

# CRANBROOK BASEMENTS

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## EXAMINATION OF THE PARTIAL REVIEW OF THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA CORE STRATEGY

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### BASEMENTS PUBLICATION PLANNING POLICY MATTERS, ISSUES AND QUESTIONS FOR EXAMINATION INSPECTOR'S DOCUMENT **ID/9A**

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#### RESPONSE OF CRANBROOK BASEMENTS

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#### Issue 1.1

- (4) Reg. 12(2) (b) requires the SA/SEA to 'identify' etc 'reasonable alternatives.' A criteria based impact assessment led policy alternative was reasonable and was not identified, described or evaluated in the 12/2012 SA/SEA. For example:

*To achieve this basement development should:*

- a. ensure that the extent of the proposed subterranean extension under garden land would:*
- allow for the maintenance of natural drainage;*
  - enable the retention of garden land as garden;*
- b. ensure that the depth of the proposed subterranean extension would give rise to construction impacts that were not manageable under relevant building control and environmental legislation...*

BAS 21 does not set out the reasons for the selection of CL7 or the reasons why other reasonable alternatives were not chosen during preparation. Predicting the effects of the 'preferred option' is not giving

reasons for it being chosen over alternatives. This absence of reasons is fundamental and a particularly significant failure in the SA/SEA exercise when the SEA/SA 12/2012 Table 2.5 demonstrates that the differences in SA Objective impacts between the 'Preferred option' and the 'Current policy approach' are negligible.

## Issue 1.2

- (5) Planning control and plan making under the Planning Acts is governed by administrative law principles. The administrative duties imposed upon the Council in sections 15 -19, 2004 Act are mandatory. The s.17 (3) duty is to set out in a CS / LP 'policies (however expressed) relating to the development and use of land in their area.' A policy not needed to serve that purpose would be unlawful as resulting from 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.'<sup>1</sup>

CL7 (e), (f) and (g) are not necessary. The assessment of harm to the significance of heritage assets in the planning context is controlled by s.16, s.66 and s.72 of the Listed Buildings & Conservation Areas Act 1990 (LBCA).<sup>2</sup>

CL (l) is not necessary. Traffic and construction activity in the highway is controlled by powers under the Highways Act 1980 and the Road Traffic Regulation Act 1984.

CL (m) is not necessary. Construction impacts including noise, vibration and dust are controlled by the Control of Pollution Act 1974 s.60, s.61, and the Environmental Protection Act 1980.

- (6) The stated planning purpose of CL7 is 'to require all basements to be designed, constructed and completed to the highest standard and quality.' There is no logical connection between that objective and restricting basement development to 50% of garden land and / or one storey. Whether a high quality basement development can take 50% or 75% of a garden, or comprise single storey or multiple stories, should be determined on its planning merits having regard to material considerations. CL7 identifies no planning purpose served in pre-

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<sup>1</sup> Secretary of State for Education and Science v. Tameside MBC [1977] A.C. 1014. Lord Diplock

<sup>2</sup> See Barnwell v East Northamptonshire DC v Secretary of State CLG [2014] 1 P&CR 22.

empting such planning decisions by imposing a s.38 (6) policy presumption against high quality basement development of more than 50% garden and / or greater than one storey. The issues of depth and garden usage are appropriately addressed by a criteria based policy (Issue 1.1 (4) above).

The limitation to one storey in policy CL7 would appear to be, in part, promoted to avoid alleged unacceptable 'off-site' cumulative impacts (34.3.50).<sup>3</sup> 'Other legislation' (COPA s.60, 61, EPA, HA, Party Wall Act), common law nuisance and planning conditions primarily address and control the process of construction. The 'aftermath' is a function of good design secured at the planning approval stage. There is no evidence produced by RBKC that basement development causes 'long term harm to residents living conditions (RJ 34.2.50).

#### Issue 1.4

- (8) CL7 makes no reference to SPD. Reg. 5 (1) (a) says that documents to be prepared as LDDs include:

*(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission.*

Such policies cannot be hived off into SPD.<sup>4</sup>

BAS 21 paragraph 4.54 refers to the adopted 'Subterranean Development Supplementary Planning Document' (26 May 2009) ('SD/SPD'):

*which further elaborates the Council's current approach to new basement development.*

The Executive Summary of the SD/SPD says applications for basement development

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<sup>3</sup> There is no recognition in CL7 itself that this is the justification for the one-storey rule.

