

Cabinet – 23 January 2019

Former Willenhall Gas Works (Stonegate & Trent Park Estates)

Portfolio: Councillor Harrison – Clean and Green

Related portfolios: N/A

Service: Planning, Engineering and Transportation

Wards: Short Heath

Key decision: No

Forward plan: No

1. Summary

- 1.1. Under Part II(A) of the Environmental Protection Act 1990 (as amended), the Council has certain duties over the identification and remediation of statutory Contaminated Land.
- 1.2. The Council published its Contaminated Land Strategy in 2001. Following a Part II(A) site prioritisation exercise within the borough in 2006 the Council identified parts of the former Willenhall Gasworks site as a sensitive site which required detailed investigation to establish potential risk to human health. The identified areas were redeveloped for residential housing during the mid-1970s.
- 1.3. A series of intrusive ground investigation works took place between 2008 and 2010. The outcome of the investigation suggested that there were exceedances of the contaminant benzo(a)pyrene (BaP) (an organic substance associated with coal and gasworks) from which it was considered there would be a 'significant possibility of significant harm' to residents. Based on the ground investigation and technical reports prepared by external consultants in 2011 this led to the Council determining the land as contaminated as defined by Section 78 A(2) of the Environmental Protection Act 1990 (as amended) in March 2012.
- 1.4. A Remediation Notice was served on the developer in March 2015 as it was believed, at that time, that the developer was liable to remediate that part of the land it developed during the 1970s (see plan contained in Appendix B). This Notice was subsequently appealed by the developer and resulted in a Public Inquiry in December 2015.
- 1.5. The Secretary of State for the Environment, Food and Rural Affairs ('the Secretary of State') in April 2017 issued a decision together with the Inspector's report; this decision quashed the Remediation Notice served on the developer by the Council.

- 1.6. Following the outcome of the Secretary of State's decision the Council appointed a new external specialist environmental consultancy to provide further advice and undertake additional ground investigation. This commission sought to determine the status of the land under Part IIA of the Environmental Protection Act 1990 (as amended). Further investigation and assessment has been undertaken to provide the Council with greater understanding on the level of contaminants in the soil so that it could determine the risks arising from the contaminant linkage and, if established, proceed with remediation of the site and seek to recover costs. The Secretary of State determined that the developer would be responsible for 84% of the costs of remediating the site if it was contaminated. However, the investigation and analysis has concluded that the risk was found not to represent a 'significant possibility of significant harm' and therefore not constitute an unacceptable risk under the Environmental Protection Act 1990.
- 1.7. This report provides Cabinet with an update on progress and seeks approval to revoke the Identification of Contaminated Land at the former Willenhall Town Gas Works previously identified in 2012 as contaminated land in accordance with the Environmental Protection Act.

2. Recommendations

- 2.1 That Cabinet authorise the revocation of the Identification of Contaminated Land at the former Willenhall Town Gas Works as shown on the plan in Appendix A for the reasons contained in Schedule 2 of the draft Record of Revocation of Determination (Appendix C).
- 2.2 That Cabinet, in noting the content of this report and its appendices, delegate authority to the Executive Director of Economy and Environment, in consultation with the Portfolio Holder for Clean and Green, to take all necessary steps including to finalise and issue the notice of Revocation of Identification of Contaminated Land for the land shown in Appendix A in accordance with the Environmental Protection Act.

3. Report detail

Background

- 3.1 The Site forms part of land formerly occupied by the former Willenhall Town Gas Works.
- 3.2 The Council published the first edition of its Contaminated Land Strategy for implementing Part II(A) of the Environmental Protection Act in 2001.
- 3.3 Based on the content on the 2001 Strategy and concerns received from local residents, the Council instructed environmental specialists to carry out detailed intrusive ground investigation and technical reporting from early 2007 to 2012. A report completed in 2011 for the Council concluded that parts of the land on the Former Willenhall Gas Works site was contaminated land as defined under Part IIA of the Environmental Protection Act 1990 (as amended).
- 3.4 As a consequence of the technical reports prepared by external consultants and available knowledge at that time, the Council determined the land shown in

Appendix A as contaminated as defined by Section 78 A(2) of the Environmental Protection Act 1990, and having regard to statutory guidance issued by the Secretary of State in 2006.

- 3.5 Following Determination, the Council sought to establish what had taken place on the land and who might be responsible for the presence of contaminants found. Work was also undertaken to establish current land ownership of and interests in land across the site along with ownership and interests back to the time of development to the time that the site had been previously operating as a gas works. In addition, the Council sought to ascertain where liability for remediation may lie while having regard to the industrial history of the land and its uses over time. Part of this work examined what had been done and under whose authority.
- 3.6 This detailed review was followed by a Remediation Notice being served on the original developer (who developed part of the site) in relation to land as shown on the plan in Appendix B. The Remediation Notice related to 69 residential properties at Kemble Close, Brookthorpe Drive and Oakridge Drive collectively comprising the Stonegate Estate and Kemble Close. The Notice also included land adjoining 1 and 2 Kemble Close. In total 71 properties were included in the Remediation Notice.
- 3.7 The Remediation Notice was subsequently appealed by the original developer which resulted in a Public Inquiry in December 2015. In April 2017 the Secretary of State for Environment issued a decision together with the Inspector's Report. The 2017 decision quashed the Remediation Notice served on the developer by the Council; the Secretary of State concluded that there were weaknesses in the expert advice provided to the Council and that there was no scientific or technical assessment of the risks arising from the contaminant linkage. The Inspector's Report can be read on the Pollution Control Public Register on the Council's website (https://go.walsall.gov.uk/pollution_control_public_registers) with the Secretary of State's letter and findings contained in Appendix D.

What has the Council been doing since the Secretary of State's decision?

- 3.8 Throughout this legally and technically complex matter, the Council has sought to support and keep residents informed where possible.
- 3.9 In noting the Secretary of State's decision the Council committed further resource to understand the degree of risk posed by the contamination and the potential for harm to public health. The Council secured the services of an external specialist environmental consultancy to provide further advice and undertake additional ground investigation to determine the degree and severity of risks posed to human health by contaminants in the soil. This involved reviewing previous information/assessments, undertaking additional ground investigation, carrying out scientific analysis of the results as well as assessing the risks to human health in the context of the Environmental Protection Act 1990 (as amended). If the assessment found significant potential of significant harm (SPOSH) the Council could then progress with remediation of the site and seek to recover the costs (84%) of such works from the developer. If the assessment found the contaminants did not pose an unacceptable risk to human health, the Council could progress with revoking the 2012 Determination.

