls into question the robustness of the whole exercise;
  - b. Even if those responsible for drafting the emerging policy were fully aware of the extent of permitted development rights, that awareness is not reflected at all in either the new policy or the reasoned justification for it. As a result, the emerging policy creates the distinct – but wholly erroneous – impression that (as para 34.3.46 says) it applies to “all new basement development”. This is likely to mislead homeowners wishing to construct or extend a basement, causing them to make planning applications in cases where permission is not required. It is likely to build up expectations which RBKC is incapable of fulfilling in the minds of adjoining landowners who may wish to object. At the very least, this lack of transparency should be corrected;
  - c. In circumstances where quite extensive basements could be created under permitted development rights, the emerging policy contains no explanation of the justification for imposing far more sweeping restrictions on those basement proposals for which planning permission is required. For example: if it is possible to create a three storey basement under permitted



development rights, what is the logic of insisting that a basement which needs permission because it extends the front wall of the dwellinghouse to within 2m of the highway should be restricted to a single storey? Given the desirability of having some control over traffic and construction activity, does it make sense to adopt a policy which seeks to prevent deeper basements, when a differently configured deep basement could be constructed without any need for permission at all? To what extent is the restrictive nature of the policy likely to encourage the construction of basements under Class A rights, without any controls over traffic, construction or dust?

- d. If and so far as the emerging policy is premised on the possibility that RBKC will make an Article 4 Direction removing permitted development rights,<sup>7</sup> there would need to be clear evidence that this is likely to happen, and that RBKC has budgeted for the claims for compensation which are likely to flow from it.

#### ***D. Next Steps***

15. I am conscious of the fact that the main consultation period on the Basement Review has long since closed, and that the emerging policy has already been through its examination. I understand that Mrs Lisle-Mainwaring did not object at this stage, because she reasonably anticipated that her own application for planning permission would be determined well in advance of the new policy coming into effect.
16. RBKC is currently consulting on “main modifications” to the submission draft of the policy. I am aware of the fact that Mrs Lisle-Mainwaring has concerns about some of these, and intends to make representations accordingly.
17. Strictly speaking, this latest round of consultation is concerned only with the proposed modifications, and not with points of principle going to the heart of the emerging policy. However, I am not aware of any point in the process which has been followed to date at which the implications of the existing permitted development rights on the drafting of and rationale for the emerging policy have been considered. For the reasons outline above, it seems to me that this is a fundamental issue which needs to be addressed and which, if it is not addressed, gives rise to serious questions about the soundness and (ultimately) the legal validity of the emerging policy. As such, I strongly advise that it is drawn to the Inspector’s attention at the same time as Mrs Lisle-Mainwaring’s more detailed representations on the proposed modifications.

---

<sup>7</sup> See para 10c above

## **CONCLUSIONS**

18. In summary, and for the reasons outlined above, my advice is that:
  - a. Class A permitted development rights include the right to construct and extend basements. The scale of development which can be achieved under these rights is considerable;
  - b. Although RBKC's emerging policy CL7 cannot, as a matter of law, remove or restrict those permitted development rights, that is not consistent with para 34.3.36 of the reasoned justification, which suggests that the emerging policy will apply to all new basement development;
  - c. At best, para 34.3.36 is highly misleading. At worst, it indicates a fundamental misapprehension on the part of RBKC of the extent to which the authority can control basement development, which calls into question the soundness and validity of the entire policy;
  - d. This issue should be drawn to the attention of the examining inspector at the earliest possible opportunity.
  
19. If there are any questions arising from the above, those instructing should not hesitate to contact me.

**PAUL BROWN Q.C.**

**12 November 2014**

**Landmark Chambers  
180 Fleet Street  
London EC4A 2HG**