Neutral Citation Number: [2015] EWHC 2105 (Admin)

Case No: CO/1027/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 July 2015

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between :

(1) ZIPPORAH LISLE-MAINWARING **(2) FORCE FOUNDATIONS (BASEMENT FORCE) LIMITED**	**Claimants**
- and -	
THE MAYOR AND BURGESSES OF THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA	**Defendant**

- -
- -

Paul Brown QC and Harriet Townsend (instructed by **Richard Max & Co**) for the **Claimants**
Timothy Straker QC and Dilpreet K Dhanoa (instructed by **the Royal Borough of Kensington and Chelsea Legal Services Department**) for the **Defendant**

Hearing dates: 7 & 8 July 2015

- -

Approved Judgment

Mrs Justice Lang:

1. The Claimants apply under section 113 of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") to quash the Defendant's adoption of a revision to its development plan – the "Basements Planning Policy" ("BPP") - on 21 January 2015.

2. The Defendant is the planning authority for the Royal Borough of Kensington and Chelsea. The First Claimant is a freehold owner of a house in the Borough, who wishes to build a basement extension. The Second Claimant specialises in the design and construction of basements. They are affected by the new policy because they consider that it will restrict their ability to construct basement extensions in future.

Summary of the Defendant's planning policies

3. Prior to 21 January 2015, the Defendant's Core Strategy policies CE1 and CL2, adopted in December 2010, made provision, *inter alia*, for basement development.

4. Policy CE1 (Climate Change) required:

   i) extensions over a specified size to achieve Code for Sustainable Homes/BREEAM standards (at a); and

   ii) an assessment to demonstrate that the entire dwelling where subterranean extensions are proposed meets EcoHomesVeryGood (at design and post construction) with 40% of the credits achieved under the Energy, Water or Materials sections or comparable when BREEAM for refurbishment is published (at c).

5. Policy CL2 (New Buildings, Extensions and Modification to Existing Buildings), opened with the statement:

   > "The Council will require new buildings, extensions and modifications to existing buildings to be of the highest architectural and urban design quality, taking opportunities to improve the quality and character of buildings and the area and the way it functions. To deliver this the Council will, in relation to:"

   The policy then set out a range of requirements.

6. Sub-paragraph (g) related specifically to "subterranean extensions" (i.e. basements) and required them to meet the following criteria:

   i) The proposal does not involve excavation under a listed building;

   ii) The stability of the existing or neighbouring buildings is safeguarded;

   iii) There is no loss of trees of townscape or amenity value;

   iv) Adequate soil depth and material is provided to ensure sustainable growth.

7. In response to an increase in basement development in the Borough, and concerns about its impact, the Defendant had earlier adopted a Supplementary Planning Document on "Subterranean Development" in 2009 ("SPD 2009"). This was not part of the development plan but it was a significant material planning consideration, and it remained in force after the 2010 Core Strategy was adopted.

8. Paragraph 1.2.2 stated:

> "This SPD provides further guidance and builds upon the criteria used to determine planning applications for subterranean development, as set out in Unitary Development Plan (UDP) Policy CD32, as saved by the Secretary of State, which "resists subterranean development where:
>
> a. the amenity of adjoining properties would be adversely affected; or
>
> b. there would be a material loss of open space; or
>
> c. the structural stability of adjoining or adjacent listed buildings or unlisted building within conservation areas might be put at risk; or
>
> d. a satisfactory scheme of landscaping including adequate soil depth has not been provided; or
>
> e. there would be a loss of trees of townscape or amenity value;
> …"

9. The key provisions in the SPD 2009 were as follows (all references to development are references to basement development):

   i) Construction and structural stability must incorporate the advice of a chartered civil or structural engineer.

   ii) Proposals for development under listed buildings or directly attached to existing basements, cellars or vaults of listed buildings will normally be resisted, though proposals for development under the gardens of listed buildings may be considered.

   iii) Visible signs of development should be well designed and discreet. The Defendant will discourage light wells and railings that are visible from the street if not a characteristic feature of the street. Restrictions on size of light wells.

   iv) All development used as sleeping accommodation must have natural light and ventilation.

   v) Basement storeys should be a minimum of 2.4m high and accord with minimum room sizes specified.

   vi) Restrictions on the grant of planning permission in flood risk areas.

vii) Sustainable urban drainage is required.

viii) No mature trees should be removed or damaged, especially those with Tree Preservation Orders, in Conservation areas, or within the curtilage of a listed building.

ix) To protect the green and leafy appearance of the Borough, the Defendant will require:

a) 1m of permeable soil above the top cover of the basement;

b) the basement should extend to no more than 85% coverage of the garden space (between the boundary walls and existing building) with the remainder of the space used for drainage, planting and tree pits.

x) Conditions will be attached to the grant of planning permission to minimise noise and nuisance for neighbours and pedestrians, traffic flow and parking.

10. The BPP superseded the above policies, in so far as they related to basement development. Against a background of an increasing number of basement extensions in the Borough, it introduced further restrictions on basement development, in response to concerns about the harmful impact of construction works. The text of the BPP is set out in Appendix 1.

The Claimants' grounds

11. The Claimants submitted that the Defendant failed to act "within the appropriate power", within the meaning of section 113(3)(a) PCPA 2004, when it adopted the BPP because:

i) the Defendant and the Inspector failed to take account of a material consideration, namely the permitted development rights for basement development, and the risk of greater reliance on them if the BPP were adopted, without the benefit of any planning control over construction noise and loss of amenity;

ii) the Defendant and the Inspector did not consider and/or assess the "reasonable alternative" of a "case by case" approach put forward by the Second Claimant, and so the Defendant failed to carry out an adequate environmental assessment, as required under reg. 5 of the Environmental Assessment of Plans and Programmes Regulations 2004 ("SEA Regulations 2004");

iii) in rejecting the Second Claimant's reasonable alternative, the Defendant belatedly relied upon a new objective of "bearing down on the volume of excavation" which was a "false objective", as the Defendant's previously stated objective was to ensure that basement development was of the highest quality; and

iv) the "false objective" was contrary to section 39 PCPA 2004.

12. The Claimants further submitted that procedural requirements had not been complied with, and they had been substantially prejudiced thereby, within the meaning of section 113(3)(b) PCPA 2004, when the Defendant adopted the BPP because:

    i) the Claimants and others were deprived of the opportunity to be consulted on the "false objective" of "bearing down on the volume of excavation", and so the consultation process was flawed;

    ii) the Inspector did not give adequate reasons in his report, as required by section 20 PCPA 2004, to indicate his conclusions on the points raised by the Claimants concerning the effect of the BPP on permitted development rights and the "reasonable alternative" of a 'case by case' approach.

The scope of a challenge under section 113 of the Planning and Compulsory Purchase Act 2004

13. It was common ground between the parties that the BPP was a revision of a development plan document, and therefore fell within section 113(1)(e) PCPA 2004. For the purposes of section 113, it was a "relevant document".

14. Section 113(3) provides:

> "(3) A person aggrieved by a relevant document may make an application to the High Court on the ground that–
>
> (a) the document is not within the appropriate power;
>
> (b) a procedural requirement has not been complied with."

15. In the case of a revision to a development plan document, "appropriate power" means Part 2 of the 2004 Act: see section 113(9).

16. Section 113(10) defines "procedural requirement" as:

> "… a requirement under the appropriate power or contained in regulations or an order made under that power which relates to the adoption, publication or approval of a relevant document."

17. The High Court may quash the relevant document and remit it to the Council, with such directions as may be appropriate, under section 113(7) and (7A), but section 113(6) provides that it may only do so where it is satisfied that:

> "(a) that a relevant document is to any extent outside the appropriate power;
>
> (b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement."

18. Section 113 of the 2004 Act is the only route by which the validity of a development plan document, or any revision of such a document, may be called into question: section 113(2).

19. It is not disputed that the Claimants are "persons aggrieved" for the purposes of section 113(3).

20. The centrepiece of Mr Straker's written submissions was that the Claimants' challenges fell outside the scope of section 113(3)(a). That led to an exchange of submissions between the parties as to the meaning of the phrase "not within the appropriate power" in section 113(3)(a). In the course of oral submissions, Mr Straker clarified his position, and as a result, the differences between the parties narrowed considerably. Nonetheless, I have to address the issue as it was raised so prominently in Mr Straker's written submissions.

21. The phrase "not within the appropriate power" in section 113(3)(a) also appears in section 287 Town and Country Planning Act 1990 ("TCPA 1990") ("Proceedings for questioning the validity of development plans and certain schemes and orders") and section 288 TCPA 1990 ("Proceedings for questioning the validity of other orders, decisions and directions"), which have a similar function to section 113.

22. In applications under sections 287 and 288 TCPA 1990, it is well-established that the decision maker may be found to have acted outside his powers under these provisions not only by reference to the powers/duties and requirements expressly set out in the statute, but also because he has acted irrationally, or taken into account irrelevant, or failed to take into account relevant, considerations, applying conventional judicial review principles.

