
Examination of the Partial Review of the Kensington and Chelsea Core Strategy:

Basements Publication Planning Policy

Matters, Issues and Questions for Examination

RESPONSES TO THE INSPECTOR'S QUESTIONS BY SOPHIA LAMBERT AND THE LADBROKE ASSOCIATION

Introduction

The Inspector invites succinct responses to the following specific questions that relate to the matters and issues that are central to his examination of the partial review. Comments unrelated to these questions should not be submitted. All existing representations will be taken into account and should not be expanded or repeated, although may be cross-referenced where relevant.

Respondents should only answer those questions relating to the subject of their original representation(s), but the Council should answer all the questions.

The questions reflect, and should be answered with reference to, the soundness criteria set out in the National Planning Policy Framework 2012 ("the Framework"): i.e. that plans should be positively prepared, justified, effective and consistent with national policy.

Further information about the Examination, Hearings and the format of Written Statements to be submitted in response to these questions is set out in a separate Guidance Note available on the Council's web site. Please note especially the 3,000 word limit.

Day 1 Tuesday 16th September 2014

Matter 1: Legal Compliance

Issue 1.1: Whether the Plan is legally compliant

1. Is the Plan legally compliant as is indicated by the Council in its ED/1 replies to the Preparatory Questions on this topic (Question 6)?
2. If the Plan is not considered to be legally compliant, please explain in what areas it does not comply and what needs to be done to make it compliant.
3. If it is considered that public consultation requirements were not properly carried out, please explain where the Council has not complied with either the 2012 Regulations or its own Statement of Community Involvement ("Involving People in Planning").
4. Does the final Sustainability Appraisal (SA) at BAS21 deal adequately with all the reasonable alternatives in assessing a policy for this type of development? Was there consideration of an impact assessment led policy approach alternative?

Note: paragraph 4.2 of the final SA (BAS21) says: "Alternative policy options were specifically considered in the December 2012 SA/SEA. As these were dismissed at that time, it is not considered appropriate to address them again in this document." However, legally the final SA

must clearly set out the reasons for the selection of the Plan's proposals and the outline reasons why the other reasonable alternatives were not chosen during preparation. These choices may not have been made within the SA process (e.g. at a committee), but the final SA should set out those reasons. It should also state whether these reasons are still valid at submission. If this has not been done, I will consider asking the Council to prepare a correcting addition to the final SA. These legal principles have been set out in various court cases, e.g. see *Heard v Broadland District Council & Ors* [2012] EWHC 344 (Admin) (24 February 2012) at: <http://www.bailii.org/ew/cases/EWHC/Admin/2012/344.html>.

Issue 1.2: Whether there is a "need" for the Policy

5. Is there a requirement in law for there to be a proven "need" for a particular policy in a local plan before a LPA can include it? I have been unable to find such a requirement in the 2004 Act, the 2012 Regulations, the Framework, or the PPG. I am aware of the soundness criteria in the Framework (elaborated upon in the PPG) for a Plan to meet the requirements (or "need") for particular types of development (e.g. housing, if housing policies are included) and for it to be justified by proportionate evidence. It is also possible for a policy to be unnecessary (see below).

We know of no requirement in law for there to be a proven "need" for a policy (although we consider that there is such a need in this case). We note, however, that the principles in paragraph 17 of the NPPF refer to the planning system being "a creative exercise in finding ways to enhance and improve the places in which people live their lives"; say that it should "always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings"; and should "support the transition to a low carbon future in a changing climate". The introduction of this policy would seem to be in line with these.

We accept that it would be inappropriate to adopt an unnecessary policy, but, in this case it is clear that a better policy for dealing with the basement issue is badly needed, as the current policy (which was more or less made up on the hoof as problems emerged) is unclear and causing major grief to many residents.

6. Is policy CL7 unnecessary because the issue can be dealt with through other local or national policies or legislation? Does other legislation primarily deal with the aftermath and/or the resulting impacts of basement development permissions?

