

## **CRANBROOK BASEMENTS**

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ROYAL BOROUGH OF KENSINGTON AND CHELSEA

'BASEMENTS' PUBLICATION PLANNING POLICY CL7

PARTIAL REVIEW OF THE CORE STRATEGY: FEBRUARY 2014

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

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**LAW / POLICY SUBMISSION OF CRANBROOK BASEMENTS**

**ON THE 'SOUNDNESS' OF PARTIAL REVIEW POLICY CL7**

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### **INTRODUCTION**

1. These submissions comprise the representations of Cranbrook Basements ('CB') on the 'soundness' of Partial Review Policy CL7 ('Policy CL7') contained in the Royal Borough of Kensington and Chelsea ('RBKC') Basements Publication Planning Policy February 2014. ('BPPP')
2. CB contends, for the reasons set out in these representations, that Policy CL7 is not 'sound.' (Regulation 20(5)(b))

### **EXAMINING POLICY CL7: NPPF 182**

3. To be sound, Policy CL7 must be shown to be:
  - positively prepared on a strategy which seeks to meet objectively assessed development and infrastructure requirements consistent with achieving sustainable development.

- justified – the policy should be the most appropriate strategy 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 in accordance with the policies in the Framework.
4. These are legal tests. A local plan 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 these representations, Policy CL7 and the ‘Basements (*Reasoned justification*)’ paragraphs 34.3.46 – 34.3.73 (‘RJ’) preceding the draft policy, are not sound when tested against the above criteria.

#### **WHETHER POLICY CL7 HAS BEEN POSITIVELY PREPARED**

5. Policy CL7 does not meet legal requirements and is not based on a strategy which seeks to meet ‘objectively assessed development and infrastructure requirements consistent with achieving sustainable development.’

#### **Consultation**

6. The RBKC Statement of Community Involvement 2007 (‘SCI’) is out of date. In particular, it fails to address or explain how the results of community involvement / consultation will be fed into the preparation of development plan documents and supplementary planning documents.
7. This is illustrated by the statement on page 22 of the SCI:  
*‘Purpose of Consultation*  
*To seek comments of the Development Plan Document that emerges following the consultation on the preferred Options Report. The aim is to seek comments on the policies and proposals before the document is submitted to the Secretary of State for independent examination.’*

Consultation requires more than seeking comments. It requires proper consideration by the Council of the comments received (if any) and the formation of a judgment as to whether they raise objectively verifiable planning criteria that should affect the content of planning policy. It is not demonstrated in the RJ that this process has been undertaken.

8. As disclosed in the RBKC documents 'Basements: Summary of Consultation 02/2014' and 'Statement of Consultation 02/2014,' weight is placed by the Council in support of the appropriateness of Policy CL7 on the outcome of the 'Basement Issues Consultation April- May 2012.' That weight is not justified by any substantial evidence.
9. In April-May 2012 RBKC invited 1,041 bodies and persons to make representations. Only 55 (5%) representations were received.<sup>1</sup> The overall response was, accordingly, statistically insignificant; and a number of the 55 responses, in any event, indicated that the existing policies governing basement development were adequate.<sup>2</sup> The consultation responses provided no robust and credible evidential basis<sup>3</sup> for the adoption of Policy CL7.
10. Similarly, the RBKC 'Basement Surveys (Aug/Sept 2012)'<sup>4</sup> ('Summary of Consultation') provided no objective evidential foundation for the adoption of Policy CL7. 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 could not be tested and is unproven.

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<sup>1</sup> RBKC 'Basements: Summary of Consultation' 02/2014 para.2.3

<sup>2</sup> Ibid 2.6

<sup>3</sup> Persimmon Homes (North East) Ltd v Blyth Valley BC [2009] J.P.L. 335 (CA)