23. In *Persimmon Homes (Thames Valley) Ltd v. Stevenage Borough Council* [2005] EWCA Civ 1365, [2006] 1 WLR 334, at [21], Laws LJ confirmed that section 287 TCPA 1990 created a "form of statutory judicial review" within which the court's role was to supervise the exercise of power by the local planning authority "according to the conventional public law test of rationality".

24. In *Seddon Properties Ltd v Secretary of State for the Environment* (1978) 248 E.G. 950, Forbes J. was determining a statutory application under section 245 of the Town and Country Planning Act 1971. Section 245 of the 1971 Act included the same phrase as its successor, section 288 TCPA 1990. In an oft-quoted passage, at 951, he said that there was a "wealth of authority which governs the principles under which a decision by the Secretary of State in a case such as this may be reviewed in the courts" and he then proceeded to set out the conventional judicial review principles.

25. The same judicial review principles have been applied in other statutory appeals in which the phrase "not within the appropriate power" is used: see *Warren v Uttlesford DC* [1997] JPL 1130, per Schiemann LJ at 1133; *Ashridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, per Lord Denning MR at 1326 F-H.

26. In my judgment, the scope of section 113(3)(a) should be interpreted in the same way as it has been in these cases.

Adoption of development plan documents under the Planning and Compulsory Purchase Act 2004

27. Mr Straker QC rightly emphasised the importance of identifying the statutory powers which were being exercised in applying section 113(3)(a).

28. The Defendant was exercising its powers under section 23 PCPA 2004 to adopt a development plan document, and under section 26 PCPA 2004 to revise an existing local development plan document.

29. Part 2 of the PCPA 2004 makes provision, among other things, for a local planning authority to prepare and maintain development plan documents.

30. Section 17 PCPA 2004 makes provision for the form and content of local development documents.

31. Section 19 PCPA 2004 sets out the requirements which a local planning authority must follow when preparing development plan documents. Subsection (2) lists matters to which the authority must have regard. Subsection (5) requires the authority 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."

32. Section 20 makes provision for independent examination by an Inspector appointed by the Secretary of State, and for the Inspector to recommend modifications, if required. By subsection (6), any person who makes representations has the right to be heard. Subsection (5) explains that the purpose of an independent examination is to determine whether the proposed development plan document:

i) satisfies the requirements of sections 19, 24(1), any regulations under section 17(7) and section 36 PCPA 2004, relating to the preparation of development plan documents;

ii) is "sound"; and

iii) whether the local planning authority complied with any duty imposed on it by section 33A PCPA 2004

33. The Inspector is required to give reasons for his recommendation to adopt the document (subsection (7)), or not to adopt the document (subsection (7A)), or to modify the document (subsection (7C)).

34. Section 21 enables the Secretary of State to intervene if he thinks that a development plan document is unsatisfactory.

35. These statutory provisions are supplemented by the Town and Country Planning (Local Planning) (England) Regulations 2012 ("TCP (LP) Regulations 2012"). Regulations 18 to 22 provide for consultation and representations on a proposed local

plan; regulations 22 to 25 relate to submission to the Secretary of State and examination by the Inspector. By regulation 22, the Inspector is required to consider any representations made before making a recommendation.

Ground 1: Permitted Development Rights

The General Permitted Development Order

36. By section 57 TCPA 1990 planning permission is required for the carrying out of any "development of land", where "development" is defined by section 55 to include "the carrying out of building, engineering, mining or other operations in, on, over or under land". It is common ground that the creation of a basement (whether beneath an existing building, or as part of the construction of a new building) is "development" for the purposes of sections 55 and 57.

37. Permission for certain classes of development is granted by Article 3 of the Town and Country Planning (General Permitted Development) Order 1995 ("the GPDO")[1] which grants planning permission for the development set out in Schedule 2 to that Order. These rights are known as "permitted development rights".

38. Part 1 of Schedule 2 deals with "development within the curtilage of a dwellinghouse"; within which Class A provides that "the enlargement, improvement or alteration of a dwellinghouse" is permitted development.

39. Class A is subject to a number of detailed restrictions, set out in paragraph A.1. Additional restrictions that apply only to developments within Article 2(3) land (including conservation areas) are set out in paragraph A.2.

40. Mr Bore, who is the Defendant's former Executive Director for Planning and Borough Development, helpfully summarised the effect of the GPDO in his first witness statement as follows:

> "10. Basements built under permitted development rights are restricted and in a conservation area are confined to the building footprint. A basement could only be constructed under the entire footprint if it has a back garden that is at least 7m or more. The creation of lightwells is not considered to fall within Class A as it is not 'enlargement, improvement or alteration' of a dwellinghouse but an engineering operation requiring planning permission (I should add this I am not attempting here to restate the General Permitted Development Order, it is to that one must look for precision).
>
> 11. Consequently, what is possible under permitted development rights is a small windowless basement restricted to the footprint of the dwellinghouse. For properties with a small garden of less than 7m it may not be possible to construct

[1] The 1995 Order was replaced by the 2015 Order with effect from 15 April 2015.

> a permitted development basement at all, or only under part of the footprint."

41. The more restrictive rules for conservation areas are relevant since some 73% of properties within the Borough are within conservations areas and most basement development takes place in those areas. Many of the applications for planning permission are made because residents wish to construct basements horizontally, going beyond the footprint of the house, under the garden.

42. A further limitation to the use of permitted development rights, particularly relevant in a central London Borough, is that they only apply to single dwellinghouses, not dwellinghouses which incorporate one or more flats.

43. The interpretation of the GPDO in relation to basements is controversial, not just between the parties to this claim, but generally within the world of planning. Different local authorities have adopted different interpretations at different times. In *Royal Borough of Kensington & Chelsea v Secretary of State for Communities and Local Government* CO/740/2015, Patterson J found that both the Defendant and the Secretary of State's Inspector had, in different ways, misinterpreted the GPDO when considering whether to grant certificates of lawful development. Since 2013 only, the Defendant had wrongly interpreted sub-paragraph A.1(f) to refer to the number of storeys in the original dwellinghouse, whereas in fact it referred to the number of storeys in the "enlarged part" i.e. the extension.

44. There remain differing views between the parties to this claim as to the interpretation of the GPDO, in particular, in relation to:

    i) whether there are restrictions on the overall size of a basement development, and number of storeys, beyond the restrictions expressly imposed by the GPDO. For example, the Defendant contends that a large or multiple storey extension for non-dwellinghouse purposes, such as offices or a swimming pool and gym, is liable to go beyond "the enlargement, improvement or other alteration of a dwellinghouse";

    ii) whether and to what extent lightwells fall outside permitted development.

45. I do not consider it is necessary for me to adjudicate upon these differences of interpretation for the purpose of deciding this claim.

46. Some categories of permitted development rights may be withdrawn by the local planning authority, pursuant to Article 4 GPDO, if it is "satisfied that it is expedient that the development described … should not be carried out unless permission is granted for it on an application". There is an elaborate procedure for such directions, including notification to owner/occupiers, as set out in Articles 4 to 6.

47. The Secretary of State can intervene to cancel or modify an Article 4 direction. National Planning Practice Guidance advises that the use of Article 4 directions:

> "…should be limited to situations where this is necessary to protect local amenity or the wellbeing of the area. The potential harm that the direction is intended to address should

> be clearly identified. There should be a particularly strong justification for the withdrawal of permitted development rights relating to a wide area (e.g. those covering the entire area of a local planning authority ….)"

48. A direction can take immediate effect where the local planning authority considers the development "would be prejudicial to the proper planning of their area or constitute a threat to the amenities of their area" (Article 6(1)(a)). However, compensation is then payable for 12 months thereafter. Where a non-immediate direction is made, but not confirmed for 12 months, compensation is not payable.

Were the permitted development rights taken into account?

49. At all material times, the Defendant, as the local planning authority, were obviously well aware of the GPDO and the permitted development rights which applied to basement development in the Borough. The Claimants do not dispute this.

50. In May 2009, the Defendant adopted a supplementary planning document called "Subterranean Development" which contained detailed information about permitted development rights at pp. 859, 864, 887, and incorporated them into its planning flowchart at p.860.

51. In April 2012, the Defendant began its revision to the Core Strategy by publishing an Issues Paper with an accompanying Scoping Report, on basement development. It included, at p.571, a summary of the Council's Annual Monitoring Report (2011) which considered the number of certificates of lawful development for permitted development which included a degree of basement excavation. It summarised the permitted development rights applicable to basements, and said:

> "4.4 It is difficult to ascertain exactly how much basement development is being carried out in the Borough because some does not require planning permission[2] and there is no requirement for an owner to apply for a certificate of lawful proposed development[3]. However, in 2011, we received notification of a further 46 basement schemes which did not require planning permission and were not the subject of certificates of lawful development."

52. In the consultation paper issued in December 2012, the Defendant referred in its Executive Summary to the 2009 SPD and the fact that some basements could be built without the need to apply for planning permission (p.581). It went on to say (at p.582):

> "**Permitted development**

---

[2] "Under Schedule 2, Part 1, Class A of the [GPDO 1995] single storey basement extensions that project no more than 3 metres into the rear garden of a single family dwelling are usually considered to be permitted development."

[3] "An applicant can apply for a Certificate of Lawful Proposed Development from the Council, which confirms that planning permission is not required for the proposed works."

