

CRANBROOK BASEMENTS LIMITED

EXAMINATION OF THE PARTIAL REVIEW
OF THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA
CORE STRATEGY DRAFT POLICY CL7

ID25: BASEMENTS PUBLICATION PLANNING POLICY
CORRECTING ADDITION TO SUSTAINABILITY APPRAISAL / STRATEGIC
ENVIRONMENTAL ASSESSMENT

BAS 21/01 – Rev A

RESPONSE OF CRANBROOK BASEMENTS TO **ID25**

The issues

1. The question raised in ID/9A Matter 1 (4.): Legal Compliance is:
Does the final Sustainability Appraisal (SA) at BAS 21 deal adequately with all the reasonable alternatives in assessing a policy for this type of development? Was there consideration of an impact led policy approach alternative?

2. These two questions were raised by Cranbrook Basements (CB) in its written 'Response' to ID/9A Issue 1.1¹ as follows:

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...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.

3. The context in which the representation was made was the requirement of the Town and Country Planning (Local Planning) (England) Regulations 2012: Regulation 22 that the documents to be submitted to the Secretary of State pursuant to section 20(3) of the 2004 Act must include 'a sustainability appraisal report' constituting an appraisal of the sustainability of the proposed policy CL7.² The report needed to comply with the Environmental Assessment of Plans and Programmes Regulations 2004. The Basements Publication Policy Sustainability Appraisal / Strategic Environmental Assessment July 2013 (BAS...) failed

¹ Rep 101/001: 5th September 2014

² Section 19 (5) 2004 Act.

to comply with the Regulations in respect of providing the information required in Regulation 12 and Schedule 2 of the 2004 Regulations.

Regulation 12 (2) (b) of the Environmental Assessment of Plans and Programmes Regulations 2004

4. Regulation 12 (2) requires that the SA/SEA:
Shall identify, describe and evaluate the likely significant effects on the environment of-
 - (a) implementing the plan or programme; and*
 - (b) reasonable alternatives taking into account the objectives and geographical scope of the plan or programme.*

4. Regulation 12(3) required that the SA/SEA included the information referred to in Schedule 2 to the 2004 regulations paragraphs 1 to 10. Among these paragraph 8 required that the SA/SEA should include:
An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information.

5. In Heard v Broadland DC [2012] EWHC 344 Ouseley J. held:
the aim of the Directive, which may affect which alternatives it is reasonable to select, is more obviously met by, and it is best interpreted as requiring, an equal examination of the alternatives which it is reasonable to select for examination alongside whatever, even at the outset, may be the preferred option.

6. The contents page of the 07/2013 SA/SEA (which was described as the 'final SEA/SA of the publication policy') contained no reference to 'alternatives dealt with.' Paragraph 4.2 referred to alternative policy options being:

'specifically considered in December 2012 SA/SEA. As these were dismissed at that time, it is not considered appropriate to address them again in this document.'

7. In the light of this assertion Cranbrook Basements looked back over the several emanations of the SA/SEA back to that of December to find that in fact no consideration had been given at any time to a criteria based impact assessment led policy alternative for basement development.

The factual background

8. On any objective analysis, a criteria based impact assessment led basement policy alternative was, at all material times, a reasonable alternative policy for basement development in the RBKC that was required by Regulation 12 (2) (b) to be identified, described and its likely reasonable effects on the environment evaluated in the SA/SEA. The existing Core Strategy basement policy CL2 (g) adopted after independent examination by an inspector, as recently as December 2010, is a criteria based policy governing subterranean development limited to four matters: excavation under listed buildings, the maintenance of the stability of existing neighbouring buildings, the loss of trees of townscape or amenity value and the provision of adequate

soil depth. Moreover, the policy was included in the 12/2012 SA/SEA (BAS 55) paragraphs 2.56 – 2.58 as an alternative “business as usual option” to be compared with ‘the preferred option.’

9. A criteria based policy allowing consideration of the planning merits of all basement development on a case by case basis including the CL2 and additional criteria – noise, dust and vibration, construction traffic, impact on heritage assets, lighting impact, drainage and impacts on residential character and amenity etc, was a ‘reasonable alternative’³ that needed to be ‘dealt with’⁴ having regard to the 16 ‘Sustainability Appraisal Objectives’ set out at paragraph 2.3 of the SA/SEA 12/2012 (BAS 55).

10. In the event in BAS 21/01-Rev A 4.2 (September 2014) (ID/25) RBKC asserted, for the first time, that the Council had given consideration to a ‘case by case approach’ without maximum limits and found it to be ‘unreasonable.’ What was meant precisely by ‘a case by case approach,’ whether it included a criteria policy and, if so, what criteria were included is not explained in the document. Paragraph 4.3 and 4.4, however, indicate that consideration was given the maintenance of Policy CL2, referred to in earlier versions of the SA/SEA as “business as usual,” and it was found that that alternative had:

‘not been as effective as it should be in managing the impacts on residents’ living conditions, character and appearance of gardens with concerns about drainage and trees.

