

CRANBROOK BASEMENTS

ROYAL BOROUGH OF KENSINGTON AND CHELSEA

PARTIAL REVIEW OF THE CORE STRATEGY JULY 2013-09-02

REGULATION 19: TOWN AND COUNTRY PLANNING (LOCAL PLAN) REGULATIONS 2012

BASEMENTS PUBLICATION PLANNING POLICY: POLICY CL7

LAW / POLICY SUBMISSION OF CRANBROOK BASEMENTS

ON THE UNSOUNDNESS OF PARTIAL REVIEW POLICY CL7

INTRODUCTION

1. This submission forms part of the representations of Cranbrook Basements ('CB') on the unsoundness of Partial Review Policy CL7 contained in the Royal Borough of Kensington and Chelsea ('RBKC') Basements Publication Planning Policy July 2013 ('BPPP'). It is to be read together with the representations on behalf of CB on planning matters submitted by Bell Cornwell (Simon Avery) and the comments of CB itself (Kevin O'Connor) on technical considerations with accompanying expert reports ('CB's representations').
2. CB contends for the reasons set out in these three representations, that proposed Policy CL7 ('CL7') is not 'sound.'(Regulation 20(5)(b))

EXAMINING POLICY CL7: NPPF 182

3. To be sound CL7 must be shown to be:
 - positively prepared on a strategy which seeks to meet objectively assessed development and infrastructure requirements;

- justified – the policy should be the most appropriate policy when considered against reasonable alternatives, based on proportionate evidence;
 - effective – the policy should be deliverable; and
 - consistent with national policy – the policy should enable the delivery of sustainable development.
4. These are legal tests. A policy not positively prepared, not justified, not effective and not consistent with national policy, or failing in respect of any one of these criteria, is beyond the powers of the RBKC as the local plan making authority. For the reasons set out in CB’s representations, CL7 and the ‘Reasoned justification’ paragraphs 34.3.46 – 34.3.73 (‘RJ’) accompanying the draft policy, are not sound when tested against the above criteria.

POSITIVELY PREPARED

The evidence base

5. To be sound CL7 must be founded upon ‘a robust and credible evidence base.’¹ The evidence must be proportionate and must inform the content of the policy.²
6. Page 4 of the BPPP states that the RJ paragraphs 34.3.46 – 73 ‘justifies the policy.’ Accordingly, in determining whether CL7 is sound, the decision maker should focus on the content of those paragraphs to discover whether they demonstrate compliance with the four point soundness criteria.

‘Concern from residents’

7. Contrary to RJ 34.3.46, CL7 does not apply ‘to all basement proposals.’ Despite the recognition in 34.3.47 that basements are ‘a useful way to add extra accommodation to homes and commercial buildings’ (and therefore, in principle, a sustainable form of development), CL7 (a) prohibits basement proposals that exceed 50% of garden land and CL7 (b) those of more than one storey. CL7 (RJ 34.3.47) purports to promulgate ‘rules’ to exclude these basement developments.

¹ Persimmon Homes (North East) Ltd v Blyth Valley BC [2009] J.P.L. 335 (CA).

² PINS LDF Guidance 09/2009:33.

8. A first apparent justification for the imposition of these 'rules' is the assertion in RJ 34.3.48 that 'Basement development in recent years has been the subject of concern from residents.' Guidance has been given by the Secretary of State on the proper approach to the evaluation of representations by third parties in relation to development.³ If they are to carry any material weight they must be shown to be soundly based on objective planning grounds.
9. The RBKC 'Basement Developments – Neighbours Survey': November 2012 provides no objective foundation for the imposition of the 'rules.' First, the survey was partial excluding all residents in the borough who were not living 'in the vicinity of properties where planning permission had been sought for a basement development.' Secondly, the extent of this geographical area – 'in the vicinity,' is not defined in the survey report and thus its appropriateness cannot be tested.
10. Thirdly, of the 8000⁴ questionnaires distributed, only 1354 (17%) were completed. It is submitted that a 17% return rate in this case, where individual householders in close proximity to basement development sites were singled out for consultation, is no substantial basis upon which to impose the proposed CL7 policy 'rules' on such development. The results of the survey show that (8000-1354) 6,646 householders 'in the vicinity of properties where planning permission has been sought for basement development' were not minded to inform RBKC that they had any concerns about such development. Thus, to the extent it was a pin point survey, the very low response rate demonstrated by implication that, despite being canvassed by RBKC, a substantial majority (83%) of the 8000 residents living 'in the vicinity of' basement development were silent as to there being any need for a policy change in the recently adopted Core Strategy policy CL2 affecting basement development. Nevertheless, RJ 34.3.47 seeks to place reliance on this mixed minority response to targeted consultation to build a policy foundation for the new 'rules' to be imposed

³ PPS1 and 'General Principles'.