<sup>4</sup> Ibid 3.0

11. Thirdly, of the 8,000<sup>5</sup> questionnaires distributed, only 1,354 (17%) were completed. It is submitted that a 17% return rate in this particular 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 Policy CL7 limitations on such development. The results of the survey show that (8,000-1,354) 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. Accordingly, in the context of it being a pin point survey, the 17% only response rate demonstrated by implication that, despite being specifically targeted / canvassed by RBKC, a substantial majority (83%) of the 8,000 residents living 'in the vicinity of' basement development were silent as to there being any need for a policy change to the recently adopted Core Strategy policy CL2 affecting basement development.
12. Furthermore, as regards the reported results of the survey in paragraph 3.3 of the Summary of Consultation, no assessment was made by RBKC as to whether residents' reports of 'negative impacts' were objectively justified. The assertion at paragraph 3.5 that 'The findings broadly corroborate one another' is not supported by any or any objective analysis of the efficacy of the claimed negative impacts. They are not 'findings' but merely recordings of unsubstantiated comments. Nor is there any explanation of or evidential support disclosed for, the statement in paragraph 4.3 that 'two further years of basement construction across the Borough have highlighted that the policies (and associated procedures) have not always have been effective as intended.'
13. In addition, the 'research commissioned' referred to in paragraph 4.3, if it is the Alan Baxter report, provides no basis for the contention 'that some provisions of the existing policy should be updated.' The Alan Baxter Report March 2013 says, among other things:

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<sup>5</sup> The population of RBKC is 196,000. 8000 represents 4% of the population of which

*1.7 Existing Party Wall legislation and common law are considered by Government to be sufficient to deal with relationships and disputes between adjoining owners...*

*1.9 Health and Safety legislation is also arguably a factor in that it imposes duties on designers and contractors to work in ways that do not endanger construction workers or the public.*

*9.1.3 Problems generally do not arise when the design and construction are thoroughly and fully considered and the interaction between design and construction is properly explored and taken into account...*

*9.2.3.1 Underpinning through London Clay is relatively straightforward, as there is usually no ground water...*

*9.2.3.2 Underpinning through sands and gravels above the perched water table is relatively straightforward...*

*9.7.5 ...all new basements under gardens should have a minimum 1m of soil over the slab, (plus the insulation and waterproofing layers) to allow for the cultivation of normal gardens above them. There are solid engineering principles related to surface water management and the maintenance of ground water on a site and in a local area that support this policy.*

*9.3.7.2 In most cases, well designed and carefully constructed residential basements can be achieved without causing structural damage to adjoining buildings...*

*9.8.3 When a basement is built, water falling on the topsoil above it needs to be channelled or directed to an unbuilt area of the garden so that it can enter the ground and find its way into the gravel and down to the Upper Aquifer. As a rule of thumb, 25% of the garden area is likely to be sufficient to enable this to happen. On this basis a new basement should not occupy more than 75% of the area of a garden...*

*9.8.4 To enable the clay subsoil to absorb some of the rainwater a proportion of the garden should not be built under and on clay sites this might be between 25% and 50%. On this basis a new basement should not occupy more than between 50% and 75% of the area of a garden on clay sites.*

*9.8.6 ...the ability to plant large trees...In most cases a 3m strip at the rear of the garden will be sufficient to allow trees to grow but this may be depend on the nature of the garden and the trees themselves...*

*11.5 Once constructed, basements tend to perform much better in environmental terms than above ground construction. They are not subject to extreme variations in temperature which results in high heating or cooling loads...*

*12.1 All construction is disruptive and involves noise, dust, vibration, delivery of materials to and from site, access to the site by construction operatives and access for plant, machinery and equipment...suspension of parking bays...the establishment of welfare facilities for workers...*

*12.11 All basement projects should have a Construction and Demolition Management Plan (CDMP) and a Construction Traffic Management Plan (CTMP)...*

*13.3.5 Each site needs to be looked at individually (see 9.8) but generally the following limits should be considered*

*a) In sites where the near surface conditions are gravel or sand, no more than 75% of the area of the garden should be built under with a basement.*

*b) In sites where the subsoil is clay, no more than between 50% and 75% of the area of a garden should be built under with a basement.*

14. It can be seen that the Alan Baxter Report March 2013 provides no substantial support for the inflexible 50% garden land rule in Policy CL7 a. or the one storey limitation in CL7 b.
15. Summary of Consultation 5.0: Basement Draft Policy Consultation – Dec 2012 / Jan 2013 (Regulation 18 Consultation): This consultation was with 1,352 ‘invited’ bodies and persons and received only 86 (6%)<sup>6</sup> responses. The responses were not only few in number but also mixed as regards support for / opposition to Policy CL7. Read as a whole, they provide no robust and credible evidence base for the Council’s contention:
- ‘Based on the consultation responses and further research by the Council into the visual impact of basements on the character of gardens and planting it was recognised that allowing basements in up to 75% of the gardens may be excessive...’<sup>7</sup>*