> The Council is considering removing permitted development rights from those basements that can currently be built without the need to apply for planning permission, This will be done through an 'Article 4 Direction'.
>
> This is not to stop these basements taking place. They would be very likely to meet the criteria of the proposed policy set out above. Instead the purpose is to allow matters of construction impact – set out under procedure above – to be controlled. It could be done across the Borough, or it could be more specifically targeted in, for example, areas where streets are narrow or construction is otherwise constrained."

53. Later in the same document, it stated (at p.597):

> "**5.0 Permitted Development**
>
> 5.1 The Town and Country Planning (General Permitted Development) Order 2008 (GPDO) sets out certain categories of development that do not require planning permission. Enlargements of a certain scale to a single dwelling are permitted development. As basements are enlargements, these are therefore permitted. In essence a 'single storey' basement directly underneath the dwelling, which projects no more than 3 metres into the rear garden, does not require planning permission, and as such is exempt from the controls that the planning system can offer.
>
> 5.2 Bringing smaller basement extensions within the remit of the planning system would enable the Council to control the implementation stage in terms of construction method and construction traffic, and receive information relating to the structural impacts on the adjoining properties, for the neighbours to then take forward in their party wall agreements. It would also allow other aspects of the project to be assessed such as the visual impact of roof lights, whether land which is contaminated is effectively considered and to require sustainable urban drainage and carbon reduction measures to be implemented.
>
> 5.3 A local authority may make a direction under Article 4 of the GPDO to remove permitted development rights, thus bringing a category of development back under planning control. Where an application made necessary by the Article 4 direction is refused, compensation is normally payable, but the publication of the Town and Country Planning (Compensation) (England) Regulations 2012 has removed that burden

> as regards extensions, alterations and improvements to dwelling houses, subject to certain requirements.
>
> 5.4 Given the considerable benefits associated with bringing all but the most minor basement extensions under the remit of the planning system, the Council is considering making the use of Article Directions either across the Borough, or more specifically targeted on, for example, areas where streets are narrow or where construction is otherwise constrained. However, this approach is not without its costs as no planning application fee is payable to the local planning authority for an application made necessary by an Article 4 Direction. This cost, if across the borough, has been estimated to be in the region of £65,000 pa, though this could rise significantly were the number of eligible applications to increase. This cost will be ongoing.
>
> 5.5 A formal procedure must be undertaken were the Council to decide to implement Article 4 Direction. The Council would have to consult those affected for at least six weeks before deciding whether to confirm the Article 4 Direction or not. In order to avoid the payment of compensation the Council would then need to give at least twelve months notice of its plans to make the direction."

54. In my judgment, these extracts make it clear that the Defendant had well in mind when considering the terms of its proposed new policy, that:

    i) some limited basement development could take place under permitted development rights;

    ii) planning permission was not required for such development and so it would fall outside the scope of the proposed BPP;

    iii) as it was outside the remit of the planning system, it had the disadvantage that the Defendant could not control construction method and traffic, and assess other aspects of the development.

55. The Defendant's proposed solution to this problem was to remove the permitted development rights by making an Article 4 direction, thus bringing all but the most minor basement development within planning control.

56. In March 2013, the Defendant published a second draft policy for consultation. It appears it had further considered the position in relation to permitted development rights and an Article 4 direction, since it explained, at p.650:

> "1.8 **Article 4 Direction:** There are separate procedures relating to the introduction of an Article 4 direction. Should the

> Council decide to progress with an Article 4 direction procedures will require further consultation in due course."

57. At the Basements Consultation Event on 8 April 2013, the Defendant's representatives were asked a question about permitted development rights. They responded that, although no final decision had been reached, they were minded to make an Article 4 direction to remove permitted development rights.

58. After some further revisions, the Defendant published its "Basements Submission Planning Policy" in April 2014, which was submitted to the Secretary of State. In setting out the criteria for basement development in draft Policy CL7, it referred to permitted development rights at (c).

59. On 12 November 2014, the First Claimant's solicitor sent written representations to the Inspector, on her behalf, in the form of a letter, attaching an Opinion from Mr Brown QC. The First Claimant considered that the proposed policy would act as "an unjustified obstacle to development". In relation to permitted development rights, the main thrust of the letter and the Opinion was the concern that the proposed BPP did not acknowledge the existence of, or proper scope, of the permitted development rights under the GPDO 1995. The letter concluded:

> "It is against this background that we note the statement at paragraph 34.3.46 of the reasoned justification for the proposed new policy, that "This policy applies to all new basement development".
>
> As a matter of law, the emerging policy cannot remove existing permitted development rights. The statement at para 34.3.46 therefore cannot be correct, unless RBKC intends to make an Article 4 direction removing all permitted development rights over basements in the Borough.
>
> Given the significantly increased value of properties which have had basement extensions, such a decision would have profound implications in terms of RBKC's liability to pay compensation, and we are unaware of anything to show that RBKC has budgeted for such liability.
>
> In view of the above, Mrs Lisle-Mainwaring has sought the advice of Leading Counsel, Mr Paul Brown QC. We attach a copy of Mr Brown's written Opinion. We draw your particular attention to paragraph 14 and 18, where Leading Counsel concludes that the failure by RBKC to properly take into account permitted development rights potentially renders the emerging policy unsound and invalid."

60. Mr Brown's Opinion was based upon the perceived conflict between the proposed BPP and permitted development rights. He concluded that the permitted development rights were wider than the BPP allowed. His ten page Opinion contained only one passing reference to the issue upon which his case before me has been based. At paragraph 14c, he asked whether and to what extent the restrictive nature of the

proposed policy was likely to encourage the construction of basements under permitted development rights, without any controls over traffic, construction or dust.

61. The letter and the Opinion arrived in late 2014, some considerable time after the Defendant had published the documents indicating its views on the inter-relationship between the proposed BPP and permitted development rights, in 2012 and 2013. I infer from the terms of the solicitor's letter that he and his counsel were unaware, at that stage, that the Defendant had already identified the difficulties caused by permitted development occurring outside planning controls, and had stated it was considering making an Article 4 direction to remove those difficulties.

62. The Inspector, Mr David Vickery, held hearings in September 2014 and reported on 2 December 2014. At paragraph 38 of the Report, he said:

> "38. The 2004 Act at s38(6) says that "regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts". Permitted development basements are a general planning permission granted not by the Council but by Parliament. Because they have already been "determined" by Parliament this Policy does not legally apply to them. So the statement at paragraph 34.3.46 that the Policy "applies to all new basement development" is clear, effective and sound."

63. In my judgment, this paragraph was both an accurate and an adequate response to the issue raised in the First Claimant's solicitor's letter and counsel's Opinion.

64. The possibility that permitted development rights might be over-used as a consequence of the introduction of the new BPP was not overlooked. During the course of the examination process, a monitoring indicator was added to the draft BPP to monitor the number of basements built within the Borough under permitted development rights, on an annual basis. It provided:

> "[t]he Council will review the effectiveness of the policy if there is a doubling in the number of basements under permitted development when compared to the 12 months before the adoption of CL7."

This review mechanism is a safeguard to ensure that the effectiveness of the policy will be reviewed if there is a significant increase in the construction of basements using permitted development rights. The Defendant's annual monitoring reports, which include the monitoring of permitted development, were provided to the Inspector. During the consultation in July – September 2013, monitored data on permitted development basements was included in a document entitled 'Basement Development Data' (July 2013).

65. The Claimants contend that the Inspector's reasons on these issues were inadequate. In *Chalfont St Peter Parish Church v Chiltern District Council & Anor* [2014] EWCA Civ 1393, Beatson LJ held that the test for adequacy of the Inspector's reasons was as set out in Lord Brown's classic formulation in *South Bucks District Council v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953, at [36];

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

66. In my view, the Inspector's duty to give reasons did not mean that he had to respond, line by line, to every point in Mr Brown's Opinion, and to each and every point made by everyone who made representations. In a major examination, that would be an impossible task. The Inspector dealt with the main issue raised by the First Claimant, namely, whether the proposed BPP could properly state that it applied to "all new basement development". The Inspector was not under a duty to address in his reasons the issue raised in paragraph 14c of Mr Brown's Opinion, regarding the possible encouragement of permitted development, without the benefit of planning control. It was not a main issue, and the First Claimant was not, in my view, prejudiced by the absence of a written response from the Inspector on it. I consider that the First Claimant has since elevated this into a point of importance for her as a peg upon which to hang a legal challenge to the BPP. The evidence indicates that her primary objective was, and is, to be able to obtain planning permission to build a basement free of undue restriction; it is not a concern about the detrimental effects of permitted development on the amenity of the neighbourhood.

67. The Inspector plainly had permitted development rights for basements well in mind, as can be seen from paragraph 38 of his Report. As an experienced planning Inspector, it would have been surprising if he had overlooked them. Looking at the evidence before him, and the references to permitted development rights in the report, I am not persuaded that he failed to take them into account when considering whether the proposed BPP met the requirements in section 20 PCPA 2004. It was a matter for his planning judgment to decide what weight to give to the risk that permitted

development rights would be over-used and the consequences of such over-use. Overall, he was satisfied that the requirements of section 20 PCPA 2004 were met.