- 3.10 During February – March and May 2018 extensive ground investigation was undertaken; this investigation included sampling from hand-dug pits in the rear gardens of 89 properties and the installation of groundwater and ground vapour monitoring wells in the public open space areas. Samples were tested for substances associated with the heating of coal on former gasworks which were then analysed and followed by detailed risk assessment. This assessment and analysis has been reported in Factual and Interpretative Reports which were received by the Council on 8 January 2019..
- 3.11 A Non-Technical Summary of the factual and interpretive reports is contained in Appendix E.

What has the new information concluded?

- 3.12 Based on the in-depth analysis of an extensive number of soil samples and detailed risk assessment, coupled with the Secretary of State's findings, this has enabled the Council to conclude that the land cannot be defined as 'contaminated' under Part IIA of the Environmental Protection Act 1990 (as amended).
- 3.13 Based on technical reports submitted to the Council on 8 January 2019 and for the reasons contained in Schedule 2 of the draft Record of Revocation of Determination (Appendix C), it is recommended that Cabinet authorise revocation of the Identification of Contaminated Land at the former Willenhall Town Gas Works as shown on plan in Appendix A.
- 3.14 It is also recommended that Cabinet delegate authority to the Director of Economy and Environment, in consultation with the Portfolio Holder for Clean and Green, to take all necessary steps to finalise and issue the notice of Revocation of Identification of Contaminated Land and issue the de-registration notice for the land shown in Appendix A in accordance with the Environmental Protection Act and associated Statutory Guidance.

What is the status of the land?

- 3.15 The assessment and analysis has concluded that although the land contains contaminants from its previous industrial use, these contaminants are not considered to represent an unacceptable risk under Part IIA of the Environmental Protection Act 1990 and, therefore, the land cannot be defined as contaminated land in accordance with the Environmental Protection Act 1990 (as amended).

What support can the Council provide to affected residents?

- 3.16 The Council will continue to support affected residents and property owners where possible.
- 3.17 Members will be aware that the Council previously issued precautionary guidance to residents in 2012. Working in collaboration with Public Health England, the Council will consider the conclusions of the analysis and assessment on previously issued advice and update it. Once complete this will be issued to residents.

What happens next?

- 3.18 The Council has arranged a Residents' Meeting following this Cabinet meeting to explain the latest information in detail while providing opportunity for questions and further explanation.
- 3.19 If Cabinet approves the recommendations contained within this report, the Council will undertake the necessary steps to revoke the Identification of Contaminated Land at the former Willenhall Town Gas Works (Appendix A).
- 3.20 Cabinet will be provided with a further update at their March 2019 meeting.

4. Council Corporate Plan priorities

In revoking the Identification of Contaminated Land it, following the extensive investigation and assessment, allows the community to have clarity and live and enjoy their life in a safe environment.

5. Risk management

Specialist external advice has been secured to support the Council which has concluded that there is a need to revoke the Notice of Identification of Contaminated Land to ensure all information and actions are reasonable.

6. Financial implications

No significant financial implications arising from the recommendations contained in this report.

7. Legal implications

The Council has engaged specialist legal Counsel to advise in relation to the site and act for the Council in the Public Inquiry. The Council's Legal Services Team and external specialists continue to be engaged and provide advice.

8. Property implications

None identified for the Council

9. Health and wellbeing implications

Precautionary advice and guidance has previously been issued to residents and contractors/utility companies who work in the area; this advice related to minimising exposure to soils or contaminants within the soils that have been the subject of former industrial works.

Working in collaboration with Public Health England, the Council will consider the conclusions of the analysis and assessment on previously issued advice and update it. Once complete this will be issued to residents.

10. Staffing implications

None identified

11. Reducing inequalities

No protected characteristic or groups have been identified as a result of revoking the Notice of Identification of Contaminated Land.

12. Consultation

All matters have followed a formal statutory process and the residents, developer and ward councillors have been kept informed throughout the process.

Consultation has taken place with communication, legal, finance and pollution control teams in preparing this report and its recommendations.

Background papers

1. LQM Interpretive and Factual Reports – January 2019
2. Remediation Notice – March 2015

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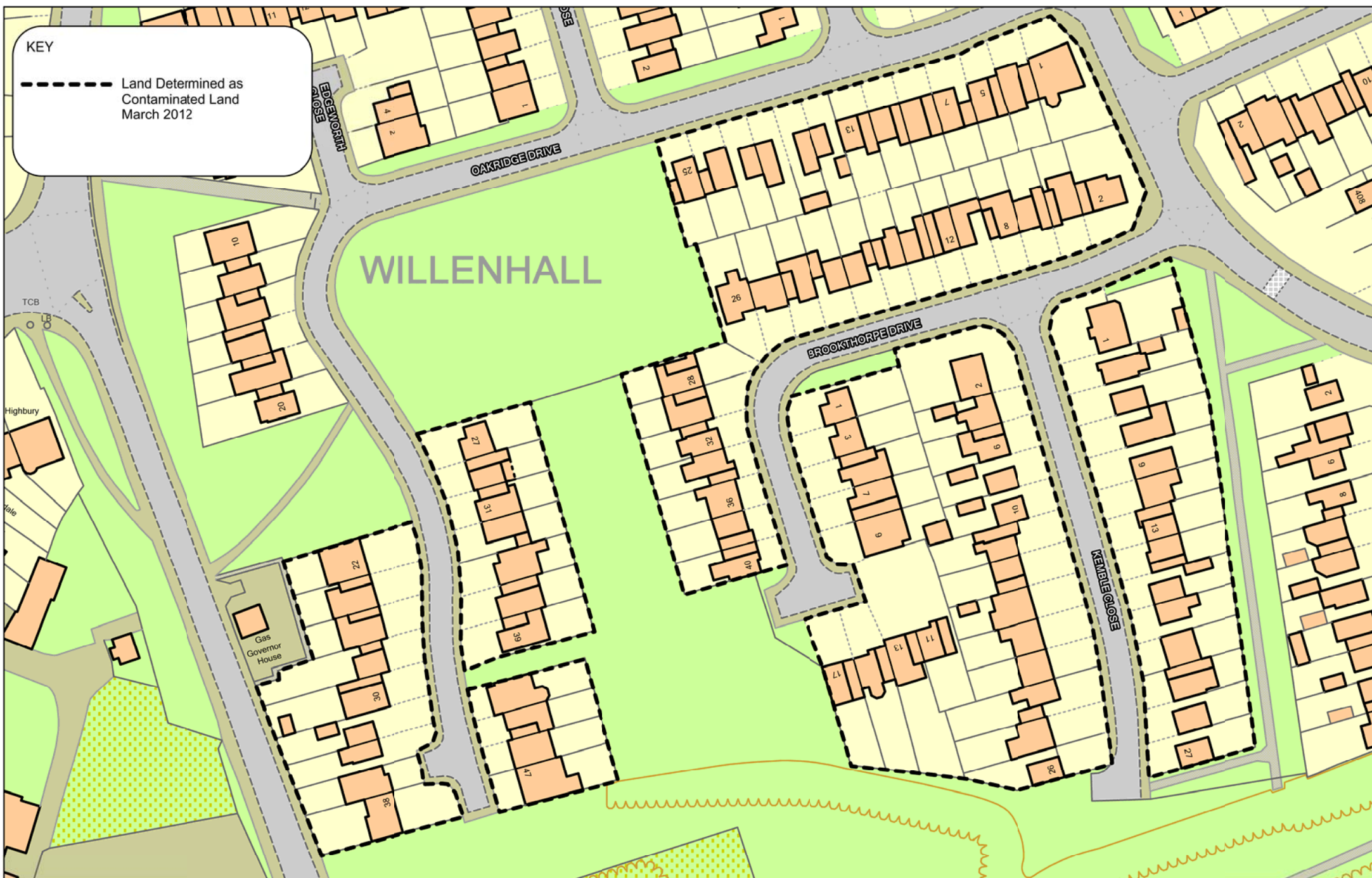
14 January 2019