Other legislation does indeed deal mainly with the aftermath/impacts, (e.g. through environmental legislation and the party wall award system), but in a highly imperfect way. This was amply demonstrated by the survey that the Ladbroke Association undertook in 2009 of neighbours of subterranean development. A copy of the report with the results of the survey is attached for ease of reference (a copy was sent to the Inspector at the time of the Ladbroke Association submission).

The Ladbroke Association has been campaigning since 2009 for changes to alleviate the adverse impacts of basement development. As part of that exercise we have tried hard to find ways forward within current legislation. We have had discussions with DCLG Ministers and officials, members of both Houses of Parliament; local authority officers; and a variety of professionals - lawyers, surveyors and engineers. None has come up with any viable alternative solutions based on existing policies or legislation. We note that we are not alone. Lord Selston tabled a bill, drafted in conjunction with surveyors from the Pyramus and Thisbe Club, seeking to rectify some of the defects in the current system. The Government refused to support it, but despite numerous approaches has been unable to point to existing policies that would deal with the relevant problems. Government Ministers made clear to us, however, that they believed that there was more that Councils could do through their planning and other policies - which is precisely what RBKC is now trying to do.

Issue 1.3: What policies will be superseded by the Plan?

7. The Council has confirmed in its Question 17 response in ED/1 that policy CL7 "will supersede Policy CL2: New Buildings, Extensions and Modifications to Existing Buildings criteria (g) (Chapter 34 of the Core Strategy (RBKC 1)) and CE1: Climate Change criteria (c) (Chapter 36 of the Core Strategy (RBKC 1))." Unfortunately, the Plan does not state this as required by Regulation 8(5). The **Council** should prepare a suggested main modification to correct this for my consideration and for discussion at the hearings.

Issue 1.4: Legally, can a supplementary planning document (SPD) be used for the purposes proposed by the Council, and is its use and purposes clearly and effectively set out in the Plan?

8. Regulations 5 and 6 of the Local Planning Regulations 2012 set out what should be in a local plan and therefore what should not be in a SPD. In the light of this [particularly Regulation 5(1)(a)(iv)], should the information proposed to be in the Basements SPD (paragraph 34.3.70) be in a local plan?

We are not experts in planning law. But we note that the legislation requires any conflict between a local plan and any other document must be decided in favour of the former. Therefore, to the extent that the Inspector considers matters proposed for the SPD are inappropriate, we urge that they should be included in the proposed revision to the Core strategy.

9. The Council's responses to the representations in BAS04 say that the Basements SPD will include the details of the Demolition and Construction Management Plans (DCMPs) and the Construction Traffic Management Plans (CTMPs) which will be required with planning applications for this type of development. However, the Plan does not actually say this. Should it, in order to be effective? And should such Management Plans apply to all basement development applications or just to certain ones?

We consider that, for the sake of absolute clarity, the Plan should indeed say this. As to whether DCMPs and DCMPs should be required for all basement developments, some common sense needs to be applied. Clearly the digging out of a few square metres of an existing cellar are unlikely to cause major problems. Yet specifying dividing lines is always difficult. We would not object to a reference to "significant" basement developments with what is significant being defined in according to guidelines in the SPD.

Matter 2: Definitions and use of terminology

Issue 2.1: Whether the Plan is effective and consistent with national policy in its definitions and use of terminology

10. Is the term 'basement' adequately defined in the reasoned justification at 34.3.46? If not, how should it be defined?

This was much discussed during the elaboration of the policy (in which the Council was exemplary in its involvement of interested parties), and we all found it difficult to reach a perfect definition. The present reference to "prevailing ground level" is not necessarily clear in a borough where so many properties are built on a slope with the ground level at the back typically being a lot lower than at the front. We are giving more thought to this issue and may send a follow-up with a possible alternative definition.

11. In paragraph 34.3.47, should the word 'principles' (or 'guidelines' or other similar term) be substituted for the word 'rules'? The word 'rules' implies the application of inflexible, immutable laws which is contrary to the Framework, the PPG, the law as it relates to Local Plans, and to planning practice.