⁴ The population of RBKC is 196,000. 8000 represents 4% of the population of which

in CL7. Such an approach is misconceived, and an example of policy being informed by evidence which is not proportionate contrary to NPPF 182.

11. Fourthly, this disproportionate reliance being placed on an insubstantial minority response to consultation is exacerbated by the lack of any apparent investigation by RBKC of the reasonableness of the 1354 responses to consultation taking account of the nature of the response, the circumstances it dealt with and whether the individual concerned had any planning justification for his or her concern having regard to the existing controls available to RBKC and other public authorities and the fact that all development has some impact on neighbours.
12. Fifthly, and in any event, the analysis in the survey report demonstrates that of the 17% responses, only about half expressed concern 'to some extent' about matters such as noise, vibration and dust. In addition, a majority of respondents noticed no change in drainage, flooding, damp and vermin either during or after construction.
13. In short, the RBKC 'Basement Development Neighbours Survey' 2012 provides no sound evidential basis for the proposed change of policy. It demonstrates no 'objectively assessed development requirement' for CL7. On the contrary, its results lend cogent support to the efficacy of the existing recently adopted Core Strategy policy CL2 in the management of basement development in the borough. As stated in the Gateshead MBC case,⁵ 'public concern' must be justified if it is to be a material planning consideration. The 2012 survey results show that the overwhelming majority of residents living in the vicinity of basement development in the borough do not see any requirement for the 'rules' in policy CL7.

The construction impact of basement development

14. RJ 34.49 says that in RBKC the construction impact of basements is a significant material consideration 'because the Borough is very densely developed and populated.' As regards the density of development and population in the borough,

⁵ [1995] Env LR 37

there has been no material change of circumstances since the adoption of the Core Strategy in 2010.

15. Nor have there been any material changes regarding the statutory control mechanisms in place to manage basement development. The RBKC Subterranean Development SPD 2009 (itself informed by the Arup Subterranean Development Scoping Study which led to the 2008 revisions of the GPDO), recognises that residents can have concerns about such development but also confirms that:

- subterranean developments can be built safely in nearly all circumstances (1.1.5);
- noise relating to construction and demolition 'will be controlled by the Council under section 60 and 61 of the Control of Pollution Act 1974' ('COPA') (Appendix C p.30);
- that British Standards Codes of Practice for Demolition and the Environmental Protection Act 1990 relating to nuisance 'should considerably reduce the risks and nuisance inherent in demolition work...' (Appendix C p.31)
- the appointment of a Party Wall surveyor is not a material planning consideration;
- a key requirement of planning policy under the new LDF process 'is not to duplicate policy or related legislation' including:
 - Building Control – engineering design, on-site operations; safe working and standards of workmanship;
 - Construction and Design and Management Regulations (2007) – health and safety during demolition and construction;
 - Control of Pollution Act 1974 – noise levels, working hours, use of plant;
 - Part Wall Act 1996 – requirement for reasonable measures to be taken to protect property from damage;
 - Highways Act 1980 – long term obstructions of the highway and skip, transfer of spoil, erection of hoardings licensing;

- Road Traffic Regulation Act 1984 / Road Traffic Act 1991 – traffic management orders;
- Environmental Protection Act 1990 – abatement notices re excessive noise, grit or dust;
- Health and Safety at Work Act 1974; and
- Housing Act 2004 – health and safety in dwellings.

16. By reason of its density, the vast majority of development of all kinds in the RBKC, including basement development, will have been and will be ‘next door’ (RJ 34.3.50). There are and have been for many years, these statutory regimes in place that are recognised by the SPD, to control construction and demolition operations relating to quality of life and structural stability. These remain extant and available, and there has been no material change of circumstances with regard to the statutory control of construction and demolition operations that amounts to an objective planning requirement for the imposition of the ‘rules’ proposed policy CL7.

Restriction on size

17. There is, accordingly, no objective planning justification or requirement for the proposed restriction on the extent of basement excavation under gardens ‘to no more than half the garden’ and the limit on the ‘depth of excavation to a single storey in most cases.’ The RBKC should focus on whether basement development ‘is an acceptable use of the land and the impact of the use, rather than control of the processes or emissions themselves where these are subject to approval under pollution control regimes.’ (NPPF 122) (Underlining added).
18. The rationale in RJ 34.3.49 - 51 for placing a policy embargo in proposed policy CL7 on these forms of basement development is not based on the use of land but essentially on the perceived short term effects of construction and demolition on neighbours. Thus, CL7 seeks to deny the ‘potential benefits’⁶ of subterranean development in the dense urban area of RBKC ‘including the increased space

⁶ Arup Geotechnics Phase 1 Scoping Study Rev B: 1.1

available to house holders and to businesses,⁷ by reference to considerations not concerned with the use of land but with short term environmental impacts of construction and demolition that are subject to control by other non-planning statutory regimes.