Councillor Harrison
Portfolio Holder

14 January 2019

Appendix A – Land Determined as Contaminated Land March 2012



Appendix B – Land Specified in March 2015 Remediation Notice



Appendix C – Record of Revocation of Determination (Draft)

Environmental Protection Act 1990
and Statutory Guidance
Issued by the Secretary of State (Defra 2012)

NOTICE OF REVOCATION OF IDENTIFICATION OF CONTAMINATED LAND

Insert names and addresses.

- 1) TAKE NOTICE THAT pursuant to Part IIA of the Environmental Protection Act 1990 (as amended) and paragraphs 5.20, 5.21 and 5.22 of the Contaminated Land Statutory Guidance issued by the Secretary of State (Defra 2012) Walsall Metropolitan Borough Council ("The Enforcing Authority") hereby **REVOKES** the Notice of Identification of Contaminated Land dated 28 March 2012, which identified the land and properties known as:
 Kemble Close numbers 1-27 (all) WV12 4DQ
 Brookthorpe Drive number 1-40(all) WV12 4TX
 Oakridge Drive number 1-25 (odds) WV12 4EN
 Oakridge Drive numbers 27-47 (odds) WV12 4DJ
 Oakridge Drive numbers 22-38 (evens) WV12 4DL
and more particularly described in Schedule 1 attached to this Revocation Notice and shown on the plan attached in Schedule 2 ("the Land") as contaminated land in accordance with Section 78 A(2) of the Environmental Protection Act 1990 ("the 1990 Act").
- 2) Notice of Revocation is hereby given to you pursuant to paragraph 5.22 of the Statutory Guidance (Defra 2012) in your capacity as [the owner of land within the land that forms the subject of the revocation]; [a person who appears to the authority to be in occupation of the whole or any part of the land]; [a person who was previously identified by the Council to be an appropriate person]; [the Environment Agency]
- 3) A copy of the Record of Revocation, which sets out the basis upon which the revocation is made, is set out in Appendix 1 to this Revocation Notice.
- 4) Should you or your legal advisers wish to contact the Council in relation to this Revocation Notice, request further information or make any other enquiry relating to this Revocation Notice, please contact: Pollution Control, Second Floor, Civic

Centre, Darwall Street, Walsall, WS1 1DG, telephone 01922 658040, email:
pollutioncontrol@walsall.gov.uk

Insert names and addresses.

Dated:

Signed:

Steve Pretty
Head of Planning Engineering and Transportation
Walsall Metropolitan Borough Council
Civic Centre
Darwall Street
Walsall
WS1 1DG

Schedule 1

In accordance with Part IIA of the Environmental Protection Act 1990 (as amended) and paragraphs 5.20 to 5.22 of the Contaminated Land Statutory Guidance (April 2012), Walsall Metropolitan Borough Council has **revoked** the determination that land enclosed within domestic curtilages at:

Kemble Close	No's 1-27 (all)	WV12 4DQ
Brookthorpe Drive	No's 1-40 (all)	WV12 4TX
Oakridge Drive	No's 1-25 (odds)	WV12 4EN
Oakridge Drive	No's 27-47 (odds)	WV12 4DJ
Oakridge Drive	No's 22-38 (evens)	WV12 4DL

is contaminated land.

Schedule 2

Location Plan of Land at Kemble Close, Brookthorpe Drive and Oakridge Drive, Willenhall.

The area of land that forms the subject of the revocation of determination as contaminated land is shown within the dashed boundary lines. National Grid Reference: 397494 299488 (centre of site).



The land that forms the subject of the revocation of determination as contaminated land is that land enclosed within domestic curtilages at Kemble Close, Brookthorpe Drive and Oakridge Drive, Willenhall.

Appendix 1

Environmental Protection Act 1990

and the Contaminated Land Statutory Guidance issued by the Secretary of State (Defra 2012)

RECORD OF REVOCATION OF DETERMINATION THAT LAND SITUATED AT KEMBLE CLOSE, BROOKTHORPE DRIVE AND OAKRIDGE DRIVE, WILLENHALL IS CONTAMINATED LAND

In accordance with Part IIA of the Environmental Protection Act 1990 (as amended) Walsall Metropolitan Borough Council has **REVOKED** the determination that land enclosed within domestic curtilages at

Kemble Close	No's 1-27 (all)	WV12 4DQ
Brookthorpe Drive	No's 1-40 (all)	WV12 4TX
Oakridge Drive	No's 1-25 (odds)	WV12 4EN
Oakridge Drive	No's 27-47 (odds)	WV12 4DJ
Oakridge Drive	No's 22-38 (evens)	WV12 4DL

Willenhall, as detailed above and indicated in the plan and description attached at Schedule 1 to this Record.