<sup>4</sup> R. (oao Wakil (t/a Orya Textiles)) v Hammersmith & Fulham LBC (no. 1) [2012] J.P.L. 1334; West Kensington Estate Tenants and Residents Association v Hammersmith & Fulham LBC [2013] EWHC 2834

*Will be determined in accordance with the UDP and London Plan policies, together with this and other SPDs unless material considerations suggest otherwise.*

The current SD/SPD is, accordingly, development management policy intended to guide the determination of applications for planning permission for basement development.<sup>5</sup> Examples of 'development management' policies in the SD/SPD (not in CL7) include the following planning application requirements:

- 2.1.2 advice of an MICE
- 2.4.1 a programme of archaeological work
- 4.2.4 a flood risk assessment
- 5.1.3 Level 4 / BREEAM
- 6.1.2 Construction Method Statement
- 7.1.4 Considerate Construction Scheme
- 7.1.5 Construction Traffic Management Plan requirement
- 8.3.2 light well limitations
- 9.1.1 tree replacement

In so far as RJ 34.3.70 proposes to replicate these controls in a new SPD and not in CL7, the SPD will not conform to the Regulations and CL7 will be unsound as not 'positively prepared' (NPPF 182).

- (9) The DCMPs and the CTMPs, in so far as they are necessary (i.e. not duplicating controls in 'other legislation'), are required by Reg. 5 to be in the DPD.

#### Issue 2.1

- (10) 'Subterranean development' which has a wider scope than 'basement.'<sup>6</sup>
- (11) 'Guidelines' (NPPF 59-60)
- (12) 'Management' (NPPF 59)
- (13) The comparative 'larger' is meaningless; larger than? The 'Large sites' exception in CL7 (b) is unexplained. If CL7 is to permit subterranean development on large and small sites limitation by reference to size

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<sup>5</sup> See further references in the SPD at paras. 1.2.2, 1.2.3

<sup>6</sup> Chambers Dictionary: 'The storey of a building beneath the ground floor.'

/depth is ‘unnecessary prescription.’<sup>7</sup> ‘guiding’ criteria based policy governing all subterranean development should be substituted (NPPF 59).

(14) Yes.

(15) (i) Yes; but (ii) the clause is unnecessary – see ss. 16, 66 and 72 LBCA 1990.

#### Issue 4.1

(17) Re Bas 18: 6.11, the ABA report does not recommend a ‘further restriction.’

(18) The blanket 50% is not supported by ABA or the evidence: see CB reports Barrell (trees), Forbes-Laird (tree’s), Sands (ecology), Toovey (ecology), Wilson (drainage / geotech), Masters (Engineering), Bedwell (transport). The 50% is a pretext for avoiding construction phase inconvenience.

(19) The reduction carbon footprint / emission reason (RJ 34.3.54, 34.3.68) is not robust. The Eight Associates Sustainability Report 2010 was conceded to be mathematically flawed (footnote 9a); RBKC will not reveal the calculations in the Eight Associates LCA report 2014 (footnote 9b).

(20) A discrete subterranean development policy, if required, should be criteria based policy viz. CL2 (g).

(21) CL2 g. iii is adequate to deal with CL7 (a) issues; and is reinforced by s.72 LBCA.<sup>8</sup>

#### Issue 5.1

(23) RJ 34.3.46 – 50 is a commentary on all basement development that relates essentially to off-site construction phase impacts (see also

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<sup>7</sup> NPPF 59

<sup>8</sup> 70% of RBKC is in Conservation Areas.

34.3.53); these 'reasons' (34.3.50) provide no differential basis for the 34.3.51 'therefore' policy limitations.<sup>9</sup>

The 'protection' of residential living conditions during construction and after is provided by CL2 g ii, iii and iv, and COPA, EPA, HA, PWA and the law of nuisance (see RJ 34.3.69). No substantial evidence has been produced to demonstrate these management structures have proved inadequate.<sup>10</sup>

Further – RBKC state that it is extremely rare for a basement to be dug in isolation with the vast majority of such projects being associated with the refurbishment of the wider building (footnote 9c).

Further , while accepting that basements are almost always part of a much larger redevelopment, RBKC have confirmed that they have not established in consultation responses, what – if any – perceived inconvenience related to the basement or other part of the development (footnote 9d – (people complaining about a project that contains a basement may very well be experiencing inconvenience that related to some other part of the wider development)).

The CL7 b exception for 'large sites' is implicit acknowledgement that subterranean development should be assessed on a site-specific planning merits basis as per adopted CL2.

There are no sound and clear cut planning reasons in the RJ or supporting evidence for the embargoes in CL7 b. and c.

