

Your Ref:
Our Ref: TR/BMM

12 November 2014

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By hand (2 copies) and email: bankssolutionsuk@gmail.com

Dear Sir

Main Modifications to RBKC Basements Submission Planning Policy (BAS 01)

We are instructed by Mrs Zipporah Lisle-Mainwaring, the owner of 19 South End, London W8 5BU. 19 South End is currently in B8 (storage and or distribution) use. Mrs Lisle-Mainwaring wishes to redevelop 19 South End for her own personal residential use, and to construct a basement as part of that redevelopment.

Mrs Lisle-Mainwaring has submitted three separate planning applications for the residential redevelopment of 19 South End including the provision of a basement:

- PP/13/02935: application submitted to RBKC on 29 May 2013. This application was refused by RBKC on 24 July 2013, but granted on appeal to the Secretary of State on 9 July 2014. The application is subject to an ongoing procedural challenge by a neighbouring property owner under Section 288 TCPA.
- PP/13/07133: application submitted to RBKC on 2 December 2013. This application was refused by RBKC members on 16 May 2014 despite being advised by officers that there were no legal grounds for doing so. Mrs Lisle-Mainwaring has appealed the decision to the Secretary of State. The appeal is not being contested by RBKC, but is opposed by the same neighbouring property owner who is challenging the grant of the first planning permission.
- PP/14/06107: application submitted to RBKC on 22 August 2014. This application should have been considered and determined by RBKC against the existing basement policy. However, in mid-October RBKC placed the following statement on its website:

"...the Council will not be determining applications for development proposals which include subterranean development, and such proposals will not be reported

to Committee, unless there are site specific material considerations which make this appropriate or they comply with the current Core Strategy, the existing SPD and the emerging policy."

Prior to placing that statement on its website RBKC had made clear that it would determine basement applications in accordance with the current adopted policy until the release of the Inspector's report on the proposed policy. RBKC is now refusing to determine PP/14/06107 before it has received the Inspector's report. We understand that RBKC is also refusing to determine around 120 current basement applications on the same basis.

Given the assurances previously given by RBKC, Mrs Lisle-Mainwaring had expected to have secured an unchallenged planning permission for a basement development of 19 South End prior to the adoption of the proposed new RBKC basement policy. For this reason she has not previously participated in the review of the proposed new basement policy.

Following RBKC's decision on 17 October 2014 to defer consideration of basement applications (including PP/14/06107) until receipt of the Inspector's report in respect of the new basement policy (the validity of which is the subject of separate correspondence), Mrs Lisle-Mainwaring's ability to construct a basement at 19 South End may now be influenced by the proposed new basement policy (if it is adopted). Mrs Lisle-Mainwaring has therefore determined that it is vital to her interests that she participate in the review of the proposed basement policy.

We set out in the attached Schedule Mrs Lisle-Mainwaring's specific comments on the proposed basement policy; followed by her comments on the "main modifications" proposed to the submitted basement policy. However, there is a wider issue to which we wish to draw the Inspector's attention.

RBKC has (like most other London Boroughs) for many years accepted that it is possible to construct or extend basements under the permitted development rights found in Class A of Part 1, Schedule 2 to the General Permitted Development Order 1995 ("GPDO"). By way of recent example, we attach as *item 1* a copy of RBKC's decision (dated 25 September 2014) to grant a Certificate of Lawfulness for the formation of a basement under 28 Godfrey Street, London SW3 3SX, together with the delegated report explaining the basis of that decision.

As the delegated report indicates, the creation or extension of a basement constitutes the "enlargement, improvement or alteration" of a dwellinghouse, and the question whether a particular basement proposal is permitted by Class A depends on whether the proposal is within the limits imposed under Class A.1 (and if relevant Class A.2) of Part 1, Schedule 2 to the GPDO. While this will undoubtedly rule out some basement proposals which extend by more than the prescribed distances beyond the elevations of the dwellinghouses concerned, it is clear that it is possible to construct substantial and large basements under the Class A permitted development rights. In particular, Class A imposes no limit on the depth of basements below the existing footprint of a dwelling.

It is against this background that we note the statement at paragraph 34.3.46 of the reasoned justification for the proposed new policy, that "*This policy applies to all new basement development*".

As a matter of law, the emerging policy cannot remove existing permitted development rights. The statement at para 34.3.46 therefore cannot be correct, unless RBKC intends to make an Article 4 direction removing all permitted development rights over basements in the Borough.

Given the significantly increased value of properties which have had basement extensions, such a decision would have profound implications in terms of RBKC's liability to pay compensation, and we are unaware of anything to show that RBKC has budgeted for such liability.

In view of the above, Mrs Lisle-Mainwaring has sought the advice of Leading Counsel, Mr Paul Brown QC. We attach a copy of Mr Brown's written opinion as *item 2*. We draw your particular attention to paragraphs 14 and 18, where Leading Counsel concludes that the failure by RBKC to properly take into account permitted development rights potentially renders the emerging policy unsound and invalid.

Whilst we recognise that this is a point which would, more usefully, have been taken at the time of the consultation on the original policy, it is an issue which potentially goes to the validity of the emerging policy, and the fact that it has not been taken to date would not prevent it being raised in any subsequent challenge to the adoption of Policy CL7. In the circumstances, it is in everyone's interests that it is addressed now. We would therefore ask you to place this correspondence and annexures before the Inspector for his consideration.

Yours faithfully



RICHARD MAX & CO

SCHEDULE

Overall Comments on the Basement Policy and Reasoned Justification

Mrs Lisle-Mainwaring opposes proposed policy CL7 in its current form.