National Grid Reference: 397494 299488 (centre of site)

is Contaminated Land, as defined by section 78A(2) of the Environmental Protection Act 1990 (as amended) because, pursuant to paragraph 5.20 of the Statutory Guidance:

Following on from an appeal against a remediation notice that was upheld by the Secretary of State for the Environment, Food and Rural Affairs in 2017 and further site investigation works by specialist consultants LQM during 2018, the Council has become aware of further information which it considers significantly alters the basis for its original decision.

A summary of the basis upon which this **revocation** has been made is set out in Schedule 2 to this Record.

Dated:

Signed:

Steve Pretty
Head of Planning Engineering and Transportation
Walsall Metropolitan Borough Council
Civic Centre
Darwall Street
Walsall
WS1 1DG

Schedule 1 to Record of Revocation of Determination

Location Plan of Land at Kemble Close, Brookthorpe Drive and Oakridge Drive, Willenhall.

The area of land that forms the subject of the revocation of determination as contaminated land is shown within the dashed boundary lines. National Grid Reference: 397494 299488 (centre of site).



The land that forms the subject of the revocation of determination as contaminated land is that land enclosed within domestic curtilages at Kemble Close, Brookthorpe Drive and Oakridge Drive, Willenhall.

Schedule 2 to Record of Revocation of Determination

1. SUMMARY OF EVIDENCE UPON WHICH THE **REVOCATION IS BASED**

1.1 Following on from an appeal against a remediation notice that was upheld by the Secretary of State for the Environment, Food and Rural affairs in 2017 and further site investigation works during 2018 the Council has decided to **revoke** the determination of contaminated land that it made in 2012 for land at the Trent Park and Stonegate Housing Estates under Part IIA of the Environmental Protection Act 1990 (as amended). Further details are available on the Council's Contaminated Land Public Register at:

<http://www.walsall.gov.uk//PubicRegister/pollutioncontrollist.asp?sfolder=/Contaminated%20Land%20Public%20Register>

2. BACKGROUND

2.1 This record of **REVOCATION** has been prepared under the provisions of Part IIA of the Environmental Protection Act 1990 and paragraphs 5.20, 5.21 and 5.22 in the Contaminated Land Statutory Guidance issued by the Secretary of State (Defra 2012).

2.2 The statutory guidance, in paragraphs 5.2, 5.3 and 5.4, includes guidance to Local Authorities on deciding that land is not contaminated land that is relevant in this case and so is reproduced below:

5.2 In implementing the Part 2A regime, the local authority is likely to inspect land that it then considers is not contaminated land. For example, this will be the case where the authority has ceased its inspection and assessment of land on grounds that there is little or no evidence to suggest that it is contaminated land. In such cases, the authority should issue a written statement to that effect (rather than coming to no formal conclusion) to minimise unwarranted blight. The statement should make clear that on the basis of its assessment, the authority has concluded that the land does not meet the definition of contaminated land under Part 2A. The authority may choose to qualify its statement (e.g. given that its Part 2A risk assessment may only be relevant to the current use of the land).

5.3 Paragraph 5.2 recognises that the nature of soil contamination means it is never possible to know the exact contamination status of any land with absolute certainty, and that scientific understanding of risks may evolve over time. However, such a lack of certainty should not stop the authority from deciding that land is not contaminated land. The starting assumption of Part 2A is that land is not contaminated land unless there is reason to consider otherwise.

- 5.4 The local authority should keep a record of its reasons for deciding that land is not contaminated land. The authority should inform the owners of the land of its conclusion and give them a copy of the written statement referred to in paragraph 5.2. The authority should also consider informing other interested parties (for example occupiers of the land and owners and occupiers of neighbouring land) and whether to publish the statement. The statement should be issued within a timescale that the authority considers to be reasonable, having regard to the need to minimise unwarranted burdens to persons likely to be directly affected, in particular the landowner, and occupiers or users of the land where relevant.

2.3 Paragraphs 5.20, 5.21 and 5.22 state that:

- 5.20 The local authority should reconsider any determination that land is contaminated land if it becomes aware of further information which it considers significantly alters the basis for its original decision. In such cases the authority should decide whether to retain, vary or revoke the determination.
- 5.21 The local authority should reconsider any determination of contaminated land if remediation action has been taken which, in the view of the authority, stops the land being contaminated land. In such cases the authority should issue a statement to this effect, having regard to paragraphs 5.2 to 5.4 above.
- 5.22 If the local authority varies or revokes a determination, or issues a statement in accordance with paragraph 5.21, it should record its reasons for doing so alongside the initial record of determination in a way that ensures the changed status of the land is made clear. If the reconsideration results in relevant documentation, such as a revised determination notice or a statement in accordance with paragraph 5.21, copies of this documentation should also be recorded. The authority should ensure that interested parties are informed of the decisions and the reasons for it, including the owner of the land; any person who appears to the authority to be in occupation of the whole or any part of the land; any person who was previously identified by the authority to be an appropriate person; and the Environment Agency.

2.4 Section 78A(7) of the Environmental Protection Act 1990 defines “remediation” as:

“(a) the doing of anything for the purpose of assessing the condition of – (i) the contaminated land in question; or (ii) any controlled waters affected by that land; or (iii) any land adjoining or adjacent to that land;

(b) the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land for the purpose – (i) of preventing or minimising, or remedying or mitigating the effects of, any significant harm (or significant pollution of controlled waters), by reason of which the contaminated land is such land; or (ii) of restoring the land or waters to their former state; or

(c) the making of subsequent inspections from time to time for the purpose of keeping under review the condition of the land or waters.””

3. DETERMINATION OF CONTAMINATED LAND

3.1 On 27th March 2012 Walsall Metropolitan Borough Council issued a Record of Determination of Contaminated Land under Part 2A of the Environmental Protection Act 1990 in respect of the land enclosed within domestic curtilages at:

- a. Kemble Close numbers 1-27 (all) WV12 4DQ
- b. Brookthorpe Drive numbers 1-40 (all) WV12 4TX
- c. Oakridge Drive numbers 1-25 (odds) WV12 4EN
- d. Oakridge Drive numbers 27-47 (odds) WV12 4DJ
- e. Oakridge Drive numbers 22-38 (evens) WV12 4DL

3.2 The above land was referred to as Zones 4, 5 and 7 by the Council (and during the subsequent appeal) however the notices refer to the individual properties.