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<sup>6</sup> RBKC Summary of Consultation 5.8

<sup>7</sup> Ibid 5.19

16. Summary of Consultation 6.6: Of the 1,406 bodies and persons invited to make representations on-line in 2013 only 105 (7%)<sup>8</sup> responded. Of these 47 were opposed to greater planning restrictions on basements.<sup>9</sup> Despite this paucity of support (58 responses) for any changes the Council concluded:
- Whilst strong objections have been made, given the dense residential environment in the Royal Borough it is considered appropriate to limit construction impacts proactively because of the planning consequences.*<sup>10</sup>
17. This statement is not only unsupported by any substantial response to consultation but also is unexplained and lacks justification by any compelling evidence of ‘planning consequences’ warranting the proposed policy embargo on basement development. The consultation exercise was ample demonstration that the alleged ‘planning consequences’ were either non-existent or not significant as a matter of common experience. Either way, no explanation is provided by the Council on what basis it decided it was ‘considered appropriate to limit construction impacts proactively because of the planning consequences.’ The absence of any such justification is indicative of the Council having made up its mind to pursue Policy CL7 without regard to the outcome of consultation.
18. In summary, Policy CL7 (February 2014) has not been positively prepared by reference to statutory consultation; nor is it demonstrated to be based on a strategy which seeks to meet objectively assessed development and infrastructure requirements based on a robust and credible evidence basis. Nor is the proposed new policy supported by any specific Sustainability Appraisal.
19. In so far as it is asserted by the Council in the BPPP that Policy CL7 is justified ‘by supporting text called reasoned justification’<sup>11</sup> CB make the following observations:

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<sup>8</sup> Ibid 6.11

<sup>9</sup> Ibid 6.13

<sup>10</sup> Ibid 6.14

<sup>11</sup> BPPP p.4

- RJ 34.3.46: The policy would not apply to ‘all new basement development.’ Basement development is permitted by Part 1 Class A of Schedule 2 to the GPDO.
- RJ 34.3.48: The concerns of residents (those responding to consultation being statistically insignificant in number) who were neighbours to development are accommodated by the planning system which provides for neighbour consultation on planning applications and the imposition of conditions on planning permissions to control the impacts of development. As noted by the ArupGeotechnics report Phase 1 Scoping Study 2008, with respect to nuisance effects (noise, vibration, dust, transport etc) of basement development:

*5.4 In general, these effects are at least of similar and sometimes of greater, magnitude that equivalent categories of disturbance created by other types of residential building works (such as replacing a roof, converting a loft or adding a conservatory).*

The Alan Baxter report March 2013 paragraphs 9.1.3, 12.1 – 12.11 are generally supportive of this empirical conclusion.

- RJ 34.3.49-50: The Royal Borough is densely developed as are many boroughs in London. The environmental effects of sustainable basement development may be satisfactorily controlled by conditional planning permission as noted above. ‘Careful control’ is appropriately achieved by these means; not by an unsubstantiated and unsustainable policy embargo.
- RJ 34.3.51: Policy CL7, by limiting policy compliant basement development to a maximum of 50% of each garden and not more than one storey, creates a policy embargo on basement development outside these parameters. Proposals for more than 50% garden land and / or more than one storey would be contrary to Policy CL7 making it necessary, applying section 38(6) of the 2004 Act, for the applicant to show ‘material considerations’ why planning permission should be granted not in accordance with the Local Plan. This would be an impossible task given that experience shows that all developments must affect the amenities of neighbours temporarily during



their construction to a greater or lesser extent. A likely effect of the policy, accordingly, would be refusals of planning permission for potentially sustainable basement development contrary to the presumption in paragraph 14 of the NPPF.

20. In short, the RBKC's consultation exercise provides no sound evidential basis for the proposed change of basement policy. It demonstrates no 'objectively assessed development requirement'<sup>12</sup> for Policy 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,<sup>13</sup> 'public concern' must be justified if it is to be a material planning consideration. The paucity of consultation responses 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.