³ The Environmental Assessment of Plans and Programmes Regulations 2004: Regulation 12(2) and Schedule 2 paragraph 8.

⁴ Ibid Schedule 2 paragraph 8.

The assertion that an alternative 'case by case approach' involving a criteria based policy (if that is what was being said) expanding on the criteria in CL2 to include considerations of 'living conditions, character and appearance of gardens' and 'concerns about drainage and trees,' was identified, described and evaluated in the SA/SEA process for the purposes of Regulation 12 is not supported by any substantial evidence as demonstrated below.

11. Section 19 (5) of the 2004 Act required RBKC to:
 - (a) *carry out an appraisal of the sustainability of the proposals in each development plan document;*
 - (b) *prepare a report of the findings of the appraisal.*

12. The 'Basement Review: Core Strategy Draft Policy STRATEGIC ENVIRONMENTAL ASSESSMENT / SUSTAINABLE APPRAISAL' December 2012 (SA/SEA 2012) (BAS 55) in the Non-technical summary says:

The report also appraises the aims of a number of alternative options against the SA Objectives. This included specific consideration of the 'business as usual' scenario.

Reference is subsequently made in paragraph 2.2 and 2.3 to 'a number of alternative options' and 'alternatives.'

13. At paragraph 2.56 the SA/SEA 2012 has a section entitled 'Predicting and evaluating the effects of the preferred Policy option against the business as usual scenario.' This is the only criteria based policy alternative considered in the report; and interestingly, the Table 2.5 'Assessment of the compatibility of preferred options and the business as usual scenario

with the SA objectives' starting on page 26 reveals that there was no material difference of impact between the two approaches as regards the achievement of the 16 'SA Objectives.'

14. Thus whilst it was seen as necessary to carry out in paragraph 2.56 a comparison of the 'preferred policy option against the business as usual scenario,' the SA/SEA 2012 contained no identification, description or evaluation of any alternative impact assessment or criteria based impact assessment policy alternative. Nor is there any reference in the document to such an alternative having been considered.
15. A similar picture emerges in the SA/SEA 07/2013 (BAS...) accompanying the 'Publication Planning Policy' CL7. As noted above, on the contents page no reference is made to 'reasonable alternatives' or any alternatives; and reference in the body of the document is only made to 'Predicting and evaluating the effects of the preferred policy option against the business as usual scenario.'
16. Paragraph 2.3 states that:

The process that the Council has carried out to ensure that it meets its requirements for Sustainability Appraisal is set out in the SA/SEA report on Basements published in December 2012.

However, as noted above, that document did not include mention let alone identification, description or evaluation of any alternative impact assessment or criteria based impact assessment basement policy.

17. Table 2.1: 'SEA Directive requirements checklist' on page 10 of SA/SEA 07/2013 contains a table headed 'Environmental Report Requirements' where at (h) it is stated that an outline of the reasons for 'selecting the alternatives' (sic) is to be found in Chapter 2 of the original SEA report (Dec 2012).' Chapter 2.0 of the SA/SEA 2012, however, deals with 'Policy Options' for the preferred policy and not with the identification, description and evaluation of an alternative case by case assessment based or criteria based basement policy to be compared and contrasted with the 'publication policy,' namely, the preferred embargo policy restricting all basement development to one storey unless on 'larger sites.'⁵

18. The conclusion to be drawn on the evidence of the SA/SEA 2012 and SA/SEA 07/2013, accordingly, is that no SA/SEA consideration was given at any time to what was a 'reasonable alternative,' namely, a criteria based policy enabling the planning merits of all basement development in the RBKC to be assessed on a case by case basis by reference to a set of criteria including noise, visual impact, loss of open or green space, character and appearance, heritage impacts, transport, residential amenity etc. And the significance of this omission is reinforced, as events have turned out, by the comment in the SA/SEA 07/2013 Non-technical summary page 4:

The SA/SEA concludes that the policy is likely to have a positive relationship with the majority of the SA objectives. This is perhaps not

⁵ Paragraph 4.2 of the SA/SEA 07/2013 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.' Not only was this an inaccurate statement since a case by case impact or criteria based policy not considered in the SA/SEA 2012 but also the SA/SEA 07/2013 here failed to acknowledge the regulatory requirement that the SA/SEA should comply with Schedule 2 paragraph 8 of the 2004 Regulations.

surprising given that the stated purpose of the proposed policy is that, “all basements must be designed, constructed and completed to the highest standard and quality.”⁶

19. Thus, the conclusion of the SA/SEA is that the preferred policy is appropriately adopted having regard to the outcome that it has a ‘positive relationship’ (whatever that may mean) with the 16 SA Objectives which is attributable to its ‘stated purpose;’ a stated purpose that is no longer part of the proposed policy CL7 as indicated in RBKC/ED/10 ‘MM Policy CL7 (beginning).’ What is now proposed in CL7 (a) and (b) is a prohibition on basement development of more than 50% garden area and more than one storey without reference to any stated purpose. This turn of events serves to underline the regulatory failure to identify, describe and evaluate the ‘reasonable alternative’ of a case by case criteria based basement policy as outlined above.