4. REMEDIATION NOTICE

4.1 On the 17th March 2015, Walsall Metropolitan Borough Council served a Remediation Notice on Jim 2 Ltd requiring remediation of the majority of the determined land (Zones 4 and 7, but not 5) including that within the domestic curtilages at:

- a. Kemble Close numbers 1-27 (all) WV12 4DQ
- b. Land adjacent to 1 Kemble Close
- c. Land adjacent to 2 Kemble Close
- d. Brookthorpe Drive numbers 1-20 (all) WV12 4TX
- e. Brookthorpe Drive numbers 22-40 (evens) WV12 4TX
- f. Oakridge Drive numbers 1-25 (odds) WV12 4EN

5. UPHELD APPEAL AGAINST REMEDIATION NOTICE

5.1 Following an appeal by Jim 2 Ltd against the Remediation Notice it was served with, the planning inspectorate and the Secretary of State (SoS) concluded (in a letter dated 5 April 2017) that the original determination of the land to which the remediation notice applied had been unreasonable.

5.2 The SoS found that the council had “*unreasonably identified the land*” as contaminated land. Specifically, the decision concluded as follows: “[t]he Secretary of State therefore finds that Walsall did not undertake a risk assessment based on sound science, which would allow it to conclude that the entirety of zones 4 and 7 represented a SPOSH, and that Walsall unreasonably identified the land to which the notice relates as contaminated land.” (para 6.4.108 page 151)

6. RECENT (2018) SITE INVESTIGATION WORKS

6.1 In 2018, specialist contaminated land consultants instructed by the Council (LQM) conducted site investigation works on land associated with the former Willenhall Gas Works within the Stonegate and Trent Park estates, including areas issued with a Record of

Determination and associated public open space. This work is described in two reports: a factual report containing the findings of the site investigation carried out between February and September 2018 (LQM 2019a) and an interpretive report containing the risk assessment under Part 2A of the Environmental Protection Act 1990 (LQM 2019b).

7. BASIS FOR ORIGINAL DECISION SIGNIFICANTLY ALTERED BY FURTHER INFORMATION

7.1 In accordance with paragraph 5.20 of the Statutory Guidance, the Council has become aware of further information which it considers significantly alters the basis for its original decision. This information comprises:

- a. The Secretary of State's (SoS) decision that the determination of Zones 4 and 7 was unreasonable. The SoS decision alters the basis for the determination of Zones 4 and 7.
- b. The LQM work concluded the areas within the Stonegate and Trent Park estates were not contaminated land under Part 2A Environmental Protection Act 1990 (as amended) and the Statutory Guidance issued in 2012. The work by LQM alters the basis for the determination of Zones 4, 5 and 7 referred to by the SoS.

7.2 On the basis of the SoS conclusions and the subsequent investigations and assessment by LQM, the Council has decided to revoke the determination in respect of properties within zones 4 and 7.

7.3 With respect to Zone 5, the Council did not serve a remediation notice but undertook further soil sampling. Risk assessments based on this further soil sampling (LQM 2019a,b) concluded that the properties within Zone 5 were not contaminated land under Part 2A Environmental Protection Act 1990 (as amended) and Statutory Guidance issued in 2012. The Council has likewise decided to formally revoke the determination in respect of Zone 5.

7.4 More detail as to the reasons for revocation can be found in the two LQM reports and the non-technical summary prepared by LQM, which are available at https://go.walsall.gov.uk/contaminated_land

7.5 On the above basis of further information and remediation in the sense of the "*doing of anything for the purpose of assessing the condition of ... the contaminated land in question*", OR in the sense of "*making of subsequent inspections from time to time for the purpose of keeping under review the condition of the land or*" the Council has decided pursuant to paragraph 5.20-5.22 of the Statutory Guidance (Defra 2012) to revoke the determination that land is contaminated land in relation to the land enclosed within domestic curtilages at:

- a. Kemble Close numbers 1-27 (all), including land adjacent to 1 and 2 Kemble Close WV12 4DQ
- b. Brookthorpe Drive numbers 1-40 (all) WV12 4TX
- c. Oakridge Drive numbers 1-25 (odds) WV12 4EN
- d. Oakridge Drive numbers 27-47 (odds) WV12 4DJ
- e. Oakridge Drive numbers 22-38 (evens) WV12 4DL

8 REFERENCES

Jenkins (2015) *Contaminated Land Remediation Notice in respect of land at Stonegate Housing Estate, Willenhall, Walsall - Appeal by Jim 2 Limited: Report to the Secretary of State for Environment, Food and Rural Affairs, The Planning Inspectorate* (London, UK), Enquiry opened on 8th Dec 2015 (APP/CL/15/3)

SoS-Defra (2017) *Letter entitled 'Part 2A of the Environmental Protection Act 1990: Appeal against a Remediation Notice served by Walsall MBC in respect of land at Stonegate Housing Estate, Willenhall, West Midlands'* Dated: 5th April 2017 (Ref APP/CL/15/03)

WMBC (2012) *Record of Determination that land situated at Kemble Close, Brookthorpe Drive and Oakridge Avenue, Willenhall is Contaminated Land* Dated 27th March 2012. Accessible within Appendix 1 at

<http://www2.walsall.gov.uk//PublicRegister/pollutioncontrollist.asp?sfolder=Contaminated%20Land%20Public%20Register/Appeal%20Documents>

WMBC (2015) *'Contaminated land – remediation notice under the Environmental Protection Act 1990 section 78E'*, Dated 17th March 2015 and accompanying documents. Accessible at <http://www2.walsall.gov.uk//PublicRegister/pollutioncontrollist.asp?sfolder=Contaminated%20Land%20Public%20Register/Appeal%20Documents>

LQM (2019a) *'Stonegate Estate – Former Willenhall Gasworks: Factual report of site investigation works (Feb-May 2018)'* Dated Jan 2019 (Ref: 1339-1(1)) https://go.walsall.gov.uk/contaminated_land

LQM (2019b) *'Stonegate Estate – Former Willenhall Gasworks: Interpretive report of site investigation works (Feb-May 2018)'* Dated Jan 2019 (Ref: 1339-1(1)) https://go.walsall.gov.uk/contaminated_land

**Appendix D – Secretary of State for the Environment, Food and Rural Affairs letter
and findings**



Department
for Environment
Food & Rural Affairs

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17 Smith Square
London
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helpline@defra.gsi.gov.uk
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Your ref: APP/CL/15/03
Date: 5 April 2017