### **National Policy**

21. At the heart of the NPPF (14) is a 'presumption in favour of sustainable development':

*Policies in Local Plans should follow the approach of the presumption in favour of sustainable development so that it is clear that development which is sustainable can be approved without delay.<sup>14</sup>*

22. Basement development is, in principle, sustainable development. As RBKC recognise in paragraph 34.3.47 of the RJ:

*Basements are a useful way to add extra accommodation to homes and commercial buildings.*

This is particularly the case in the densely developed boroughs of central London.

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<sup>12</sup> NPPF 182

<sup>13</sup> [1995] Env LR 37

<sup>14</sup> NPPF 15.

23. The sustainability of basement development is also confirmed by implication by the Secretary of State's amendment to Part 1 Class A to Schedule 2 of the GPDO: 'The enlargement, improvement or other alteration of a dwellinghouse,' which grants planning permission until 30<sup>th</sup> May 2016 for a single storey basement extension 4 metres in height extending beyond the rear wall of the original dwellinghouse by up to 8 metres in the case of a detached dwellinghouse and 6 metres in the case of any other dwellinghouse. (A.1 (ea))

24. NPPF 12 says:

*Proposed development that accords with an up-to-date Local Plan should be approved and proposed development that conflicts should be refused unless other material considerations indicate otherwise.*

And NPPF 15 says:

*Policies in Local Plans should follow the approach of the presumption in favour of sustainable development so that it is clear that development which is sustainable can be approved without delay.*

25. If Policy CL7 were to be adopted, planning applications for basement development exceeding a maximum of 50% of a garden and or, more than one storey, would be contrary to the up-to-date plan and would be refused unless other material considerations indicated otherwise.

26. It follows that the policy effectively places an embargo on what is, in principle, sustainable basement development, not by reference to its planning merits assessed on a case by case basis but by reference to a limit on size and scale, namely, any basement development covering more than 50% of garden land and being more than one storey.

27. Such an approach is contrary to the advice and guidance in NPPF 14 which states that planning authorities should grant planning permission for sustainable development unless 'any adverse impacts of doing so would significantly and

demonstrably outweigh the benefits...’ The presumption against basement development covering more than 50% of garden land and or greater than one storey would make such development policy non-compliant prior to any consideration being given to the planning merits of the individual application and whether or not it caused ‘adverse impacts.’

28. Policy CL7, accordingly, has not been positively prepared in accordance with national policy.

#### **WHETHER THE PUBLICATION PLANNING POLICY CL7 IS JUSTIFIED**

29. NPPF 182 requires that draft policy CL7 should be the most appropriate strategy, when considered against reasonable alternatives, based on proportionate evidence.

30. For the reasons stated above, the results of consultation provide no proportionate evidential basis for policy CL7.

#### **The construction impact of basement development in the Borough**

31. RJ 34.49 says that in RBKC the construction impact of basement development 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, however, there has been no material change of circumstances since the adoption of the Core Strategy in 2010 including extant policy CL2.
32. 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 ArupGeotechnics 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.

33. By reason of the density of the Borough, the vast majority of development of all kinds in the RBKC will have been or will be ‘next door’ (RJ 34.3.50). There are, and have been for many years, these statutory regimes in place 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 necessitating an objective planning requirement for the imposition of the policy limitations on size of garden area covered and or single storey depth in Policy CL7.

34. 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 policy should instead facilitate focus on whether a basement development made the subject of a planning application is acceptable on its individual planning merits: focus on whether it is ‘an acceptable use of the land, and [on] 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).
35. The rationale in RJ 34.3.49 - 51 for placing a policy limitation on basement development in Policy CL7 is not based on the use of land but principally on the perceived short term potential adverse impacts of construction and demolition on neighbours. Thus, Policy CL7 seeks to deny the ‘potential benefits’<sup>15</sup> of subterranean development in the dense urban area of RBKC ‘including the increased space available to house holders and to businesses,’<sup>16</sup> 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 non-planning statutory regimes.
36. 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

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<sup>15</sup> ArupGeotechnics Phase 1 Scoping Study Rev B: 1.1

<sup>16</sup> Ibid

guidance,<sup>17</sup> therefore, Policy CL7 seeks to impose an embargo on sustainable basement development by reference to non-material planning considerations. The policy is not, as a result, soundly based or consistent with the achievement of sustainable development.<sup>18</sup>