The stated aim of the policy is "to require all basements to be designed, constructed and completed to the highest standard and quality." Mrs Lisle-Mainwaring supports this policy aim in general terms. However, taken together, there is no evidence that the detailed criteria (a) to (o) set out in the proposed policy are necessary to achieve this aim.

In particular:

- The proposed blanket requirements that basement developments should "not exceed a maximum of 50% of each garden or open part of the site" (CL7(a)); "not comprise more than one storey" (CL7(b)); or "not add further basement floors where there is an extant or implemented planning permission for a basement of one built through the exercise of permitted development rights" (CL7(c)) are not supported by evidence. Whether the size of a proposed basement is appropriate in planning terms should be assessed on a case by case basis, depending on the particular circumstances of the application. CL7(a); CL7(b) and CL7(c) should be removed;
- The protection of heritage assets is provided for in the National Planning Policy Framework; Planning (Listed Building and Conservation Areas) Act 1990 and other RBKC policies. CL7(e), CL7(f) and CL7(g) should be removed;
- The location of light wells and railings should also be assessed on a case by case basis. The restriction set out in CL7(h) should be removed;
- "energy, waste and water" and structural stability issues are dealt with by the Building Regulations 2010. CL7(k) and CL7(n) are unnecessary and should be removed;
- The requirement to "maintain and take opportunities to improve the character or appearance..." of a property and its surroundings (CL7(i)) goes beyond what is necessary to ensure the planning impacts of proposed basements are acceptable;
- CL7(l) and CL7(m) contain uncertain tests as to what level of basement construction related activity will be acceptable. These issues should be dealt with through planning conditions in the normal way. There is no justification for including specific criteria in the basement policy in respect of construction related impact. CL7(l) and CL7(m) should be removed.

Comments on "main modifications"

The "main modifications" are all only minor and do not go far enough to address the fundamental issues (set out above) with the proposed policy, which will act as an unjustified obstacle to development. Mrs Lisle-Mainwaring's comments on specific modifications proposed to the wording of policy itself are set out below:

Modification	Comment
<p>Para 34.3.58</p>	<p>It is unclear whether the proposed new text is intended to indicate that it is only the restriction on further basement floors which would not apply to an original property, or a property as at 1st July 1948, or whether it is also intended to cover extensions under the garden.</p> <p>Deferring the decision on the information which will need to be provided with an application to a Basements SPD is opposed.</p>
<p>Para 34.3.70</p>	<p>First, this is an area where authorities have increasingly required applicants to provide more information at the point of application, even though much of this relates to matters (such as dust management) which are perfectly capable of being dealt with by condition. This is contrary to both the NPPF and the NPPG. RBKC's requirements should therefore be subject to examination and testing through the development process.</p> <p>Second, RBKC does not yet have an SPD in place, and there is no indication of the date by which one can be expected. RBKC's determination of basement applications has already been held up by the emerging Core Strategy, and further delays while RBKC formulates its SPD are unacceptable. The proposed modifications to para 34.3.70 would only be acceptable if RBKC were prepared to undertake not to defer consideration of current applications pending finalisation of its SPD.</p> <p>We attach as <i>item 3</i> a memorandum from Graham Stallwood - the Council's Head of Development Management & Conservations - which confirms the difficulties of implementing a policy for which no SPDs are available. The requirements are both prescriptive and undefined.</p> <p>The proposed deletion of the overall goal for Policy CL7 is opposed.</p>

Policy CL7 (beginning)	There should be an overall goal that the policy is seeking to achieve, which can be used to sensibly interpret and apply the (often unnecessary and unjustified) individual criteria proposed by the council in CL7(a) – (o).)
Policy CL7(e) and (g)	<p>The deletion of CL7(g) is supported. However, CL7(e) is also unnecessary and should be removed.</p> <p>A criterion that states simply that development should “<i>comply with the tests in national policy as they relate to the assessment of harm to the significance of heritage assets</i>” is redundant and adds nothing to existing policy.</p>
Policy CL7(f)	<p>This change is opposed.</p> <p>There is no justification for the proposed blanket ban on any excavation under vaults of listed buildings.</p>
Policy CL7(h)	<p>The removal of the unjustified blanket ban on side and front lightwells and railings is supported.</p> <p>However, the criterion as amended adds nothing to existing policy tests. CL7(h) should be removed entirely.</p>
Policy CL7(i)	<p>The additional reference to light pollution is opposed.</p> <p>Light pollution can be dealt with effectively through standard planning conditions.</p>
Policy CL7(j)	<p>The addition of the reference to maintaining SuDS “in perpetuity” is opposed. No reason is given for this unnecessary addition.</p>
Policy CL7(k) and 34.6.68	<p>The Council’s evidence that “carbon emissions of basements are greater than above ground development” is not supported by the evidence. CL7(k) is not sound and should be removed.</p>
Policy CL7(l)	<p>The wording as amended still imposes an uncertain test as to what impacts would be “unacceptable”.</p> <p>Construction traffic impacts are best dealt with</p>

	through the imposition of standard planning conditions. CL7(l) should be removed entirely.
Policy CL7(n)	No comment

**Item 1: RBKC Decision and Officer's Report dated 25 September granting
Certificate of Lawful Proposed Development for basement development at 28
Godfrey Street, London SW3 3SX**

(enclosed)

Item 2: Opinion prepared by Paul Brown QC
(enclosed)

Item 3: Stallwood memorandum of 16 October 2014

(enclosed)