20. As with its earlier iterations, the SA/SEA 02/2014 (BAS 21) contained only a comparison of the preferred basement policy ‘against the business as usual scenario.’ In the document no mention is made of or consideration given to ‘alternatives dealt with.’

21. The ‘Basements: Policy Formulation Report’ 02/2014 (BAS 18) at section 6 set out the ‘Options considered and rejected before consulting on the draft policy.’ In 6.2 reference is made to ‘Option 1 not to amend the existing policy’ (CL2). The paragraph explains that while the existing

⁶ See also on the same page the reference to ‘The proposed policy however is not stopping basement development altogether but reducing the scale of basements or to otherwise mitigating their impact. The policy is seeking to ensure high quality development.’

policy is not out of date, it required to be reviewed. The other four 'Options' constituted possible variations to the content of the preferred policy (referred to as the 'preferred options' in paragraph 6.13).

22. No consideration is given or reference made in the document to the possible adoption or not of a case by case criteria based basement policy or indeed, to why the existing criteria based (not NPPF out of date) Policy CL2 should not be amended to include additional criteria to enable individual assessment of basement developments having regard to relevant planning considerations.

23. In RBKC/ED/4⁷ Matter 1 paragraph 4 the Council stated:
As noted the final SA (BAS 21) refers to the consideration of alternatives in the December 2012 SEA/SA (BAS 55). The Council has also set out the options considered in section 6 of the Policy Formulation Report (BAS 18). However, the Council is working on producing an addition to the final SA to include the reasons for the selection of the Panel's proposals and the outline reasons why the other reasonable alternatives were not chosen during preparation. This will be sent to the Inspector and published on the examination website by the 12th of September 2014. (Underlining added).

24. As noted above, however, apart from a comparative exercise purporting to favour the preferred basement policy against a 'business as usual' (CL2) alternative, the SA/SEA 12/2012 (BAS 55) did not identify, describe or evaluate any 'other reasonable alternatives' to the preferred policy; in

⁷ RBKC response to ID/9A

particular, it did not identify, describe or evaluate a case by case criteria based basement policy.

25. The promised addition to the final SA to include the reasons for the selection of the Panel's proposals and the outline reasons why 'the other reasonable alternatives' were not chosen during preparation was subsequently published as 'BAS 21/01-Rev A Basement Publication Planning Policy Correcting Addition to Sustainability Appraisal / Strategic Environmental Assessment' in September 2014⁸ in response to the Inspector's two questions set out at paragraph 1 above. Despite now being referred to as 'unreasonable,' section 4 of the document purports to deal with these 'other reasonable alternatives.'⁹
26. In paragraph 4.2 the Council states:
This option ['case by case approach on its own merits'] was considered 'unreasonable' by the Council...
- The use of the past tense here is to be noted. There is no evidence in the SA/SEA documentation before the Examination that any consideration was given to a case by case criteria based basement policy at any time during the several iterations of the SA/SEA.
27. The next paragraph 4.3 is a statement of fact about CL2; nothing more.
28. Paragraph 4.4 then explains why the Council considered that the 'existing approach' (CL2) had not been 'as effective as it should be.'

⁸ ID/25

⁹ It is to be noted that although the Council said in RBKC/ED/4⁹ Matter 1 paragraph 4 that it would deal with 'other reasonable alternatives' considered in fact BAS 21/01-Rev A only attempts to deal with what is described, without any other detail, as a 'case by case approach'

29. Paragraph 4.5 then says:

Given that one of the prime objectives of the policy is to bear down on the volume of excavation in order to curtail the individual and cumulative effect of basements on living conditions. A case by case approach with no maximum limits would fail against these objectives.

30. This statement, in the present tense, appears not as description of a justification reached following consideration of an alternative policy at some earlier time in the SA/SEA process but as a first time ex post facto justification for not considering at any time a case by case criteria based basement policy.

31. Further, the 'option' so called,¹⁰ is not described with any particularity. For example, no reference is made to relevant criteria that might be included in any such case by case / merits basement policy and or how such criteria must fail to achieve the 16 SA Objectives. It is to be noted in this context, that in 'Table 2: Assessment of the preferred option (2012) and the business as usual scenario' on page 18 of the document, the CL2 limited criteria based policy is assessed and found to have near identical implications for the achievement of the 16 'SA objectives.' No such Table 2 exercise has been conducted for a case by case criteria based assessment policy despite such a policy being described by the Council as an 'other reasonable alternative' to be dealt with in BAS 21/01-Rev A .