We think "rules" is fine. Guidelines are non-binding and references to "principles" or guidelines" just invite arguments; we want the policy to be clear. We also note that "rule" is an elastic term – the OED definition refers to "*principle to which action or procedure conforms or is intended to conform, dominant custom, canon, test, standard, normal state of things*".

12. In paragraph 34.3.50 should the word 'management' be substituted for the word 'control'?
The Framework and the PPG no longer uses the term 'control'.

No. What we are talking about here is control and we should be clear on that. Management is not enough. We note moreover that there are parts of the NPPF and PPG which use "control".

13. Is the term 'large site' adequately defined in the reasoned justification at 34.3.57? If not, how should it be defined?

Again this was an issue which was much discussed during the consultation on the new policy. We are torn between the certainty of a more precise definition and the possibly undesirable consequences of inflexibility. The justification for an exception for a large site is itself open to question, as bigger sites will tend to have bigger basements which will tend to cause bigger environmental problems. There may be a case for making clear that exceptions will be limited to the truly exceptional, with factors being taken into account being the size of the site (over one hectare in residential areas); in residential areas only for detached buildings (as they are less risky for the neighbouring structures); and normally only where the basement serves a purpose which brings social benefits to the community to offset the greater environmental disbenefits.

14. In clause l. of CL7 should the word 'significantly' be inserted before the word 'harm' as otherwise any harm, no matter how small, would be unacceptable?

We think "harm" is fine. It is not the same as "inconvenience" which we accept may be caused. As an ex-Government Director of Road Safety, I would be wholly opposed to any degree of harm to road safety.

15. In clause e. of CL7 should the word 'substantial' be inserted before 'harm' to reflect the advice in paragraph 133 of the Framework?

No. Paragraph 133 refers to all developments, including highly desirable ones in terms of sustainable development. Basement development do not meet this latter description and we see no reason why they should be allowed to cause any harm to heritage assets.

Matter 3: The order of the reasoned justifications for the Policy

16. From my reading of the Plan's reasoned justification, paragraph 3.14 of BAS02 and other documentation, I understand that the Council has a priority order for the reasons justifying the Policy. These are, in order: the increasing number of basement planning applications; that these developments are primarily under existing dwellings and gardens within established residential areas; that the Royal Borough is very densely developed and populated; the adverse impact on residential amenity, primarily on residents' health, well-being and living conditions due to factors such as noise and disturbance, vibration, dust and heavy vehicles over prolonged time periods, together with the loss of rear gardens and structural stability concerns; the desire to limit carbon emissions; the need to retain natural gardens and trees to maintain the character and appearance of the Royal Borough, along with sustainable drainage and biodiversity requirements; the adverse impact on the large number of listed buildings and conservation areas in the Royal Borough; and, lastly,

the adverse visual impact of certain externally visible aspects of these developments. Is this correct? If so, should it be more clearly stated in the Plan? If the above is not correct, please explain.

We do not see why there has to be an order of priority. All of these can be important; how important they are in relation to each other must depend largely on the individual circumstances of each case.

Attendees
To be added

Day 2 Wednesday 17th September 2014.

Matter 4: Restriction on the use of garden/open area

Issue 4.1: Whether CL7 a. is justified by the evidence, consistent with national policy, and effective

17. What are key reasons for criterion CL7 a. not to exceed a maximum of 50% of each garden or open part of the site? Is it paragraphs 6.11 and 6.12 in BAS18?

Yes, and the following paragraphs.

18. Are each of the reasons for the criterion justified by the evidence? Please be brief and refer to previously submitted evidence without repeating it in full.

One will never produce absolutely firm evidence for a precise definition of this sort (why 50% rather than 49% or 51%, for instance). But here again a degree of common sense is required and the evidence for a large restricted area seems to us compelling.

19. I note that one of Council's reasons for limiting the size of basement extensions is to reduce carbon footprint/emissions. **Council:** is this a (or even the) reason and justification for the restrictive CL7 policy? If it were found to be unreliable and not robust would the policy be inadequately justified and thus unsound? If not, why not?