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**PART 2A OF THE ENVIRONMENTAL PROTECTION ACT 1990: APPEAL AGAINST A
REMEDATION NOTICE SERVED BY WALSALL MBC IN RESPECT OF LAND AT
STONEGATE HOUSING ESTATE, WILLENHALL, WEST MIDLANDS**

I am directed by the Secretary of State for the Environment, Food and Rural Affairs ("the Secretary of State") to say that consideration has been given to the report of the Inspector, Mr I Jenkins BSc CEng MICE MCIWEM, who held a public local inquiry on 8-11 December and 15-18 December 2015 into an appeal made under s. 78L(1) of the Environmental Protection Act 1990 ("the Act") by Jim 2 Ltd ("Jim 2") against the remediation notice issued by Walsall Metropolitan Borough Council ("Walsall") for the land known as Stonegate Housing Estate, Willenhall, West Midlands.

The remediation notice was served pursuant to s.78E(1) of the Act on 17 March 2015 in relation to the land which Walsall identified as being contaminated land under s.78B(1) of the Act on 27 March 2012.

Inspector's recommendation and summary of the decision

The Secretary of State has given careful consideration to the Inspector's report ("IR") and has determined, in line with the Inspector's recommendations contained at IR 9, that:

- In relation to ground of appeal (a), the appeal be allowed and the Remediation Notice quashed.

The IR included analysis on the remaining grounds of appeal in case the Secretary of State reached a different conclusion on ground of appeal (a). As she has upheld the appeal on ground (a), which is determinative of the Appeal, the Remediation Notice will be quashed. However, for completeness and in order to assist the parties in understanding the approach to be taken in relation to the relevant guidance and legislation, the Secretary of State will set out her conclusions on the remaining grounds of challenge. The Secretary of State considered that:

- In relation to grounds of appeal (c), (d) and (e) the appeal would have been dismissed;
- In relation to grounds of appeal (m) and (n) the appeal would have been allowed and the Remediation Notice quashed.

Procedural matters

The Secretary of State notes that Jim 2 confirmed in its opening statement that it no longer wished to pursue its appeal under Ground (d) in respect of other parties it had cited as possible appropriate persons, namely leaseholders, Triton Investments and Shenstone Properties Ltd (IR 8.5.4.2).

The Secretary of State also notes that Jim 2 accepts that it would not be in Walsall's interests for it to seek to have E Fletcher Ltd ("Fletcher") restored to the Companies Register (IR 4.4.24) in order that a proper assessment can be made of its ability to meet its financial liability as an appropriate person.

Matters arising since the close of the inquiry

The Secretary of State has noted the representations made after the close of the Inquiry by Jim 2 on 8 January 2016 and 22 March 2016; and on 5 February by Walsall. The Secretary of State does not consider that the Contaminated Land Expert Panel case study submitted as evidence during the Inquiry has any material effect on the appeal decision or the decision with regard to costs. The Secretary of State also notes that neither party has asked for the case study issue to be considered within the appeal process.

Policy and statutory considerations

The legislative framework for this appeal is set out in Part 2A of the Act and the Contaminated Land (England) Regulations 2006 ("the Regulations"). Section 78L(2)(b) of the Act confirms that on appeal the Secretary of State may confirm the Remediation Notice (with or without modification) or quash it.

Under s.78A(2) of the Act, the Secretary of State has made statutory guidance on the manner in which the determination of whether land is contaminated was to be made by local authorities. Two versions of that guidance are relevant to this appeal. The first came into force in September 2006 (the "2006 Guidance"). That was replaced by a revised version, the "2012 Guidance", which came into force in April 2012.

In addition to the statutory guidance, the Secretary of State published guidance in July 2008 entitled 'Guidance on the Legal Definition of Contaminated Land' (the "2008 Guidance").

Regulation 7(1) of the Regulations sets out the grounds on which an appeal against a remediation notice may be made. Jim 2 has appealed on the following of those grounds:

- Ground (a) i) and ii) – that, in determining whether any land to which the notice relates appears to be contaminated land, the local authority – i) failed to act in accordance with guidance issued by the Secretary of State under 78A(2), (5) or (6); or ii) whether by reason of such a failure or otherwise, unreasonably identified all or any of the land to which the notice relates as contaminated land.
- Ground (c) – that the enforcing authority unreasonably determined the appellant to be the appropriate person who is to bear responsibility for any thing required by the notice to be done by way of remediation.
- Ground (d) – that the enforcing authority unreasonably failed to determine that some person in addition to the appellant is an appropriate person in relation to any thing required by the notice to be done by way of remediation.
- Ground (e) – that, in respect of any thing required by the notice to be done by way of remediation, the enforcing authority failed to act in accordance with guidance issued by the Secretary of State under section 78F(6).
- Ground (n) – that the enforcing authority in considering for the purposes of section 78N(3)(e) whether it would seek to recover all or a portion of the cost incurred by it in doing some particular thing by way of remediation – (i) failed to have regard to any hardship which the recovery may cause to the person from whom the cost is recoverable or to any guidance issued by the Secretary of State for the purposes of section 78P(2); or (ii) whether by reason of such a failure or otherwise, unreasonably determined that it would decide to seek to recover all of the cost.
- Ground (m) – that the enforcing authority itself has power, in a case falling within section 78N(3)(e), to do what is appropriate by way of remediation.
- Ground (b) – that, in determining a requirement of the notice, the enforcing authority – (i) failed to have regard to guidance issued by the Secretary of State under section 78E(5); or (ii) whether by reason of such a failure otherwise, unreasonably required the appellant to do any thing by way of remediation.
- Ground (p) – that a period specified in the notice within which the appellant is required to do anything is not reasonably sufficient for the purpose.

Main issues – grounds of appeal

Ground (a) – ‘that, in determining whether any land to which the notice relates appears to be contaminated land, the local authority – (i) failed to act in accordance with guidance issued by the Secretary of State under section 78A(2), (5) or (6); or (ii) whether by reason of such a failure or otherwise, unreasonably identified all or any land to which the notice relates as contaminated land.’