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<sup>9</sup> Both the ArupGeotechnics Phase 1 (2008) 5.4 and the ABA 2013 report 9.1.3, 12.1-12.11 say that basement construction impacts are generally in magnitude of a similar order to those with other forms of development. 9a. RBKC Document. Council Response to Cranbrook Report and Analysis. BAS 05\_03 – Para 12, 13, 14, 87

9b. Cranbrook Document 71. RBKC – Refusal to provide Carbon Calculations – Eight Associates

9c – See Cranbrook Document 35 – RBKC formal response

9d – See Cranbrook Document 1 – RBKC Response to Freedom of Information Request – Page 3 – Item 4 & 5

<sup>10</sup> See CB planning (Bell-Cornwell: S Avery), structural engineering (Stephen Masters), tree (Barrell), ecology (E Toovey) and drainage /geotechnical (S. Wilson) reports.

- (24) CL7 b. and c.: there is no substantive evidence of differential construction phase impacts to justify permitting a one-storey basement development but not more.<sup>11</sup>
- (25), (26) Subterranean development is sustainable (RJ 34.3.47). It's a useful means of providing additional accommodation in London (NPPF 10) by optimising the potential of existing sites to accommodate development (NPPF 58). A restriction to one storey without there being sound and clear cut reasons for the limitation is unnecessary and contrary to the presumption (NPPF 14).
- (27) Planning control over subterranean development is appropriately managed by a criteria-based policy consistent with NPPF 59. CL 2 is an example; it could be added to if necessary.
- (28) An exception clause is unnecessary where criteria can address relevant planning considerations relating to subterranean development.

#### Issue 6.1

- (29) There are none. No authority is given for the propositions 'Consequently' in RJ 34.3.61. The English Heritage 'Practice Guide' is flexible.<sup>12</sup>
- (30) No evidence has been produced justifying the embargo.
- (32) It is no different.
- (33) Nothing has changed. The embargo was never justified ((35) below).
- (35) Protection of physical structure and setting of a listed building is secured by s.16 and s.66 of the LBCA. The criterion is unjustified and unnecessary.
- (36) Yes; but see (35) above.

#### Issue 7.1

- (37) Yes – see BAS05/05 page 11, '34.3.67'. Should be a case by case merits approach.

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<sup>11</sup> See ABA 'Case Studies' report 6.1-6.4.

<sup>12</sup> See also BAS05/05 p.9 34.3.62 and "Comments by Cranbrook Basements" on CL7f box Refs: 68.00 to 73.00 and the associated documents 16, 32.

(39) Alternative wording – ‘the introduction of light wells and their location will have regard to the character and appearance of the area and local amenities.’

(40) Yes.

#### Issue 8.1

(41) – (46) The CL2 g. iv. criterion is a necessary requirement and is appropriately replicated in CL7 j. with a one metre minimum limitation.

#### Issue 9.1

(47) (48) (49) ‘These reasons’ for limiting basement development in RJ 34.3.50 do not include considerations of energy, waste or water performance. The assertions in 34.3.54, in so far as they rely on the Eight Associates LCA 2014 documents referred to in the footnote, cannot be substantiated. Despite requests from CB, RBKC will not provide the calculations upon which the LCA analysis 02/2014 is based.<sup>13</sup>

Document 11,- Waterman Energy, Environment & Design – ‘Critical Report Review,’ Document 9, – MES Energy Services – ‘Technical Review of Eight Associates Report’ and Document 24, – BBS Energy Services ‘Review of RBKC Basement Publication Policy,’ show that both the embedded carbon and operational carbon associated with basement construction and operation is effectively the same as a traditionally constructed above ground building. CL7 k. issues are addressed by the Building Regulations 2010 where necessary.

The criterion is not, accordingly, supported by any substantial reasons.

(50) CL 7 k. to be compliant with NPPF 95 should say ‘to a level of performance that accords with nationally described standards.’

(52) Yes.

#### Issue 10.1

(53) The reasons for criterion CL7 n. appear to be unsubstantiated ‘concerns about the structural stability of nearby buildings’ (RJ 34.3.48, 50) and the observation that ‘Basement development can affect the structure of existing buildings’ (RJ 34.3.70). Contrast

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<sup>13</sup> The Eight Associates report 09/07/2010 was fundamentally flawed.



ABA Report 03/2013: 9.1.3, structural problems do not arise;  
ArupGeotechnics Subterranean Scoping Study 1.1.5: subterranean  
developments can be built safely in nearly all circumstances.