37. Nor would the policy serve any measurable or practical planning purpose. As advised by the ArupGeotechnics, the forms of disturbance caused during the carrying out of 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).'<sup>19</sup> RBKC have produced no substantial evidence to demonstrate the fallacy of this statement or that basement works of the type to be embargoed by Policy 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.
38. Policy CL7 is not, accordingly based on any plan making strategy that seeks to meet 'objectively assessed development requirements.'<sup>20</sup>
39. Policy CL 7 is not 'justified' for the reasons mainly set out in the CB technical representations and accompanying expert reports previously submitted to RBKC. 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 convincing research has been produced by RBKC to demonstrate that the number of vehicle movements that would be associated with a larger basement construction project must have significant planning consequences. The Alan Baxter 'Case Studies' report 2104 drew the following summarised conclusions:

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<sup>17</sup> And contrary to the High Court judgement in Richard Szpiro V. RBKC and Wheeler CO/11629/2011 Underhill J.

<sup>18</sup> NPPF 182 first bullet.

<sup>19</sup> ArupGeotechnics report Phase 1 Scoping Study Rev B 5.4

<sup>20</sup> NPPF 182 first bullet.

6.1 there was no clear correlation between the time taken to excavate the basement and the overall size or volume of the basement.

6.2 there was little correlation between the excavation times [as between the cases studied]

6.3 as expected, larger basements in general had a greater rate of excavation (m<sup>3</sup>/week) than smaller ones

6.4 As would be expected there was good correlation between the volume of excavation and the total number of lorry movements. The variation [between cases] related to the size of vehicles which were used. The data used made a variety of assumptions which related to the volume of material to be excavated. These were then assessed against the specific constraints on access for each site and the assumptions varied to suit.

None of these conclusions is demonstrative of larger basement development necessarily giving rise to adverse planning consequences by reason of lorry movements. Rather they are supportive of an individual merits approach being adopted in policy governing the determination of planning applications for this type of development.

- the report by Eight Associates (RJ 34.3.54, 68) is demonstrably flawed as regards its assessment of lifetime carbon emissions relating to basement development. In addition, Eight Associates fail to recognise that, once constructed, basements tend to perform much better in environmental terms than above ground construction. They are not subject to extreme variations in temperature which results in high heating or cooling loads.<sup>21</sup>
- Policy CL7 and its accompanying RJ (34.3.55-56, 59) is not underpinned by any professional arboricultural or horticultural advice demonstrative of the alleged benefits of retaining 'at least half of each garden.'<sup>22</sup> 'Trees and Basements' February 2014 (5.1) is not conclusive that 1m of permeable soil is insufficient to sustain large trees.

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<sup>21</sup> Alan Baxter Report 2013 para. 11.5

<sup>22</sup> See the Barrell and Gilchrist reports.

- Policy CL7 is not supported by any expert evidence to show that basement construction can materially affect the health of residents such that it should be limited only to single storey;
- Policy CL7 (RJ 34.3.70) 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;<sup>23</sup> As noted in RJ 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.’
- CL7 (RJ 34.3.60-65) fails to acknowledge the flexibility supported by English Heritage with regard to basement development under listed buildings and in conservation areas;<sup>24</sup>

40. In summary, the restriction in Policy CL7 limiting basement development to not more than 50% garden coverage and to one storey has not been shown to be justified by any proportionate evidence produced by RBKC. Nor does the RJ consider the draft policy against any reasonable alternative; for example, criteria based policy (as discussed below).

#### **EFFECTIVE**

41. 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, if adopted, the policy is likely to inhibit many sustainable basement developments in the RBKC in conflict with the presumption in NPPF 14 and by doing so, prevent the optimisation of scarce residential and commercial development opportunities in this dense urban area of London.

#### **CONSISTENT WITH NATIONAL POLICY**

42. CB contend for the forgoing reasons that Policy CL7 is not founded upon a ‘proportionate evidence base’ (NPPF 158) and, if adopted, would have a negative effect on the promotion of sustainable basement development in RBKC. It is,

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<sup>23</sup> See the Masters structural design report

<sup>24</sup> Planning for the Historic Environment PRACTICE GUIDE: ENGLISH HERITAGE



thereby, in material conflict with London Plan Policy 2.1 and its accompanying commentary which supports growth and development in the city. The draft policy, if adopted, is also likely to cause significant financial damage to employers in the basement industry by placing, in effect, an embargo on sustainable basement developments in the borough contrary to the 'economic role' of sustainable development (NPPF 7, 18-19).