¹⁰ Paragraph 4.2

32. In addition to these considerations, paragraph 4.5 states that one of the prime objectives of the (preferred) policy is to bear down on the volume of excavation in order to curtail the effect of basements on living conditions. This statement is not supported by anything said in the several iterations of the SA/SEA; nor is it one of the 16 'SA Objectives' against which the Council decided that the "business as usual" alternative should be tested. There is, accordingly, no explanation or justification for the bald statement that a 'case by case approach' (including consideration of individual and cumulative impacts on living conditions) with no maximum limit would necessarily fail to protect living conditions or meet the 16 SA Objectives.
33. Paragraph 4.6 asserts that a 'case by case' approach would fail to give clarity on decision making. Why this should be so is not explained. It is common experience that criteria based policies allowing case by case decisions to be taken against a relevant set of criteria are found in Development Plans allowing clarity of decision making with regard to likely impacts.
34. Paragraph 4.7 then asserts, again without explanation, that a case by case criteria approach would lead to inconsistency in decision making. No evidential support is identified for this statement. The reference to conflicting consultant reports is equally obscure and opaque; not least when it is understood that the preferred policy would permit single storey basement development requiring reports as now required by the Main Modifications.

35. Paragraph 4.8 asserts that a case by case approach would fail to comply with the NPPF 15 and 154. However, the NPPF contains a number of examples where criteria based policies (NPPF 21, 113, 144) are encouraged to enable case by case planning decisions applying relevant criteria. In addition, basement development is acknowledged by the RBKC itself as being a sustainable form of development. In the RJ 34.3.47 (BAS 14) basements are described as ‘a useful way to add extra accommodation to homes and commercial buildings;’ and the proposed policy CL7 actively encourages basement development. There is, accordingly, no evidential basis for the contention that a ‘case by case approach’ to basement development in the RBKC would fail to comply with the NPPF; indeed it is a core planning principle in NPPF 17 to encourage the reuse of existing resources and the effective use of land. And NPPF 19 says that planning should operate to encourage and not act as an impediment to sustainable growth.

36. To summarise:

- the SA/SEA process does not comply with Regulation 12 (2) of the Environmental Assessment of Plans and Programmes 2004
- it does not deal adequately or at all with other reasonable alternatives in assessing a policy for basement development.
- in particular, despite the Council acknowledging that ‘a case by case’ policy was an ‘other reasonable alternative’ in RBKC/ED/4 Matter 1 paragraph 4 to be dealt with in BAS 21/01- Rev A, the latter document does not deal adequately or at all with a reasonable alternative criteria based policy;

- the SA/SEA does not ‘identify’ or ‘describe’ anywhere a criteria based policy or its contents (despite the existing policy CL2 being a criteria based policy);
- nor does it ‘evaluate the likely significant effects on the environment’ of a criteria based basement policy and, in particular, whether it would meet the 16 SA/Objectives;
- paragraphs 4.1 to 4.10 contain assertions only which are unsubstantiated by any evidence;
- and the paragraphs themselves do not contain the information required by Regulation 12 and Schedule 2 paragraph 8 of the Regulations;
- further and in addition, those paragraphs do not constitute an Addendum of the type found adequate in the Cogent Land LLP case¹¹ but are of the nature of an ex post facto justification for the preferred policy where it is plain from the evidence that no consideration was given at any relevant time in the SA/SEA process to a reasonable alternative ‘case by case’ criteria based basement policy.¹²
- SA/SEA process did not include parallel development of the environmental report and the draft preferred policy with regard to ‘other reasonable alternatives’ (Cogent Land LLP paragraphs 117);
- on the facts of the case disclosed in the evidence before the Examination the scheme of the Regulations and the Directive was breached (Cogent Land LLP 118 -120); there was no opportunity for the reasonable alternative of a case by case criteria based

¹¹ Cogent Land LLP v Rochford District Council and Bellway Homes Ltd [2013] 1 P&CR 2

¹² It is important to note that in the Cogent Land LLP case Singh J. (107) found ‘on the facts’ of that case that the Addendum had provided a more detailed appraisal of alternative locations previously considered (98, 103)

basement policy to inform the development of the preferred policy CL7.

37. For these reasons, the final Sustainability Appraisal does not deal adequately or at all with all the reasonable alternatives in assessing the preferred policy. There was no proper consideration at any time of a criteria based impact led policy approach alternative to basement development. The SA/SEA and the preferred policy CL7 are, accordingly, unsound.

Timothy Comyn

13/11/2014