

**Matter 6: Restriction on excavation under a listed building**

*Issue 6.1: Whether CL7 f. is justified by the evidence, consistent with national policy, and effective.*

1. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 imposes a “General duty as respects listed buildings in exercise of planning functions”. Subsection (1) provides: “In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority ... shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.”
2. We note that this Matter is confined to the consideration of one of three criteria addressing heritage issues (criteria e and g also deal with this). By way of summary, we firmly believe that criterion f is not justified by the evidence, is not consistent with national policy, and will not be an effective means of achieving the policy’s stated objectives.
3. Paragraph 29 asks what are the key reasons for the criterion. We recognise that it is for the Council to answer this question and therefore we may wish to add to this Hearing Statement in the light of anything they say.
4. Paragraph 30 asks whether each of the reasons for the criterion is justified by the evidence. We consider that they are not. Our Representations address heritage issues in the round at Section 6, paragraphs 100-130.
5. Nothing we say seeks to underplay the significance in planning terms of the question whether development causes harm (substantial or less than substantial) to the significance of a heritage asset. However, this criterion would replace the planning judgment involved in assessing the degree of harm in a given case and the corresponding public benefits of development which may be involved in that case. As the Council recognises, a balance is required by the NPPF and is consistent with the statutory duty set out above.
6. In its response to our Representations, the Council relies principally on BAS 05/08. This demonstrates the poverty of the evidence: first it identifies only the potential for harm in paragraph 1.1. Then it identifies a particular category of residential dwelling in RBKC for which it states the introduction of an additional storey would be harmful [paragraphs 1.2-1.4]. Then it demonstrates that, although the policy would apply to all forms of subterranean development under all sites Borough Wide, the Council is only really targeting a particular form of residential extension which, the writer claims, delivers no public benefit [paragraph 1.5]. It also includes an extraordinary generalisation about the difference between above ground extensions and those below ground [paragraph 1.11]. It is the impact of above ground extensions which enable local planning authorities to refuse permission for those which may be judged too large. The same approach should apply to development below ground. BAS 05/08 is a completely inadequate justification of this arbitrary and damaging restriction.

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7. We consider it is even potentially damaging to the significance of heritage assets which require considerable expenditure to maintain them to a high standard, bearing in mind that the active continuation of viable uses is the most secure route to preservation. We refer to the potential for our approach to support the longevity of listed buildings at paragraph 130 of our Representations. This point has not been answered by the Council.
8. The Council has also referred to evidence submitted with the Submission draft Plan, namely the Alan Baxter Report of February 2014 and the English Heritage report of 1996. We responded to the latter report at paragraphs 106-107 of our Representations. We consider it supports our approach of a case by case assessment of harm. We do not consider the Alan Baxter Report suggests our approach is incorrect.
9. At paragraphs 124 we referred to the response of English Heritage to consultation on the first draft policy. Contrary to the Council's response, what we said was correct. We maintain that English Heritage's comment made it clear (although it did not state expressly) that they would not have objected to a policy that allowed development underneath listed buildings. We note that the draft policy did not include a criterion like CL7 f but only draft policy criterion d. which at that time stated "The scheme must not cause substantial harm to heritage assets." Their response (at paragraph 125 of our Representations) must be read in that light. In it they did not state that there should be any greater protection than a case by case assessment of harm. It is our contention that they would have done if they did indeed object to a policy capable of allowing development underneath listed buildings provided the degree of harm is acceptable in the given case.
10. Paragraph 31 asks whether the restriction is too limiting. For the reasons given we consider that it is.
11. Paragraphs 32-34: We were not involved in the preparation of the Core Strategy adopted in December 2010 and do not know whether CL2g.i. was a matter the subject of particular examination. We note that adoption was pre-NPPF with its emphasis on delivery of sustainable development; and that there is no reasoned justification for this sub-criterion (see for example 34.3.20 which does not help on this point); but we do not claim there has been a material change in law or policy for the preservation of the historic environment. It is therefore our contention that CL2 g.i. is not consistent with the NPPF and not necessary to ensure subterranean development preserves and enhances the historic environment.
12. We are not sure from a procedural point of view whether modifications to CL2 are within the remit of this Examination. However, even if they are not, the existence of an unjustifiable prohibition on development in CL2 does not justify its repetition elsewhere.
13. Paragraph 35: We consider the protection of the historic environment is best achieved in the way referred to by English Heritage as stated at paragraph 127 of our Representations.
14. Paragraph 36: we believe that the need for an exception within the criterion demonstrates that the criterion is itself inappropriate, and would make the operation of the policy over detailed and unnecessarily complex. However, it is obviously less harmful than that proposed by the Council.

- END OF HEARING STATEMENT -