68. On 19 December 2014, the First Claimant's solicitors wrote a pre-action letter to the Defendant, enclosing a copy of the representations made to the Inspector, including Mr Brown's Opinion. They asked the Defendant to confirm that the proposed BPP would not override permitted development rights; queried its interpretation of the GPDO 1995; and enquired whether the Defendant intended to make an Article 4 direction. There was no mention of the risk that adoption of the BPP would increase use of permitted development rights, causing harm which would be outside the remit of planning control. The Defendant responded in a letter dated 12 January 2015.

69. The BPP, with the modifications recommended by the Inspector, was adopted by the Defendant at its meeting on 21 January 2015.

70. On 19 March 2015, the Defendant's Cabinet decided to commence the process for making an Article 4 GPDO direction to remove permitted development rights for basement construction. A non-immediate direction was proposed, to take effect after one year, preceded by a public consultation. An immediate direction would expose the Defendant to a liability to make compensation payments.

71. Mr Bore, in his report to Cabinet, recommended that all basement development should be brought within planning control because of the concerns about the harmful impact of basement construction on local residents. He said, at paragraph 1.2:

> "With the introduction of Policy CL7: Basements and its stringent planning requirements, there would be an incentive for some owners to construct basements using their permitted development rights rather than applying for planning permission. Such development would not be caught by any of the requirements of Policy CL7 which have been carefully designed to mitigate harmful construction and other impacts on residents and the residential character of the Borough."

72. The Claimants submitted that this was a clear acknowledgment by the Defendant of the point upon which they rely. The Defendant should have taken this factor into account at an earlier stage and concluded that the BPP should not have been adopted because of these likely consequences. The Claimants also submitted that the Defendant only proceeded with the Article 4 direction because of the threat of their legal challenge.

73. I am unable to accept the Claimants' submission that the Defendant failed to take account of permitted development rights when it adopted the policy, including the risk of greater reliance on permitted development rights if the policy was adopted, with consequent harm and loss of amenity outside the remit of planning controls. The Defendant considered the BPP at length with the benefit of its knowledge and experience as a local planning authority which routinely deals with permitted development rights. The Defendant was considering a change to the existing policy, set out in the 2009 SPD on basements, which described permitted development rights in that context. The Inspector's report was before the Council which expressly referred to permitted development rights in paragraph 38. At the consultation and

draft policy stages, the Defendant analysed the permitted development rights in the consultation and draft policy stages, expressly identifying the problem of a lack of planning control over noise and loss of amenity arising from basements constructed under permitted development rights. The Defendant indicated on several occasions that it was considering an Article 4 direction to remove permitted development rights to address this problem, but that would require a separate procedure. In my view, its subsequent decision to do so was consistent with its previously stated intention, not a response to the Claimants' legal challenge. Paragraph 34.3.72 of the BPP made provision for the ongoing monitoring of the policy to assess its effectiveness, and there was a specific monitoring requirement in respect of the number of basements built under permitted development rights, with a mechanism to trigger a review of the effectiveness of the policy, should there be a doubling in the number of basements constructed. This provision both acknowledged and addressed the risk of an increase in basement construction under permitted development rights.

74. The Claimants argue that the BPP should not have been adopted because of the risk of increased basement construction under permitted development rights; an approach which serves their underlying objective of defeating the BPP altogether. However, that is an exercise of judgment which ultimately is not theirs to make. At times, in their written and oral submissions, they seemed to be suggesting that, because the Defendant went ahead and adopted the BPP, it must have ignored the significance of permitted development rights. As I see it, the Defendant simply took a different approach to the benefits of the BPP, even taking account of the potential problem with permitted development rights.

75. Parliament has entrusted responsibility for the preparation of development plan documents to a local planning authority under the PCPA 2004, which requires it to exercise its judgment on the development and use of land in their area, within the statutory framework. Its proposals are subject to independent examination by the Secretary of State's Inspector. The role of this court is a much more limited one of statutory review, intervening only where an error of law is established, and not conducting a review of the merits of the planning authority's development plan documents.

76. For these reasons, ground 1 does not succeed.

Ground 2: The Environmental Assessment

The statutory framework

77. Section 39 PCPA 2004 provides that a body exercising functions under Part 2 of the PCPA 2004 must do so with the objective of contributing to the achievement of sustainable development.

78. When revising the development plan, the Defendant was required to carry out an appraisal of the sustainability of the proposals in the plan and prepare a report of the findings of the appraisal: section 19(5) PCPA 2004.

79. By Regulation 5 of the SEA Regulations 2004 the Defendant was also required to carry out an environmental assessment ("SEA") in accordance with Part 3 of those

Regulations of any plan or programme which sets the framework for future development consent of projects listed in Annex I or II of the Environmental Impact Assessment Directive.

80. The SEA Regulations 2004 transpose into English law the requirements of the SEA Directive[4] of which Article 1 states

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

81. Article 2 of the SEA Directive states:

> "(b) 'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9;
>
> (c) 'environmental report' shall mean the part of the plan or programme documentation containing the information required in Article 5 and Annex I;"

82. Article 5.1 provides:

> "Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

83. By Regulation 8(2) the Defendant was required to meet certain requirements before adopting the BPP. These included, under regulation 8(3), that account must be taken of the environmental report and any opinions expressed in response to consultation under Regulation 13.

84. Regulation 12 states:

> "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of

[4] Directive on the assessment of the effects of certain plans and programmes on the environment.

> a) implementing the plan or programme; and
>
> b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme."

85. By regulation 12(3), the report shall include such of the information in Schedule 2 of the SEA Regulations 2004 as may reasonably be required. This includes, at paragraph 8 of Schedule 2:

> "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."

86. In England the practice is for the sustainability appraisal under section 19(5) PCPA 2004 to incorporate the requirements of the SEA Regulations 2004.

87. The duties in the TCP (LP) Regulations 2012, which require the local planning authority and the Inspector to hear, and have regard to, representations, apply to the issues which fall to be considered in the sustainability appraisal and environmental assessment.

The competing submissions

88. By regulation 12 of the SEA Regulations 2004, the Defendant was required to consider "reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme".

89. The Second Claimant contended that its proposal was a reasonable alternative. The proposal was that the policy should not impose general restrictions but instead it should identify the issues which would need to be addressed on a "case by case" basis, when an application for planning permission was submitted. According to the Second Claimant, this approach would meet the policy objective as stated in the opening sentence of the draft BPP prior to modification:

> "The Council will require all basements to be designed, constructed and completed to the highest standard and quality."

90. The Defendant submitted that the Second Claimant's alternative was not "reasonable". It was essentially permissive (even more so than the existing policy), whereas one of the Defendant's primary policy objectives was to mitigate the harmful impacts of basement construction on residents by, among other things, limiting it. Moreover, a "case by case" approach would leave all aspects of the policy open to interpretation, offering no certainty to applicants or planning officers. This would be contrary to the National Planning Policy Framework which provides (at paragraph 154); "Only policies that provide a clear indication of how a decision maker should react to a development proposal should be included in the plan".

91. The Second Claimant's response was that the policy objective of limiting basement development was not the Defendant's original objective, and had only been introduced by Mr Bore at a late stage. In the 'Correcting Addition', submitted to the Inspector in September 2014, the Defendant said:

> "4.4 The Council's evidence has demonstrated that the existing approach has 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. It would be unreasonable for the Council to draw back from this policy framework and take a 'case by case' approach.
>
> 4.5 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." (underlining added)

92. The Second Claimant submitted that the passage underlined was a "false objective", introduced belatedly, as a reason to reject his alternative proposal, and it was contrary to section 39 PCPA 2004; because it had only been raised at the end of the process, there had been inadequate consultation on it.

The Defendant's policy objective/s

93. I have carefully reviewed the evidence in order to identify the Defendant's policy objective/s. In my judgment it is unarguable that the Defendant's sole, or even primary, policy objective was to ensure the standard and quality of basement design and construction. From the outset, it is apparent that the impact of widespread basement construction on residents was a major concern which the Defendant was seeking to address by, among other things, limiting basement development, and imposing additional requirements on developers. I will refer to it as "the disputed objective", as I have concluded that it was a genuine objective, not as the Claimants submit, a "false" one.

94. I set out some, but not all, of the references below.

95. The Defendant's Issues Paper, published in April 2012, identified the key question as whether or not its existing policies were effective or needed to be changed. It considered the following issues in relation to basement development: External appearance and design; Listed Buildings; Archaeology; Parks and gardens; Flooding; Trees and landscape; Mitigating environmental impacts e.g. caused by evacuation, construction, transportation; Structural stability; Reducing the impact of construction e.g. noise, vibration, dust, disturbance associated with the moving of spoil and construction materials.

96. The Strategic Environmental Assessment/Sustainability Appraisal Scoping Report Addendum, dated April 2012, acknowledged the value of basement extensions to residents seeking additional living space but stated that "basement development must be carefully managed if it is to be a good neighbour" (at 1.3).

97. In August/September 2012, the Defendant carried out surveys of owners of basement developments, their neighbours and residents associations.