As this question is addressed to the Council, we are not sure if we are allowed to answer it. But from our point of view this is only one of the reasons for this policy.

20. Could the aims/reasons be achieved or satisfied in another way? If so, please suggest an alternative wording.

21. Why is CL2 g. iii. in the adopted Core Strategy not adequate to deal with the issues proposed to be addressed by CL7 a.?

This is not just about the loss of trees, but also about the whole character of the garden and about drainage.

22. Should the criterion contain an exception clause to cater for differing circumstances? (I am aware of the representations about small and/or paved over garden/open areas).

We are not convinced that an exception is necessary. In some ways there is even more need for small gardens not be affected by basement developments, given that they are so small. Where a garden is already partly paved over, there is even more reason not to cause possible further environmental harm.

Matter 5: One storey restriction

Issue 5.1: Whether CL7 b. and c. are justified by the evidence, consistent with national policy, and effective

23. What are key reasons for criterion CL7 b. and c. which restrict basement development to one storey?

Lengthier construction period; greater engineering risks; greater soil extraction and waste disposal problems; more piling; more concrete; greater disruption and risk of damage to neighbouring properties during construction; more energy use post-construction; greater potential for water problems during and after construction. CL7c. is a way of ensuring consistency by banning all double basements, and seems to us both fair and appropriate (this also was much discussed during the consultation).

24. Is each of the reasons for the criteria justified by the evidence? Please be brief and refer to previously submitted evidence without repeating it in full.

We believe it is, as is shown in a number of documents.

25. Is the restriction too limiting? Please explain briefly (referring to previous evidence).

No. There are relatively few applications for double basements and the basement construction companies will still have plenty of work building single basements.

26. Is the restriction too lax? Please explain briefly (referring to previous evidence).

27. Could the aims/reasons be achieved or satisfied in another way? If so, please suggest an alternative wording for the criteria.

28. Should the criteria contain an exception clause to cater for differing circumstances?

We cannot think of any circumstances that might need an exception.

**Attendees
To be added**

Day 3 Thursday 18th September 2014.

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

29. What are key reasons for criterion CL7 f. restricting excavation under a listed building?

Harm to the character of the building, and that includes the interior and immediate curtilage of the building.

30. Are each of the reasons for the criterion justified by the evidence? Please be brief and refer to previously submitted evidence without repeating it in full.

We are not sure what evidence is required. It seems self-evident that digging a basement where there was none before changes the character of the heritage asset.

31. Is the restriction too limiting? Please explain briefly (referring to previous evidence).

32. How is this criterion different in principle from that in the adopted Core Strategy in policy CL2 g. i. (apart from the inclusion of pavement vaults)?

We accept that there may be some tidying up of the text to be done here to avoid duplication.

33. If it is not substantially different, what has changed that I should now, unlike my colleague at the Core Strategy examination, find it to be unsound?

34. Why have pavement vaults been included?

Buildings in this largely Victorian borough typically include pavement vaults (chiefly coal-cellars) and they are very much part of the character of the buildings.

35. Could the aims/reasons be achieved or satisfied in another way? If so, please suggest an alternative wording for the criterion.

36. Should the criterion contain an exception clause to cater for differing circumstances, such as where there is no special interest in the foundations and the original floor hierarchy can be respected?

The foundations are almost inevitably part of the character of the building and we do not therefore see a need for any exception.

Matter 7: Light wells and railings

Issue 7.1: Whether CL7 h. is effective

37. Is the criterion for light wells and railings in clause h. of CL7 too limiting? Please explain briefly (referring to previous evidence).

38. Is the criterion too lax? Please explain briefly (referring to previous evidence).

In this area, it is common for private back gardens to back onto semi-public communal gardens, from which lightwells and railings can be only too visible, and there is no reason to treat back gardens differently from front and side gardens in these cases. The words "or adjoining communal gardens" should be added. Moreover, harm to the amenity can also be caused by rooflights (adverse effects on the character of the streetscape/communal garden), and it may not be enough for them to be "sensitively sited". Wording should be added along the lines of "Rooflights should not be installed where they would adversely affect the character of the streetscape, a communal garden adjoining a private garden or other green space".