43. In addition, Policy CL7 conflicts with national policy set out in the NPPF as outlined above. It would not encourage 'the effective use of land' (NPPF 17) or 'multiple benefits from the use of land.' It is also inconsistent with the guidance that: 'Development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe.' (NPPF 32) As such, the policy has not been 'prepared with the objective of contributing to the achievement of sustainable development.' (NPPF 151) Overall, it would inhibit 'the delivery of sustainable basement development' in conflict with NPPF 182.
44. Further, Policy CL7 as drafted does not 'provide a clear indication of how a decision maker should react to a development proposal' (NPPF 154) for basement development. In particular, the policy (CL7 a. and b.) allows for exceptions (to the 50% / one storey rules) 'on large sites' without any indication as to what is meant by or what would be included in that phrase.

#### **AN APPROPRIATE BASEMENT POLICY**

45. The RJ identifies a number of issues regarding basement development in the Borough:
  - a) noise and disturbance during construction
  - b) the management of traffic, plant and equipment
  - c) the structural stability of nearby buildings
  - d) the character of rear gardens

- e) sustainable drainage
- f) the impact of carbon emissions
- g) the impact on trees
- h) impact on heritage assets
- i) the protection of archaeological remains
- j) the visual impact of light wells, roof lights etc
- k) flooding

46. Noise and disturbance during construction: As recognised in RJ 34.3.69 and footnote 21, the issue of noise and disturbance during construction is controlled by Acts and regulations including the Control of Pollution Act 1974 (Section 61 agreements),<sup>25</sup> the Environmental Protection Act 1990, the Noise Emission in the Environment by Equipment for Use Outdoors Regulations 2001 and British Standard 5228. In addition to these external to planning controls, working hours and days of the week can be imposed on construction works by a planning condition requiring the approval of a Construction and Demolition Management Plan for the protection of adjoining residential amenities.<sup>26</sup>
47. The management of traffic plant and equipment: The management of construction traffic is typically achieved by a policy requirement for the submission of a Construction Traffic Management Plan and its approval by the Council. The approved plan can then be made enforceable by planning condition.<sup>27</sup> The placing of plant, temporary site accommodation and skips in the highway is dealt with under powers in the Highway Act 1980.<sup>28</sup> Good practice can be achieved under these powers.<sup>29</sup>

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<sup>25</sup> See ArupGeotechnics Phase 1 –Scoping Study, 6.4.6.

<sup>26</sup> Alan Baxter Report March 2013, 12.1-12.3, 20.11

<sup>27</sup> Ibid 12.612.6-12.7

<sup>28</sup> Section 139 Control of builders' skips.

48. The structural stability of nearby buildings: As is acknowledged in the RJ 34.3.70: *'The structural stability of the development itself is not controlled through the planning system but through Building Regulation. The Party Wall Act is more suited to dealing with damage related issues.*

In addition, however, control can be imposed by planning condition requiring the submission of an Engineering Design and Construction Statement demonstrating what is proposed to be done in engineering terms and the methodology to be employed.<sup>30</sup>

49. The character of rear gardens: The impact of development including basement development on rear gardens is a material planning consideration that is normally and appropriately addressed on a site specific basis. The aerial photographic study 'Basement Visual Evidence February 2014 is of doubtful value. Townscape is not ordinarily evaluated and appreciated from the air. The bird's eye view is not an aesthetic view to which weight is attached. The sweeping judgement (1.10) formed on the basis of the aerial photographs that 'Gardens with basements underneath generally appear artificial and sterile compared to the informal leafy character that was present before' is subjective and of limited significance. All domestic gardens are artificial being designed and laid out by their occupiers. And as conceded in the document (1.12) 'gardens designs can be changed as a result of above ground extensions or just because the owner wishes to change the design of

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(1) A builders' skip shall not be deposited on a highway without the permission of the highway authority for the highway.

(2) A permission under this section shall be a permission for a person to whom it is granted to deposit, or cause to be deposited, a skip on the highway specified in the permission, and a highway authority may grant such permission either unconditionally or subject to such conditions as may be specified in the permission including, in particular, conditions relating to—

(a) the siting of the skip;

(b) its dimensions;

(c) the manner in which it is to be coated with paint and other material for the purpose of making it immediately visible to oncoming traffic;

(d) the care and disposal of its contents;

(e) the manner in which it is to be lighted or guarded;

(f) its removal at the end of the period of permission.