98. The Defendant's "Basements Draft Policy for Consultation", issued in December 2012, stated in its 'Executive Summary':

> "**Background**
>
> Many residents have expressed concern about basements, very largely during the construction phase, and in relation to the impacts on adjacent properties.
>
> ….
>
> **Review**
>
> Alan Baxter Associates were commissioned to provide up to date evidence on a range of basement matters. The draft policy in this document is based on their report.
>
> A questionnaire was circulated to gather residents' views of basements.
>
> **Proposal**
>
> **Policy**
>
> The new policy does not propose to 'ban basements'.
>
> It proposes to maintain the current position in relation to:
>
> - listed buildings, where basements are permitted under the gardens… but not under the building itself;
> - sustainable urban drainage measures being required;
> - light wells etc needing to be discreetly located; and
> - measures to limit carbon emissions being required.
>
> It proposes to limit basements to:
>
> - a single storey ..This is on the basis that the larger the basement the greater the construction impact;
> - under gardens to maintain natural drainage, for basements never to exceed 75% of a garden, and could be significantly less than that, depending on the surface water conditions on the site…
>
> It proposes to give more weight to construction impact issues … including:

- construction traffic;
- construction methods;
- hours that building work can be carried out; and
- how to safeguard the structural stability of neighbouring buildings…

Procedures

It is proposed that applicants will be required to provide information at the time the application is submitted (rather than related to a condition at the end of the process). On top of the existing requirements relating to Flood Risk and Carbon assessments, this will include assessments of:

- construction traffic
- how issues of noise, dust and vibration will be controlled during construction
- how to safeguard the structural stability of neighbouring buildings…"

99. The 'Introduction' to the 2012 paper included the following paragraphs:

"**What has informed the review**

1.13 Both consultations indicate that there is concern from a number of residents and amenity groups that the implementation of basement developments is having an unacceptable impact upon the living conditions of those living nearby. Of the 1350 neighbours who responded to the survey between 50% and 60% were concerned about the impact of construction noise, vibration and dust. 53% were concerned about construction traffic and a little over half noted an impact on their own property. Further detail was provided by additional surveys completed by a number of residents' associations."

"**Basement development and the planning regime**

1.22 Planning is primarily designed to assess the final physical form and use of a proposed development. Construction is not normally regarded as a planning matter, but where basements are under construction in a residential street, the extent and duration of construction can have a major long term effect on residential living conditions."

100. The paper set out the draft policy. In the supporting text, which was the reasoned justification for the policy, it stated:

> "34.3.57. Basements pose particular problems not raised by above ground extensions and developments….There are also concerns in relation to drainage and flooding and the considerable impacts that the construction process can have upon neighbours. Neighbours may also have concerns about the impact on the structural stability of properties in the vicinity…."
>
> "34.3.58. For all these reasons, there is a need for a bespoke basement policy…"
>
> …..
>
> "34.3.61. Given the duration of building works for the construction of basements, the tight urban grain and the constrained nature of many of the Borough's roads, the impact of the construction phase of a deep basement can be tantamount to being a 'bad neighbour' use. Basements beneath existing buildings or their gardens, or in small scale developments, will therefore be limited to a single storey which is not of a depth that may be suitable for further horizontal subdivision in the future. Deeper basement extensions may be acceptable on larger sites which are less constrained where impacts can be successfully mitigated. In addition, in order to reflect the particular impact that the construction phase of a basement dig can have, the Council will normally limit the construction of proposals which include a significant element of basement development to weekdays only. "
>
> …..
>
> "34.3.74 Construction traffic can cause nuisance and disturbance for neighbours and others in the vicinity. The applicant must demonstrate that an appropriate approach has been taken to reduce this impact to acceptable levels, taking the cumulative impacts of other development proposals into account…"
>
> "34.3.75 The methods used in construction can have a significant bearing on the quality of life of residents and businesses in the vicinity, in terms of issues such as noise, air quality, dust and vibration. The applicant must demonstrate that an appropriate approach will be taken, taking the cumulative impacts of other development proposals into account.
>
> 34.3.76 The structural implications of the construction of basements below existing buildings …. are of particular importance to local residents….."

101. The text of the draft policy began with the words:

> "**Basements**
>
> Basement development must be of the highest quality. The Council will require Basement development to adhere to the following requirements: .."

102. There followed a list of requirements, which included:

i) restrictions on the extent of basement development, such as no more than 75% of each garden and no more than one storey;

ii) a bar on damage to trees or substantial harm to heritage assets;

iii) restrictions on design and construction;

iv) requirements to demonstrate that the adverse impact of construction traffic and activity on neighbours would be minimised.

103. In the "Strategic Environmental Assessment/Sustainability Appraisal", issued in December 2012 with the consultation paper, the Defendant assessed the draft policy and concluded:

> "2.5 The preferred policy and various options are likely to have a positive relationship with the majority of the SA objectives, in particular with SA Objectives 1,5,6,7,9,10,11 and 16. This is as expected given that the stated purpose of the policy is for "basements and associated development to be of the highest design quality, to protect and take opportunities to improve the character and quality of buildings, townscape and gardens and the way the area functions, individually, cumulatively and in the longer term, to improve water management and to minimise the construction impacts on the neighbourhood." The alternative options are also considered to have a positive relationship with the SA Objectives.
>
> 2.6 The principal negative relationship that is likely to occur relates to that with SA Objective 9a, as policies to control the nature of basements may, in some circumstances, discourage the development on previously developed land. It is the Council's view that other ambitions should outweigh this objective.
>
> 2.7 The Council does recognise that a policy which may reduce the scale of basement extensions permitted may have a negative impact on SA Objective 3 (Fostering Economic Growth). The construction industry is seen as one of the key drivers for growth, and as such proposals which may suppress development could potentially have a slight negative impact.

> 2.8 Similarly, a policy which resists the creation of new residential units below ground could conflict with the objectives of SA Objective 13 (Housing needs)."

104. The BPP, as finally adopted in January 2015, reflected the issues and objectives in the 2012 Consultation Paper and first draft:

i) Paragraphs 34.3.48 – 34.3.49: basement development has increased and it is the subject of concern from residents about noise and disturbance, multiple vehicle movements; structural stability of nearby buildings.

ii) Paragraph 34.3.50: basement development next door can have a serious impact on the quality of life and multiple excavations can be the equivalent of a permanent inappropriate use; the Council considers that careful control is required over the scale, form and extent of basements.

iii) Paragraph 34.3.53: restricting the size of basements and reducing the volume of soil to be excavated will help protect residential living conditions by limiting the extent and duration of construction noise, vibration etc and reduce use of heavy vehicles.

iv) Paragraph 34.3.67: the developer must demonstrate that construction traffic, parking suspensions, noise, dust and vibration of construction will be kept to acceptable levels, having regard to the cumulative impact of other development.

105. The text of the BPP, as eventually adopted over 2 years later, was revised and modified, as one might expect. However, the essence of it remained the same:

i) generally, a cap on the extent of basement development under the garden, leaving the unaffected part in a single area. The cap was initially 75% in 2012 reduced to 50% in the final version;

ii) generally, only one storey will be permitted;

iii) no loss, damage or long term threat to trees of townscape or amenity value;

iv) safeguarding of heritage assets;

v) restrictions (albeit modified) on the introduction of light wells and railings;

vi) take opportunities to improve the character or appearance of the building, garden or wider area with external elements being sensitively designed and discreetly sited;

vii) sustainable drainage schemes;

viii) a minimum of 1 metre of soil above a basement beneath a garden;

ix) ensure that traffic and construction activity do not cause unacceptable harm to road safety, congestion, nor place unreasonable inconvenience on the day to day life of those living and working nearby;

x) ensure that construction impacts such as noise, vibration and dust are kept to acceptable levels;

xi) designed to safeguard structural stability;

xii) reliance on the policy requirements in Policy CE2 (Flooding).

106. The Claimants relied, in particular, upon the removal of the first sentence of the draft policy text - "Basement development must be of the highest quality" – which they submitted signalled a change of policy objective. This sentence was removed following a recommendation from the Inspector who said in his Report:

> "39. The Policy (CL7) restricts basement developments to not exceeding a maximum of 50% of each garden or open part of the site (criterion a.); to not having more than one storey (criterion b.); and not to add further floors where there is an extant or implemented permission or one built through permitted development rights (criterion c.).
>
> 40. None of these restrictions are to achieve basements *"of the highest standard and quality"* as it states in the preamble to CL7. They are, in fact, requirements to mitigate perceived adverse impacts of such development. Therefore, in order to be clear and thus effective I agree with the Council's modification (MM2) to delete the CL7 preamble and to simply state that what follows in the various criteria are the Policy's requirements."

107. This deletion was listed as a "main modification" in the Appendix to the Inspector's Report, exercising his powers under section 20 PCPA 2004, and adopted by the Defendant pursuant to section 23 PCPA 2004.

108. In my judgment, the Inspector's reasoning, in paragraph 40 of his Report, was correct. The draft text was simply inaccurate and so needed to be amended. I do not consider that it signalled a change of policy objective.