39. Could the aims of the criterion be achieved or satisfied in another way? If so, please suggest an alternative wording.

40. Should the criterion contain an exception clause to cater for differing circumstances? For instance, where light wells and railings could be made acceptable by blending into the surroundings and/or hidden or disguised from public view?

We are very suspicious of such arguments. Even if say screening is installed at the time of construction, this can be removed later.

Matter 8: Requirement for one metre of permeable soil

Issue 8.1: Whether CL7 j. is justified by the evidence, consistent with national policy, and effective

41. What are key reasons for criterion CL7 j. to have one metre of permeable soil above any part of a basement?

Planting and drainage. Even though most trees can survive in a metre of soil, it does stunt their growth at least to some extent.

42. Is each of the reasons for the criterion justified by the evidence? Please be brief and refer to previously submitted evidence without repeating it in full.

43. Could the aims/reasons be achieved or satisfied in another way? If so, please suggest an alternative wording.

44. Why is CL2 g. iii. and iv. in the adopted Core Strategy not adequate to deal with this issue?

The new wording is more precise. CL2g. refers only to loss of trees, for instance.

45. Has the one metre soil requirement in the May 2009 Subterranean Development SPD (BAS93) proven to be effective such that it should continue in this Plan?

Too soon to tell as somebody said of the effects of the French Revolution. Trees grow slowly and drainage problems may take years to emerge.

46. Should the criterion contain an exception clause to cater for differing circumstances? (I am aware of the representations about small and/or paved over garden/open areas).

We see no need for any exceptions. As we say above, small gardens may need even more protection if they are to remain gardens rather than yards.

**Attendees
To be added**

Day 4 Tuesday 23rd September 2014.

Matter 9: Energy, waste and water conservation

Issue 9.1: Whether CL7 k. is justified by the evidence, consistent with national policy, and effective

47. What are key reasons for criterion CL7 k. requiring a high level of performance in dealing with energy, waste and water?

The NPPF is clear that the dominant principle should be sustainable development. It is far from clear that the average basement development in this borough meets the sustainable development criteria. Most are built to provide private leisure facilities not open to the public and cause an immense amount of socially unacceptable inconvenience to neighbours (see the results of the Ladbroke Association survey attached), so they are of negative social value. They also have a number of adverse environmental consequences during construction, and require significant extra energy to operate post-construction, so bring environmental disbenefits. Economically, they provide a small amount of work (in the overall scheme of things) to the construction industry and associated trades and add value to the asset of the owner of the property (often a developer). We doubt whether this outweighs the

social and environmental disbenefits, so anything to reduce these disbenefits must be welcome.

48. Is each of the reasons for the criterion justified by the evidence? Please be brief and refer to previously submitted evidence without repeating it in full.
49. Is the restriction too limiting? Please explain briefly (referring to previous evidence).
50. Is the Plan consistent with the Government's zero carbon buildings policy as required by paragraph 95 of the Framework? In particular, should paragraph 34.3.68 refer to BREEAM targets given that most basement development will be to homes? Does the paragraph take account of the May 2014 BREEAM UK New Construction advice?
51. Could the aims/reasons be achieved or satisfied in another way? If so, please suggest an alternative wording.
52. Should the criterion contain an exception clause to cater for differing circumstances?

Matter 10: Structural stability

Issue 10.1: Whether CL7 n. is justified by the evidence, consistent with national policy, and effective

53. What are key reasons for criterion CL7 n. safeguarding the structural stability of the application building, nearby buildings and other infrastructure?

The fact that these are risky engineering problems that have in at least some cases caused disastrous damage to neighbouring structures (on which we have offered to supply details). Even when there is no disaster, in the majority of cases there is at least some damage (see Ladbroke Association report). All the party wall award can do is to ensure that this is repaired (not for nothing do the wags among surveyors describe the Party Wall Act as giving you licence to damage your neighbour's building so long as you put it right afterwards). Any socially responsible Council should be ensuring that planning permission is not given without some sort of guarantee that any damage to neighbouring structures will be minimised to what is reasonable, given the defectiveness of other legislation in this respect.