<sup>29</sup> Ibid 12.8

<sup>30</sup> Alan Baxter Report March 2013, 13.2.3-5.

the garden...’ There is no evidential basis identified for the contention ‘this does not seem to be a widespread trend.’ (1.12).

50. In so far as the 50% garden coverage rule proceeds on this basis of this exercise policy CL7 is seeking to introduce planning control affecting changes in the character of private gardens where it has no place. Where planning control is considered necessary for example to protect trees (Tree Preservation Orders) or to limit the exercise of permitted development rights (GPDO Schedule 1, Article I (5) land) it is provided for by statute. The alteration of private gardens is not subject to such control. Nor is there in any event a uniformity of private gardens that is recognised as characteristic of the Borough. Where trees are considered worthy of protection in the interests of preserving ‘leafy character’ these are and continue to be made, the subject of TPO’s. The limitation in draft Policy CL7 to 50% coverage of rear gardens justified by reference to subjective judgements as to how rear gardens should appear and be maintained is not a proportionate evidence base upon which to support the policy. .
51. Sustainable drainage: A scheme for sustainable drainage of a basement development can be made the subject of a planning condition. It does not justify the 50% limitation. As noted in RJ 34.3.71 fitting basements with a positive pumped device will ensure that they are protected from sewer flooding.
52. Impact on trees: Where trees require protection they can be made the subject of a TPO. In conservation areas trees are protected in any event. Further, adopted Policy CL2 consistent with a robust criteria based approach to planning decision making, requires that there be no loss of trees of townscape or amenity value. There is no justification for the 50% rule to be imposed to protect trees.
53. Impact on heritage assets: Similarly, heritage assets are protected by the listing regime and the inclusion of land in conservation areas under the Listed Buildings and Conservation Areas Act 1990.<sup>31</sup> The proposed 50% rule and or the single storey rule cannot be justified by any need to protect heritage assets.

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<sup>31</sup> See, in particular, sections 16, 60 and 72.

54. The protection of archaeological remains: As is commonplace, the protection of archaeological remains in situ or by excavation and recording is achieved by the imposition of appropriate conditions where necessary on planning permissions.
55. The visual impact of light wells, roof lights etc: The implicit (if not explicit) contention in the RJ that such features are intrinsically undesirable is nothing more than the subjective opinion of the author. It is not supported by any measurement of informed objective opinion. Further, and in any event, these features can be controlled by design which is a material planning consideration to be taken into account under section 70 of the 1990 Act. As advised in NPPF 60, local planning authorities: *should not stifle innovation, originality or initiative through unsubstantiated requirements to conform to certain development forms or styles*. The proper exercise of planning control over such matters does not require or justify the imposition of an embargo on basement development beyond 50% garden coverage rule or above one storey.
56. Flooding: This issue is dealt with at paragraph 50 above.
57. In summary, the issues concerning the on and off site impacts of basement development set out in paragraph 43 above are either addressed by non-planning legislation or may be dealt with by planning control exercised over scheme design in the normal way by refusals of planning applications where justified on their merits or the grant of planning permission subject to planning conditions. As recognised in both the ArupGeotechnics Phase 1 Scoping Study 2008 and the Alan Baxter Report March 2013, sustainable basement development in RBKC may be appropriately controlled by a criteria based planning policy applied to the planning merits of the individual case. It does not necessitate or justify an unsustainable borough wide blanket policy embargo being imposed on basement development extending beyond 50% of the garden area or a limitation to single storey construction.

## **CONCLUSION**

58. Applying the guidance in 'Plan-making' NPPF 150-181, draft Policy CL7:

- has not been positively prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements consistent with achieving sustainable development. The evidence base upon which the policy is founded is not shown to be robust and proceeds largely on unsubstantiated subjective opinion.
- is not justified by proportionate evidence; and is not an appropriate strategy compared with the potential for a criteria base policy strategy along the lines of Local Plan policy CL2n places unnecessary and unjustified financial burdens on basement development
- would not be effective but would place unjustifiable financial burdens on sustainable basement development putting in doubt its deliverability in RBKC; and
- is inconsistent with the NPPF and the presumption in favour of the delivery of sustainable development.

59. Policy CL 7 has not been prepared in accordance with legal and procedural requirements and is not sound.

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