109. I accept Mr Straker's submission that it was clear from the draft reasoned justification and policy text in its first publication in December 2012 that it was a primary policy objective to mitigate the harmful impacts of basement construction on residents by limiting it, as well as imposing additional requirements on developers. The SEA/SA referred to a list of objectives and made express reference to limiting basement construction. It was also a policy objective to ensure that basement construction and design was of a high standard and quality. This reflected requirements in the NPPF, the London Plan and the Local Plan, as well as the statutory duty under section 39(2A) PCPA 2004. However, I do not consider that this was the Defendant's sole or indeed primary policy objective. I base this conclusion on my examination of the material in evidence before me.

110. In my view, the Second Claimant implicitly acknowledged the disputed objective, in its consultation response to the second draft of the policy issued in March 2013, which said:

> "A bespoke basement policy must be consistent with the presumption in favour of sustainable development which the draft CL7 and supporting text is not. These are very clearly preoccupied with the perceived need to address a single source of complaint by some neighbours of some residential schemes and to do so through the planning system.
>
> The solution is not to reduce by arbitrary criteria the number of basements Borough-wide or their complexity, but to approve only those which are demonstrably well designed by those who are competent to deliver a structurally sound and well designed basement and to ensure that they are implemented in a considerate way…" (emphasis added)

111. I consider that the Claimants, and other members of the public, had sufficient opportunity, from December 2012 onwards, to make representations on the disputed policy objective, and in fact did so. Therefore I reject the argument that the Defendant's consultation procedure was flawed.

112. The Claimants also submitted that, in pursuing the disputed objective, the Defendant acted in breach of its duty, under section 39 PCPA 2004, to "exercise its functions with the objective of contributing to the achievement of sustainable development".

113. The April 2012 Strategic Environmental Assessment/Sustainability Appraisal Scoping Report Addendum, at paragraph 4.10, set out the Council's sustainability appraisal objectives against which the implications of a new basement development policy would be assessed. These included:

i) 1. To conserve and enhance the natural environment and biodiversity.

ii) 3. To support a diverse and vibrant local economy to foster sustainable economic growth.

iii) 5. To minimise effects on climate change through reduction in emissions, energy efficiency and use of renewables and adopt measures to adapt to climate change.

iv) 6. To reduce the risk of flooding to current and future residents.

v) 9. To reduce pollution of air, water and land.

vi) 9a. To prioritise development on previously developed land

vii) 10. To promote traffic reduction … to reduce energy consumption and emissions from vehicular traffic.

viii) 13. To aim that the housing needs of the Royal Borough's residents are met.

ix) 14. To encourage energy efficiency through building design; maximise the re-use of buildings and the recycling of building materials.

x) 16. To reinforce local distinctiveness, local environmental quality and amenity through the conservation and enhancement of cultural heritage.

114. In the "Strategic Environmental Assessment/Sustainability Appraisal", the draft policy was assessed against these objectives. The Defendant's conclusion was as follows:

> "The Council considers that the negative impact on SA Objectives 3, 9A and 13 are unlikely to be significant and to be outweighed by the considerable benefits to the other SA objectives associated with the successful implementation of the policy."

115. The Defendant conducted further SA/SEA assessments of the amended draft policy in March 2013, July 2013 and February 2014. In the "Basements Publication Planning Policy Sustainability Appraisal/Strategic Environmental Assessment", published in February 2014, the Defendant concluded:

> "4.60 In terms of the SEA/SA the policies [i.e. the "preferred policy" and the "business as usual scenario"] are considered to have a positive effect on the majority of the Council's Sustainability Appraisal Objectives. Any conflicts with the SA objectives are only slight and are outweighed by the considerable benefits associated with the policy."

116. The draft BPP was examined in detail by the Inspector. In his report, at paragraphs 8 to 21, he considered the issues on sustainable development arising from the Defendant's SA/SEA appraisals and from the representations made to him by the Second Claimant, among others. He said, at paragraphs 19 to 21:

> "19. It was said that the economic impact of the Policy's proposals had not been properly considered. The role of SA is to promote sustainable development by assessing the extent to which the emerging plan will help to achieve relevant environmental, economic and social objectives (PPG 1D 11-001). A SA should consider the plan's wider economic and social effects in addition to its potential environmental impacts (PPG 1D 11-007), focussing on those which are likely to be significant (PPG ID 11-009). It does not need to be done in any more detail, or using more resources, than is considered to be appropriate for the content and level of detail in the Local Plan (PPG ID 11-009).
>
> 20. Objective 3 of the SA is "*to support a diverse and vibrant local economy to foster sustainable economic growth*", and this was assessed. The SA noted that the Policy could potentially have a negative impact on this outcome, but that this was likely to be small because extensions under the Policy would add significantly to the value of properties, thereby offsetting any slight negative impact on the economy during the construction stage (paragraph 4.7). It also noted that unsuitable extensions

> could harm the attractive built form of the Borough and so in turn could have a negative impact on the economy (paragraph 4.16). The SA considered that the benefits associated with restricting basement development or influencing how they are built outweighed any negative impact (paragraph 5.2).
>
> 21. The economic assessment was appropriate for this development management policy which affects only one particular type of development, and it focussed on the significant factors. It was proportionate, adequate and relevant (NPPF 158). To have attempted to quantify the economic effects in more detail using monetary amounts (perhaps as a cost/benefit analysis) would not have been appropriate or proportionate, and would have taken more resources than would be justified to assess a policy of this type. It would not necessarily have brought any more clarity to the SA process as its figures would have been open to interpretation and vigorous dispute."

117. The Inspector analysed the evidence relied upon by the Defendant to justify the BPP, at paragraphs 32 to 34, and concluded that it was justified. He addressed a point made by the Second Claimant and others that the policy was unnecessary because the issues could be dealt with by other means. He said, at paragraph 36:

> "Some said that basement development could be dealt with either through existing policies or other legislation, and so the Policy was unnecessary. I do not agree that other existing planning policies adequately deal with the subject for the reasons above. On other legislation, most of the tools available to the Council or to others are reactive or retrospective in their application. For instance, environmental health and highway remedies only apply once a problem has been identified and require evidence and legal action. Their resolution can be time-consuming and costly, as can disagreements and disputes under the Party Wall etc Act 1986.

118. He concluded, at paragraph 37:

> "37. I conclude that there are good and compelling justifications for a positive planned approach for basement developments in the Borough which do not rely upon out-of-date existing planning policies or retrospective legal resolution. Government policy in the NPPF requires the Council to decide upon its approach to sustainable development by providing clear guidance to applicants and developers about what is likely to be permitted. An up-to-date comprehensive policy will enable necessary sustainable basement developments to be constructed in an appropriate manner from the outset."

119. Having reviewed the evidence, I have concluded that the Defendant did comply with its duty, under section 39 PCPA 2004, to "exercise its functions with the objective of

contributing to the achievement of sustainable development". It assessed the evidence fairly against the appropriate factors and reached cogent, reasonable conclusions. Following a consultation procedure, its conclusions were examined by the Inspector and upheld. I do not consider that any error of law has been established.

The assessment of reasonable alternatives

120. I gratefully adopt Hickinbottom J.'s helpful summary of the relevant legal principles in *Friends of the Earth v Welsh Ministers* [2015] EWHC 776, at [88], in particular the following:

> "i. The authority's focus will be on the substantive plan, which will seek to attain particular policy objectives. The EIA Directive ensures that any particular project is subjected to an appropriate environmental assessment. The SEA Directive ensures that potentially environmentally-preferable options that, will, or may attain those policy objectives are not discarded as a result of earlier strategic decisions in respect of plans of which the development forms part. It does so by imposing process obligations upon the authority prior to the adoption of a particular plan.
>
> ii. The focus of the SEA process is therefore upon a particular plan – i.e. the authority's preferred plan – although that may have various options within it. A plan will be "preferred" because, in the judgment of the authority, it best meets the objectives it seeks to attain. In the sorts of plan falling within the scope of the SEA Directive, the objectives will be policy-based and almost certainly multi-stranded, reflecting different policies that are sought to be pursued. Those policies may well not all pull in the same direction. The choice of objectives, and the weight to be given to each, are essentially a matter for the authority subject to (a) a particular factor being afforded enhanced weight by statute or policy, and (b) challenge on conventional public law grounds.
>
> iii. In addition to the preferred plan, "reasonable alternatives" have to be identified, described and evaluated in the SEA Report; because, without this, there cannot be a proper environmental evaluation of the preferred plan.
>
> iv. "Reasonable alternatives" does not include all possible alternatives: the use of the word "reasonable" clearly and necessarily imports an evaluative judgment as to which alternatives should be included. That evaluation is a matter primarily for the decision-making authority, subject to challenge only on conventional public law grounds.
>
> v. Article 5(1) refers to "reasonable alternatives taking into account the objectives … of the plan or programme …".

> "Reasonableness" in this context is informed by the objectives sought to be achieved. An option which does not achieve the objectives, even if it can properly be called an "alternative" to the preferred plan, is not a "reasonable alternative". An option which will, or sensibly may, achieve the objectives is a "reasonable alternative"…
>
> vi. The question of whether an option will achieve the objectives is also essentially a matter for the evaluative judgment of the authority, subject of course to challenge on conventional public law grounds. If the authority rationally determines that a particular option will not meet the objectives, that option is not a reasonable alternative and it does not have to be included in the SEA Report or process."