19. In the DCLG publication 'Non-Material Planning Considerations,' guidance is given that such considerations include 'Matters controlled under building regulations or other non-planning legislation e.g. structural stability, drainage details, fire precautions, matters covered by licences etc...Problems arising from the construction period of any works e.g. noise, dust, construction vehicles, hours of working (covered by the control of pollution Acts).' Contrary to this explicit guidance,⁸ therefore, policy CL7 seeks to impose an embargo on sustainable basement development by reference to non-material planning considerations. The policy is, thereby, not soundly based or consistent with achieving sustainable development.⁹
20. Nor would the policy serve any measureable or practical planning purpose. As advised by the ArupGeotechnics, the forms of disturbance during basement works give rise to effects which, in general 'are at least of similar, and sometimes of greater, magnitude than equivalent categories of disturbance created by other types of residential building works (such as replacing a roof, converting a loft, or adding a conservatory).'¹⁰ RBKC have produced no substantial evidence to demonstrate the fallacy of this statement or that basement works of the type to be embargoed by CL7 are of a magnitude in short term impact on amenity greater than that of other types of residential building works in the borough ordinarily controlled by planning conditions.

⁷ Ibid

⁸ And contrary to the High Court judgement in Richard Szpiro V. RBKC and Wheeler CO/11629/2011 Underhill J.

⁹ NPPF 182 first bullet.

¹⁰ ArupGeotechnics report Phase 1 Scoping Study Rev B 5.4

21. In conclusion under this heading, CL7 is not based on any plan making strategy that seeks to meet ‘objectively assessed development requirements.’¹¹

JUSTIFIED

22. Policy CL 7 is not ‘justified’ for the reasons mainly set out in the CB technical representations and accompanying expert reports. For the reasons stated there:

- there is no evidence to support the claim that limiting the area of garden excavation to 50% will reduce the level of construction phase inconvenience;
- no research has been carried out by RBKC to quantify the number of vehicle movements that would be associated with a larger basement construction project.
- the report by Eight Associates (RJ 34.3.53,69) is demonstrably flawed as regards its assessment of lifetime carbon emissions relating to basement development;
- CL7 and its accompanying RJ (34.3.54 -55, 60, 68) is not underpinned by any professional arboricultural or horticultural advice relating to the alleged benefits of retaining ‘at least half of each garden’¹² or proven drainage requirement;
- CL7 is not supported by any expert evidence to show that basement construction can materially affect the health of residents;
- CL7 (RJ 34.3.71) is not based on any survey or survey evidence showing that damage has actually been caused to properties in RBKC as a consequence of basement development above single storey;¹³
- CL7 (RJ 34.3.61 – 66) fails to acknowledge the flexibility supported by English Heritage with regard to basement development under listed buildings and in conservation areas;¹⁴

¹¹ NPPF 182 first bullet.

¹² See the Barrell and Gilchrist reports.

¹³ See the Masters structural design report

¹⁴ Planning for the Historic Environment PRACTICE GUIDE: ENGLISH HERITAGE

- CL7 (RJ 34.3.67) adopts an unreasonable blanket ban on lightwells and railings to the front and side of buildings without opportunity for consideration to be given to the planning merits of individual schemes; and
- unnecessarily and inappropriately (RJ 34.3.71) requires proof of detailed structural design at the planning application stage.

EFFECTIVE

23. Proposed policy CL7 is not positively prepared or justified by substantial and compelling evidence and will not be effective or deliver sustainable development. On the contrary, CL7, if adopted, is likely to inhibit many sustainable basement developments in RBKC and prevent the optimisation of scarce residential and commercial development opportunities in this dense urban area of London.

CONSISTENT WITH NATIONAL POLICY

24. CB contend for the forgoing reasons that CL7, in having a negative effect on the sustainable development of basements in RBKC, is in material conflict with London Plan policy 2.1 and its accompanying commentary which supports growth and development in the city. CL7 if adopted is likely to cause significant financial damage to employers in the basement industry by placing an embargo on sustainable basement developments in the borough.
25. In addition, CL7 does not 'take into account the London Plan' policy 3.5 (RJ 34.3.54). As stated to CB by Jennifer Peters, a strategic planner at the GLA, policy 3.5 does not relate to subterranean construction.
26. CL7 also conflicts with national policy set out in the NPPF as outlined above and for the reasons stated in Bell Cornwell's submissions on behalf of CB.

CONCLUSION

26. In overall conclusion, having regard to the guidance in NPPF 150-181, proposed policy CL7

- has not been prepared with the objective of contributing to the achievement of sustainable development.
- places unnecessary financial burdens on development
- is not based on adequate, up-to-date and relevant evidence
- contains no clearly justified safeguards and thereby inhibits development unnecessarily; and

is accordingly not a sound planning policy.

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