54. Is each of the reasons for the criterion justified by the evidence? Please be brief and refer to previously submitted evidence without repeating it in full.
55. Is the criterion necessary given the existence of other legislation on the subject? Please explain briefly (referring to previous evidence).

Yes – see above reply and original submission by the Ladbroke Association, plus the engineering reports commissioned by RBKC.

56. Is this criterion primarily related to land stability as a material planning consideration as set out in the Framework paragraph 120 and the PPG (ID: 45-001) in order to minimise the risk and effects of land stability on property, infrastructure and the public? If so, should the criterion be reworded to reflect that?

No. Damage can be caused to neighbouring structures even where there is no question of land instability.

57. Does the requirement to apply this criterion to the existing property comply with the national policy test in the PPG (ID 21a-004) that requirements should be relevant to the development to be permitted and not be used to remedy a pre-existing problem or an issue not created by the proposed development?

We have seen no evidence that damage claimed to be caused as a result of basement construction is really due to a pre-existing problem. Of course there can be arguments about e.g. whether a crack existed beforehand, but party wall surveyors are pretty good at spotting pre-existing problems (they photograph everything now) and factoring them in. They will not make an award where the damage was due to a pre-existing problem. There is on the other hand a real difficulty in proving 100% that damage not covered by a party wall award was caused by the basement development when it almost certainly was (and compensation would have been awarded if the development had been within the Party Wall Act). The Ladbroke Association has already referred to a case where £30,000 of damage was caused to a building two doors away and can supply full details. The Council's policy needs to allow for this.

58. I note that the wording of this criterion is similar to that existing in adopted policy CL2 g. ii. What has changed that I should now, unlike my colleague at the Core Strategy examination, find it to be unsound?

59. Could the aims/reasons be achieved or satisfied in another way? If so, please suggest an alternative wording for the criterion.

Matter 11: Other CL7 criteria and alternative policy wording

Issue 11.1: Whether the remaining criteria in CL7 are justified by the evidence, consistent with national policy, and effective

60. In criterion i. of CL7, should the need to limit light pollution be mentioned to reflect advice in paragraph 125 of the Framework?

Yes. We are very worried about the increasing light pollution from light wells and rooflights especially in back gardens. This is a particular problem where back gardens adjoin communal gardens. But it also applies in other circumstances, e.g. where a number of back gardens meet creating an area of green and dark at night. We would like wording (perhaps rather in CL7h, combined with the proposal in our answer to Question No. 37) such as "and do not significantly increase light pollution from the building or its curtilage".

61. In respect of criteria d., g., i., l., m., and o. in policy CL7: are they justified by the evidence, consistent with national policy, and effective?

Yes. See for instance the NPPF passim.

62. Could the aims/reasons for the criteria be achieved or satisfied in another way? If so, please suggest an alternative wording for the criteria.

Issue 11.2: Whether the Plan and its policy CL7 sets out an approach that is consistent with the presumption in favour of sustainable development

63. Does the Plan and policy reflect the presumption in favour of sustainable development set out in the Framework? If not, why not?

Yes. See answer to Question 47. It is right that developments that are of doubtful sustainability should be carefully controlled to limit their adverse social and environmental effects.

64. When applied, will the Policy allow reasonable development needs to be met in a way that is appropriate to the specific character of the Royal Borough?

Yes – still plenty of scope for single basements that should meet any reasonable needs.

65. A number of representors have suggested that the policy should instead be an impact assessment led one (case by case) with an overall exception clause, and some have made suggestions. In the light of the Council's explanations to date, please would representors suggest their final wording for such a policy?

We would welcome an impact assessment system and see the one used by the London Borough of Camden as a model. But there need also to be criteria that apply to all basement developments. A case-by-case approach would lead to massive uncertainty and probable unfairness which would help nobody.

Attendees
To be added

Day 5 Wednesday 24th September 2014.

Reserved for Overrun