121. Mr Brown QC submitted that Hickinbottom J. erred when he said, at [88(iv)] that the local planning authority's judgment as to whether or not a proposed alternative was reasonable could only be challenged on conventional public law grounds. He submitted that it was a matter of objective fact upon which the Court is required to exercise an original jurisdiction.

122. Mr Straker QC submitted that the statutory scheme plainly envisages that it is a decision for the local planning authority, not the court. Applying well-established principles of planning law, and having regard to the role of the court in a statutory review, the local planning authority's decision can only be quashed if it erred in law. He referred to the principles set out in *R v Rochdale MBC ex parte Milne* [2001] Env. L.R. 22, per Sullivan J. at [106] – [107].

123. The day after our hearing, the Court of Appeal obligingly supplied me with the definitive answer, which endorsed supporting Hickinbottom J.'s approach. In *Ashdown Forest Economic Development LLP v Wealden District Council & South Downs National Park Authority* [2015] EWCA Civ 681, Richards LJ, giving the judgment of the Court, held:

> "42. I accept Mr Edwards' submission that the identification of reasonable alternatives is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law principles, including *Wednesbury* unreasonableness."

124. I was also referred to *Chalfont St Peter Parish Church v Chiltern District Council & Anor* [2014] EWCA Civ 1393, per Beatson LJ, at [75]:

> "75 … Departmental Policy PPS12, which was in force at the time of the decisions, states of the requirement to evaluate reasonable alternatives, that "there is no point in inventing an alternative if it is not realistic". That and the phrase "obvious non-starters" used by Ouseley J in Heard's case (at [66]) [*Heard v Broadland DC* [2012] EWHC 344 (Admin)] for proposals which do not warrant even an outline reason for being disregarded shows that the threshold is low."

125. In this case, the Defendant was well aware of its obligation to assess reasonable alternatives, and did so. In the December 2012 consultation paper (referred to above), the Defendant set out the alternative options which it had considered, together with its reasons for rejecting them in favour of the preferred policy. The alternative options were:

    i) not to amend the existing policy;

    ii) resist the creation of basements within the curtilage of a listed building;

    iii) resist all basement development within a conservation area;

    iv) resist demolition which is carried out to assist in the implementation of a basement development;

    v) set a limit of, for example 50%, as to the extent of development beneath a garden which will be permitted, in terms of visual impact/opportunity for tree planting in the future.

126. In the December 2012 SA/SEA, the Defendant assessed the alternative options against the sustainability objectives, and compared them with the preferred option.

127. In the March 2013 SA/SEA assessment, the Defendant assessed the "business as usual option" (i.e. retaining existing basement development policies without change) and compared it with the preferred option.

128. The Second Claimant responded to the July/September 2013 consultation, stating that "although we do not consider it necessary for RBKC to have a specific policy ….. we do not object to the existence of an appropriate policy." It set out a critique of the policy, and at paragraph 20, suggested that the Defendant's SA/SEA process was flawed because of the failure to assess reasonable alternatives, such as the alternative proposed in its representations, "namely the use of criteria based on the quality and impact of development rather than the imposition of prescriptive prohibitions…and the option of no cap".

129. In the February 2014 SA/SEA assessment, the Defendant assessed the "business as usual option" (i.e. retaining existing basement development policies without change) and compared it with the preferred option, taking into account revisions which had been made.

130. The Second Claimant also responded to the February/March 2014 consultation. It again stated that there was no need for a specific policy and reiterated its previous criticisms of the SA/SEA assessment for not considering other reasonable alternatives, such as a criteria based approach.

131. The Defendant responded in April 2014 explaining that the Second Claimant's proposal was not a reasonable option. The criteria-based approach, as set out in paragraph 5 of the Second Claimant's representations, was not compliant with Objective CO5 of the Core Strategy and would leave all aspects of the policy open to interpretation, offering no certainty to applicants or to planning officers, contrary to NPPF paragraph 154. The "no policy" approach had been found to be inadequate as

long ago as 1998 when the UDP Policy CD32 on basements was introduced. The "no cap" policy had been appraised and found to be unsatisfactory in 2009 when the Supplementary Planning Document was adopted in 2009. In these circumstances, it was unreasonable to assess a "no-policy"/ "no-cap" option.

132. The Second Claimant made representations to the Inspector, observing that the reasons which the Defendant had given for rejecting its proposal as a reasonable alternative ought to have been included in the final SA, but had been omitted. The Second Claimant also submitted its own proposed policy wording, which provided that the Defendant would grant planning permission for basement development which met various criteria.

133. Following submission to the Secretary of State, the Inspector, in his Preparatory Questions, asked the Defendant if any significant concerns about the sustainability appraisals had been raised by third parties. The Defendant responded giving him details of the representations made by the Second Claimant, together with its response.

134. The Inspector then prepared "Matters Issues and Questions" and invited responses from all respondents. Matters 1: Legal Compliance Q.4 asked:

> "Does the final Sustainability Appraisal … 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 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)."

135. The Defendant responded to the Inspector's question in the following way:

> "As noted the final SA … refers to the consideration of alternatives in the December 2012 SEA/SA … The Council has also set out the options considered in section 6 of the Policy Formulation Report… However, the Council is working on producing an addition to the final SA to include the reasons for the selection of the Plan'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 September 2014."

136. The Defendant produced the Correcting Addition to the SA/SEA as stated above. It included an appraisal of all the alternatives that had previously been considered and rejected by it. It identified two options which had been rejected as unreasonable, one of which was the Second Claimant's proposal:

> "**4. Rejected "unreasonable" options**
>
> 4.1 When formulating policy a Council is required to carry out a SA/SEA to assess "reasonable alternatives" (Environmental Assessment of Plan and Programme Regulations 2004 (Reg 12 (2) (b)) and planning practice guidance (ID 11-018). As such the Council has chosen not carry out SA/SEA for two "unreasonable" options which have been suggested as part of the consultation process. The following paragraphs outline why the Council considers these alternatives not to be "reasonable".
>
> **The Council should introduce a policy which allows each development to be assessed on a case by case approach, on its own merits. No maximum limits for development should be specified**
>
> 4.2 This option was considered "unreasonable" by the Council for the following reasons:
>
> 4.3 The Council's existing policy framework regarding basement applications includes Policy CL2 g of the adopted Core Strategy 2010. In addition the Council has a Subterranean Development SPD (BAS 93) adopted in May 2009 which provides guidance and is a material planning consideration in determining planning applications for basements. As set out in section 9.2.1 of the SPD the Council has applied a maximum limit of 85% on the extent of basements underneath gardens since its adoption in 2009.
>
> 4.4 The Council's evidence has demonstrated that the existing approach has 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. It would be unreasonable for the Council to draw back from this policy framework and take a 'case by case' approach.
>
> 4.5 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.

4.6 A 'case by case' approach as proposed would fail to give clarity on decision-making to everyone concerned including applicants, planning officers, residents and Councillors.

4.7 Such an approach would lead to an inconsistency in decision making which would not be as transparent it should be. There would be long negotiation in every case with potentially conflicting consultant reports submitted to the Council and unsatisfactory outcomes for all. This would potentially lead to a greater number of appeals.

4.8 The case by case approach would fail to comply with the NPPF with regard to local planning policy formulation. In particular –

- Para 15 of the NPPF which states *"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. All plans should be based upon and reflect the presumption in favour of sustainable development, with clear policies that will guide how the presumption should be applied locally."*; and,

- Para 154 of the NPPF which states *"Local Plans should be aspirational but realistic. They should address the spatial implications of economic, social and environmental change. Local Plans should set out the opportunities for development and clear policies on what will or will not be permitted and where. Only policies that provide a clear indication of how a decision maker should react to a development proposal should be included in the plan."*

4.9 The Council responded to this suggestion of a 'case by case' approach in BAS 06/02 (Council's response to para 5.), Council's Response to Basement Force. In this document the Council stated that,

"The criteria stated above would leave all aspects of the policy open to interpretation offering no certainty to applicants or the planning officers. Para 154 of the NPPF refers "Only policies that provide a clear indication of how a decision maker should react to a development proposal should be included in the plan".

> *The criteria above seeks to promote 'acceptable' development in most cases. Objective CO5 of the Core Strategy states "Our strategic objective to renew the legacy is not simply to ensure no diminution in the excellence we have inherited, but to pass to the next generation a Borough that is better than today, of the highest quality and inclusive for all. This will be achieved by taking great care to maintain, conserve and enhance the glorious built heritage we have inherited and to ensure that where new development takes place it enhances the Borough." Clearly as proposed the policy is neither compliant with the NPPF nor the relevant Core Strategy objective."*
>
> 4.10 Clearly for all the above reasons the 'case by case' option with no limits would be wholly unreasonable not least because it would be taking a significant step back from the existing local policy framework. It would have the opposite to the desired aims of formulating the policy i.e. mitigating the harmful impacts of basements.
>
> **That the Council should resist any basement which does not lie entirely beneath the footprint of the property.**
>
> 4.11 The evidence presented by the Council shows that a carefully designed basement, following considered parameters, will not necessarily cause harm. As such a policy restricting basements to the footprint of properties would run counter to the intention of the NPPF and as such would be inappropriate."