- (54) These reasons are not supported by any evidence demonstrating that structural considerations are required to be included in planning policy. As stated in 34.3.70 'The structural stability of the development itself is not controlled through the planning system but through Building Regulations. The Party Wall Act is more suited to dealing with damage related issues.'
- (55) The criterion is not necessary (see (54) above).
- (56) The ground conditions (London clay) in RBKC are well documented.<sup>14</sup> NPPF 120 refers to 'where a site is affected by ...land stability issues;' CL 7 n. should reflect that. A design safeguarding the structural integrity of existing buildings and adjacent land is a matter for Building Regulations approval.
- (57) No.
- (58) No change; but query whether CL 2 g. ii is sound /a material planning consideration where basement structural stability would be secured by the passing of plans and supervision of building works under the Building Regulations?
- (59) The criterion is not necessary. If changed to reflect NPPF 120 it should say: 'ensure that where the site is affected by contamination or land stability issues these are addressed in the design process.'

#### Issue 11.1

- (60) Light from basement development is not per-se 'light pollution.' Artificial light in / from buildings in close proximity in RBKC is commonplace. Reference to light pollution, accordingly, is not necessary in CL 7 l. if its effect would be to exclude basement development when the policy permits basement development.

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<sup>14</sup> See generally the Alan Baxter Report March 2013: chapter 5.

- (61) The reasons for CL7 a. are not justified as demonstrated in the CB reports on trees, ecology and drainage / geotechnics;<sup>15</sup> nor by the ABA report (75% or 50% to 75% depending site constraints).

CL7 d.: the 'preservation' and 'planting' of trees are material planning considerations by s.197;<sup>16</sup> 'd' is therefore unnecessary and unjustified. BAS 34 shows surface treatments in gardens that householders may undertake whether they build basements or not. Where trees are in a CA or TPO'd there is existing amenity protection.

CL 7 e., f. and g.: the protection of listed buildings and conservation areas is provided for in s.16. s.66 and s.72 of the LBCA. Subterranean development under listed buildings can take place without harm (ABA report 03/2013: 9.2.3.1, 9.3.7.22).

CL 7 i.: the obligation to 'maintain' and 'take opportunities to improve' the character etc is too prescriptive. It imposes a test that is more onerous than s.72 LBCA 'preserve or enhance.' In so far as it requires maintenance and enhancement of the status quo it conflicts with 'avoid unnecessary prescription or detail' and 'not stifle innovation, originality...' etc in NPPF 59, 60.

CL 7 l.: relates to off-site traffic impacts in the widest terms which are not normally the subject of planning control. Traffic generated by development in London must affect other road users to a greater or lesser extent. The tests of 'harm,' 'significantly increase traffic congestion'<sup>17</sup> and 'place unreasonable inconvenience' are unclear as to their scope and thereby open up a wide area of discretion within which developments would be refused planning permission as contrary to policy on the strength of subjective judgements as to likely impacts (and possibly cumulative impacts)<sup>18</sup> employing these phraseologies. These matters are normally dealt with by requiring a Demolition and

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<sup>15</sup> See (18) above.

<sup>16</sup> 1990 Act

<sup>17</sup> Implicit in this phraseology is acceptance that London traffic is congested in any event.

<sup>18</sup> Normally only relevant to E.I.A. development.

Construction Management Plan (DCMP) and a Construction Traffic Management Plan (CTMP) by planning condition. There are no special circumstances why there should be a departure from the norm in the case of basement development. The wider impact of construction traffic is a component of the everyday impact of all traffic in London and is controlled and accommodated by traffic regulations and the Highways Act; and not by refusing planning permissions. CL 7 l. should be deleted and a criterion substituted requiring the submission of a DCMP and a CTMP.

CL 7 m. similarly 'acceptable levels' is wholly uncertain as to its application to a basement development. As a policy tool it could be used to refuse basement development by reference to its cumulative impact with other development (normally only an issue where an E.I.A. is required). The environmental impacts of basement development will inevitably depart from the norm in residential areas while the work is being carried on. Controls are provided by s.60 & 61 of COPA, the EPA and by planning conditions on working hours and noise attenuation of machinery etc. It is these controls that ensure that construction impacts are kept within reasonable limits. There is no similar criterion in CL 2 for 'Extensions and modifications' or 'High Buildings' for these reasons. CL 7 m. should be deleted accordingly.

- (62) The aims / reasons in CL 7 d., g., i., l., and m. are normally, and can be dealt with by other legislation and by planning condition. Not by refusals of planning permission on the grounds of speculative impacts being contrary to policy (S.38 (6)) triggering the need to show 'material considerations' for permission.

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