Statutory Guidance

The Secretary of State agrees with the Inspector at IR 8.3.5.1 that it was the 2006 Guidance, rather than the 2012 Guidance, that Walsall were required to act in accordance with under the Act and that the issuing of the 2012 Guidance did not give rise to a legal obligation on Walsall to review the determination it had already made. The Secretary of State also agrees with the Inspector at IR 8.3.5.2 that as the 2012 Guidance had not been ratified at the time of determination, limited weight should be given to it as a material consideration in that determination. Further, the Secretary of State agrees that it was not unreasonable for Walsall to proceed to issue its determination without delay, given the statutory obligation under 78B of the Act on regulators to give notice of the identification of contaminated land.

The Secretary of State confirms that the Inspector’s approach to the various pieces of statutory and non-statutory guidance is correct; and considers that the two step approach to applying the definition of contaminated land asserted by the Inspector at IR 8.3.5.4, based on the 2006 Guidance, is the appropriate test. That is: 1) to determine whether there is a pollutant linkage between a contaminant, a pathway and a receptor and 2) whether that pollutant linkage exists in respect of a piece of land and whether it presents a significant possibility of significant harm (SPOSH) being caused to the receptor. This should be determined by scientific and technical assessment undertaken according to relevant, appropriate, authoritative and scientifically based guidance on such risk assessments, taking into account whether or not there are suitable and sufficient risk management arrangements in place to prevent such harm.

Potential pollutant linkage and possibility of significant harm

The Secretary of State agrees with the Inspector’s reasoning at IR 8.3.6 that there is a clear case for the existence of a pollutant linkage with a possibility of significant harm, based on the potential presence of Benzo(a)pyrene in the ground. The Secretary of State notes that there was no dispute between the parties on this point.

Use of Guideline Values

The Secretary of State agrees with the Inspector that the approach taken by Walsall set out at IR 8.3.7 to derive Site Specific Assessment Criteria (“SSAC”) resulted in an authoritative and scientifically based guideline value.

Site Investigation

AECOM Reports

The Secretary of State agrees with the Inspector's expectation at IR 8.3.8.2 that the Council would appoint appropriately qualified and competent advisors when determining whether the land was contaminated.

Notwithstanding the Inspector's finding at IR 8.3.8.8 that Walsall's findings with regard to soil sampling, sample distribution and soil analysis were reasonable, the Secretary of State agrees with the Inspector's further findings at IR 8.3.8.9-12. That is, that the following factors indicate the weaknesses in AECOM's advice: Mr Smart as Technical Director at AECOM lack of previous experience in investigating former gas works sites, the incorrect use of the term 'Health Criteria Value' to describe the derived SSAC in Walsall's Record of Determination ("RoD"), the misleading depiction of some of the report's findings, and the lack of clarity in the evidence submitted by Walsall in advance of the Inquiry. The Secretary of State therefore supports the Inspector's conclusion at IR 8.3.8.13 that the advice provided to Walsall by their consultants, AECOM, fell short of expert advice and that it would have been reasonable to expect Walsall to recognise this and not repeat mistakes such as the use of incorrect terms, in light of the 2008 guidance.

Zoning of the site

The Secretary of State supports the Inspector's reasoning set out at IR 8.3.8.14-18 and agrees that Walsall's approach to zoning based on information available on historic uses of the site was not unreasonable.

Outliers

Notwithstanding the reasonable expectation of Walsall that, given the heterogeneous nature of the made ground with the determined zones, high next to low sample results are to be expected, and Walsall's adequate regard to historic uses when zoning zones 4 and 7, the Secretary of State agrees with the Inspector's findings set out at IR 8.3.8.21-29 with regard to Walsall's approach to the potential outliers in zone 7. That is, that there is a significant degree of uncertainty as to whether the two high values for zone 7 represent a genuine risk.

Given the significant influence of the two high results in the datasets on the derived statistical mean for the zone, the Secretary of State agrees that it would have been reasonable to explore conditions in the vicinity of WS13 and SMW2 in more detail. At the time, there was relevant guidance available for the treatment of potential outliers in the form of CIEH/CL:AIRE Guidance on *Comparing Soil Contamination Data with a Critical Concentration* ("CIEH Guidance"). This guidance indicates that various outlier tests are available that can be used by assessors to identify anomalous data in a dataset. The Secretary of State notes at IR 8.3.8.23 that statistical analysis was not undertaken for zone 7, although it was provided for other individual zones, and that no explanation was given for its lack. Furthermore, statistical analysis undertaken by Dr Cole on behalf of Walsall for the Inquiry identifies the potential for multiple soil contaminant populations to exist and in particular suggests that the higher concentrations related to a specific soil component that is not present in the samples with the lower concentrations.

The CIEH Guidance also recommends that field records should be re-examined to establish whether observations at the time samples were taken can explain the results and that further sampling may be necessary to verify conditions in the outlier area. The Secretary of State notes at IR 8.3.8.25 that no such records were provided in the case of SMW2.

The Secretary of State agrees with the Inspector's reasoning at IR 8.3.8.26 that Walsall's lack of evidence to verify that the material within WS13 would have been different from the material found within the curtilage of No. 1 Brookthorpe Drive casts doubt over whether WS13 can be considered representative of that area, or the wider zone 7 area; or that any follow up exploration was prohibited by the requirement for the use of heavy equipment.

In conclusion, the Secretary of State agrees with the Inspector at IR 8.3.8.30 that Walsall acted unreasonably in not exploring conditions in the vicinity of WS13 and SMW2 in more detail, the outcome of which had the potential to affect the manner in which the determined zone 7 was zoned, the outcome of the risk assessment for that zone and the determination based upon it.

Topsoil as a separate soil population in the assessment and the adequacy of shallow soil sampling

The Secretary of State agrees with the Inspector as found at IR 8.3.8.31-2 that it would be unreasonable to assume that an un-mixed layer of topsoil would remain in place over time; and that sample results from the top one metre of ground indicated that there is no discernible variation in the concentration of B(a)P with depth. It was therefore not unreasonable for Walsall to regard these sample results as representative of those soils to which human receptors would be most likely to be exposed. On this basis, the Secretary of State agrees that Walsall was not unreasonable in not treating topsoil as a separate soil population.

Summary on Walsall's approach to risk assessment

The Secretary of State agrees with the Inspector's conclusion at IR 8.3.8.33 that Walsall did not carry out a scientific and technical assessment of the risks arising from the pollutant linkage, according to relevant, appropriate, authoritative and scientifically based guidance on such risk assessments. On that basis, Walsall failed to follow the two-step approach of the 2006 Guidance.