137. The Second Claimant responded to this consultation, saying that the Defendant's reasons for rejecting its proposal as unreasonable were not valid, and were merely an ex post facto justification. The proposal had not been genuinely considered. It said:

> "83. Paragraph 4.5 of the Council's reasons for rejecting "unreasonable" options states "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." That may be so but:-
>
> > a. The phrase "bear down on" is not clear but is taken to mean reduce the volume of excavation but the Council's own actions have led to a sharp rise in applications (those who fear that next year they will not be able to get permission are seeking to obtain consent now),

> b. That the volume of excavation is the cause of impact on amenity is not proven and is contested by Basement Force and others. What makes the difference is a well ordered site and good management of traffic. If the size of the project is the issue, this is often determined by the scale and complexity of the above ground development rather than the basement element.
>
> c. The policy blights all parts of the Borough and all types of basement construction (including commercial sites) with the same restrictive requirements.
>
> d. There is no support in the NPPF or elsewhere in national policy or in the London Plan for the stated "prime objective" of the policy, around which and in pursuit of which all assessments (as to its ability to contribute to sustainable development for example) are subservient.
>
> 84. Reading the Council's reasoning as a whole, it is clear that instead of driving up standards in the delivery of sustainable development they are seeking a swift and efficient way of turning away development proposals. This is the antithesis of sustainable development.
>
> 85. The fact that the approach of Basement Force and others was not considered in the SA/SEA process is a fundamental flaw in the Council's approach in this matter, and undermines the legal basis for its proposed policy…"
>
> Conclusions
>
> 86. For all these reasons,
>
> a. The approach to drafting a Core Strategy policy governing basement development which is proposed by Basement Force and others is plainly a "reasonable alternative" and should have been assessed in the SA/SEA process…."

138. The Inspector, in his Report, gave his reasons for agreeing with the Defendant's assessment of the Second Claimant's option as unreasonable. He concluded that the correction to the SA was legitimate and the SA had been properly and correctly carried out. He said:

> "Sustainability Appraisal
>
> 10. The final Sustainability Appraisal (SA) at BAS21 says: "*Alternative policy options were specifically considered in the*

December 2012 SA/SEA. As these were dismissed at the 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 Policy'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, but the final SA should set them out with reasons. It should also state whether all these reasons are still valid at submission.

11. Prior to the hearings the Council published a 'Correcting Addition' to the SA (BAS 21/01) which set out the alternatives considered in the previous SAs and confirmed that the reasons for not choosing them were still valid. This was further revised during the hearings (Revision A) to more clearly set out the Council's reasons for not carrying out SA on two options which were not considered to be "reasonable alternatives".[3] One of these options was a policy where each development is assessed on a case by case approach, on its own merits with no maximum limits. Some representors said that this option was, in fact, a reasonable alternative and that the Council's explanation of why it was not had been stated too late in the local plan preparation process.

12. The Council said that this was not a reasonable alternative because: existing policies already include defined limits to such development and the evidence was that these were not preventing unacceptable impacts; it would fail to give clarity as to what was permissible; it would give rise to inconsistencies; it would not be transparent as to how decisions had been reached; and it would fail to deal with the objectives of the policy, particularly in dealing with adverse construction impacts.

13. The NPPF requires Local Plans to set out *"clear policies on what will or will not be permitted and where. Only policies that provide a clear indication of how a decision maker should react to a development proposal should be included in the plan"* (paragraph 154). I agree with the Council that a policy based on a case by case on its own merits, with no maximum limits, would not give a clear indication of what would be permitted or how a decision maker should react to a proposal.

14. Alternatives must be realistic and deliverable (PPG ID 11-018). As I say later, I agree with the Council about the unacceptable impacts of basement development under present policy criteria. I also agree that it would be unrealistic to expect a more relaxed policy to reduce those impacts, and that such a policy would not deliver the SA objectives sought by the Council in preparing a revised policy.

> 15. I therefore conclude that this type of criteria policy is not a reasonable alternative, and so the Council was not obliged under Article 5 of Directive 2001/42/EC and Regulation 12(2)(b) of the Environmental Assessment Regulations to subject it to a sustainability appraisal in its environmental report. To my mind this conclusion is clear and is considerably above the low threshold required before an alternative can be disregarded[4].
>
> 16. The other option in this category was of only permitting basements which lie entirely beneath the footprint of a property, and I agree with the Council that this also is not a reasonable alternative for the reasons it gave.
>
> 17. Both of these options were only clearly explained by the Council at a relatively late stage in the Policy's preparation, just prior to the submission of the Policy for examination. SA is an iterative process – it is not a single document – which has to take place before a plan's adoption. Deficiencies, as here, can be identified during that process, even as late as the examination stage, and corrected using the proper procedures. I mentioned at the hearings the Cogent court case[5] concerning a SA correction, initiated by one of my colleagues during an examination, which upheld this principle.
>
> 18. One of the tests in the Cogent court case was whether a correction to a SA was an exercise to justify a pre-determined strategy. I do not believe that to be the situation here. As I have said, I accept that both options are not reasonable alternatives, and so they should not be included in the SA and thus they do not affect the Policy's SA outcome. The Council were late in saying this, but it has now been stated. This is not a "bolt-on" to justify an already chosen preference. The SA has been corrected; it has been the subject of appropriate public consultation; and I have considered the responses – none of which have caused me to alter my views. Overall, I conclude that SA, with the Correcting Addition, has been properly and correctly carried out."
>
> [3] "Environmental Assessment of Plan and Programme Regulations 2004, Reg 12(2)(b) and PPG ID 11-018.
>
> [4] Chalfont St Peter Parish Council and Chiltern District Council and Holy Cross Sisters Trustees Inc [2014] EWCA Civ 1393.
>
> [5] Cogent Land LLP v Rochford District Council & Anr [2012] EWHC 2542 (Admin)."

139. In the final sentence of paragraph 15, the Inspector mis-stated Beatson L.J.'s words in the *Chalfont St Peter* case, but I consider that this was merely an unfortunate slip in his drafting. I do not think it remotely likely that this experienced Inspector misunderstood what Beatson LJ meant. Reading the text in paragraphs 14 and 15 as a

whole, I am satisfied that he did not misdirect himself in law. Nor do I consider that his report would have misled the Defendant when it took its decision.

140. Applying the *South Bucks* test, I consider that the Inspector's reasons were intelligible and adequate, enabling the Claimants and others to understand what conclusion had been reached on the main issues.

141. The Second Claimant has presented arguments why the Inspector and the Defendant ought not to have concluded that its option was not a reasonable alternative means of achieving the policy objectives, but these are merits-based challenges to the evaluative judgment which has been entrusted to the Defendant. They reflect the Second Claimant's profound disagreement with the Defendant's policy. Contrary to Mr Brown's submission, the court only has a supervisory role, applying conventional public law principles. In my judgment, the Defendant's decision, supported by the Inspector, was a reasonable one, reached after taking into account the relevant considerations. It was adequately explained and justified. Mr Brown made a number of criticisms of the approach and reasoning of both the Inspector and the Defendant, but in my view these do not come anywhere near establishing any misdirection or error of law on the part of the Inspector or the Defendant. In my judgment, the Defendant complied with its statutory obligations in its preparation of the SA and the SEA.

Conclusions

142. For the reasons set out above, the application is dismissed.

Appendix 1

"Policy CL7

Basements

The Council will require all basement development to:

a) not exceed a maximum of 50% of each garden or open part of the site. The unaffected garden must be in a single area and where relevant should form a continuous area with other neighbouring gardens. Exceptions may be made on large sites;

b) not comprise more than one storey. Exceptions may be made on large sites;

c) not add further basement floors where there is an extant or implemented planning permission for a basement or one built through the exercise of permitted development rights;

d) not cause loss, damage or long term threat to trees of townscape or amenity value;

e) comply with the tests in national policy as they relate to the assessment of harm to the significance of heritage assets;

f) not involve excavation underneath a listed building (including vaults);

g) not introduce light wells and railing to the front or side of the property where they would seriously harm the character and appearance of the locality, particularly where they are not an established and positive feature of the local streetscape;

h) maintain and take opportunities to improve the character or appearance of the building, garden or wider are, with external elements such as light wells, roof lights, plant and means of escape being sensitively designed and discreetly sited; in the case of light wells and roof lights, also limit the impact of light pollution;

i) include a sustainable drainage system (SuDS), to be retained thereafter;

j) include a minimum of one metre of soil above any part of the basement beneath a garden;

k) ensure that traffic and construction activity do not cause unacceptable harm to pedestrian, cycle, vehicular and road safety; adversely affect bus or other transport operations (e.g. cycle hire), significantly increase traffic congestion, nor place unreasonable inconvenience on the day to day life of those living, working and visiting nearby;

l) ensure that construction impacts such as noise, vibration and dust are kept to acceptable levels for the duration of the works;

m) be designed to safeguard the structural stability of the existing building, nearby buildings and other infrastructure including London Underground tunnels and the highway;

n) be protected from sewer flooding through the installation of a suitable pumped device.

A specific policy requirement for basements is also contained in Policy CE2, Flooding."