Significant Possibility of Significant Harm

The Secretary of State accepts that toxicological risk assessment cannot answer the policy question about what is acceptable or unacceptable. The correct approach to determine whether there is a SPOSH in respect of piece of land is asserted by the Inspector at IR 8.3.5.6-7 and set out in paragraph 23 of the 2008 Guidance. That is, 1) the completion of a science-based risk assessment which takes account of toxicological information and site specific local circumstances and 2) a judgement taken by the local authority on whether there is a SPOSH based on scientific risk assessment, and due account of the purposes of Part 2A. The Secretary of State also acknowledges the Inspector's assertion at IR 8.3.9.2

that if an SGV is exceeded, the assessor will usually need to conduct a detailed qualitative risk assessment (DQRA) to discover whether there is a SPOSH.

There is no dispute that regulators are afforded considerable discretion when making a judgement on whether contamination poses a significant level of risk. However, the Secretary of State agrees with the Inspector that there were a number of shortcomings in relation to the approach taken by Walsall in its determination.

The Secretary of State notes the Inspector's reasoning at IR 8.3.9.6 that the AECOM reports that informed the determination include a chapter on human health risk assessment that drew conclusions in relation to B(a)P simply on the basis of the degree to which the SSAC was exceeded. For her part, the Secretary of State notes from IR 8.3.9.6-8 that Walsall indicated that exceedance of the SSAC was used as a starting point and that it was not the only factor considered to determine the existence of SPOSH. Other factors included the extent to which the SSAC, rather than the SGV, was exceeded - in some cases up to 2 orders of magnitude, and the depth below the surface from which samples were obtained. Walsall's RoD also indicates that account was taken of the likelihood of occupiers or users of the land being exposed to contamination, referencing the extent of surface cover/landscaping and the potential for disturbance of soils. However, the RoD does not make clear to what extent Walsall's judgement was informed by consideration of unacceptable intake or direct bodily contact, which is a requirement under the 2006 Statutory Guidance. The Secretary of State notes the Inspector's assertion at IR 8.3.9.9 that there is no evidence to show that a toxicological assessment was actually undertaken and that Dr Cole has acknowledged in his written evidence that Walsall did not do so.

On this basis, the Secretary of State agrees with the Inspector's conclusion at IR 8.3.9.9 that Walsall's approach departed significantly from the 2006 guidance such that it can be regarded as non-compliant with the Guidance as a whole and therefore unreasonable.

In addition to this conclusion, the Secretary of State agrees with the Inspector's finding at IR 8.3.9.9 that the exposure and toxicological review undertaken by Dr Cole for the purposes of the Inquiry is not relevant to the question as to whether Walsall acted in accordance with the statutory guidance when making its determination in 2012.

Overall conclusion on ground (a)

The Secretary of State agrees with the Inspector's conclusions on Walsall's approach to the determination of the land as contaminated set out at IR 8.3.9.11 as follows. It was the 2006 Guidance that Walsall was required to act in accordance with at the time the determination was made. However, in making that determination, Walsall failed to act in accordance with 78A(2) of the Act, the 2006 Guidance and in accordance with the CIEH guidance.

The Secretary of State therefore finds that Walsall did not undertake a risk assessment based on sound science, which would allow it to conclude that the entirety of zones 4 and 7 represented a SPOSH, and that Walsall unreasonably identified the land to which the notice relates as contaminated land.

The Secretary of State's Discretion

Section 78L(2)(b) of the Act confirms that the Secretary of State has a discretion to quash, modify or confirm the Remediation Notice. Walsall has suggested that, in light of the later evidence gathered from the site by Walsall for the Inquiry, the Secretary of State could exercise that discretion to allow the Remediation Notice to stand. The Secretary of State agrees with the Inspector at IR 8.3.10.1 that, in order not to delay remediation of the land unduly and to the detriment of the residents, it is appropriate that she considers whether to exercise her discretion.

The Secretary of State notes at IR 8.3.10.8 that Walsall commissioned Dr Pease, an expert in contaminated land, to carry out an additional risk assessment. This assessment was carried out in light of the four category test introduced under the 2012 Statutory Guidance and the technical guidance published on the methodology to be used for the derivation of category four screening levels. The Secretary of State also notes that Walsall did not take forward the recommendations made by Dr Pease, despite her expertise (IR 8.3.10.9).

The Secretary of State also notes that Walsall undertook a review of its determination in light of the 2012 Guidance (IR 8.3.10.10); and that Dr Cole undertook an exposure and toxicological review in his original proof of evidence (IR 8.3.10.11) as well as an appraisal of the factors set out in paragraph 4.27 (IR 8.3.10.15) of the 2012 Statutory Guidance based on the remediation solution proposed by Walsall of excavation and replacement of soil.

As has been found under Ground (a), a substantive factor contributing to the unreasonableness of Walsall's determination of the land as contaminated is the inclusion in datasets of the two potential outlier values in zone 7. The further assessments undertaken by Walsall when reviewing its determination in light of the 2012 Guidance included these two potential outlier values without further analysis. The Secretary of State notes that this leads the Inspector to conclude at IR 8.3.10.10 that Walsall's findings in respect of its review under the 2012 Guidance cannot be regarded as made on a robust basis and may only be afforded little weight.

On this basis, the Secretary of State agrees with the Inspector's findings at IR 8.3.11.2 that the further assessments undertaken by Walsall do not amount to the robust assessment required by guidance to support a determination of contaminated land. The Secretary of State considers that it would therefore be inappropriate for her to exercise her discretion to allow the Remediation Notice to stand.

Final conclusion

The Secretary of State is satisfied that with regards to the above the Inspector has taken due account of policy concerns and applied the law correctly to reach the conclusion that the Remediation Notice should be quashed.

The remaining grounds of appeal

As the Secretary of State has decided to uphold ground (a) of the appeal, the Remediation Notice will be quashed. The remainder of the grounds are not now determinative of the

appeal. As the Inspector has made a decision on each of the remaining grounds in the event that the Secretary of State decided that the determination of the land is reasonable, the Secretary of State's findings in respect of the remaining grounds are set out here to assist the parties in understanding the approach to be taken to the relevant guidance and legislation.

Ground (c) – that the enforcing authority unreasonably determined the appellant to be the Appropriate Person who is to bear responsibility for any thing required by the notice to be done by way of remediation.

The Secretary of State agrees with the Inspector's judgement at IR 8.4.3 that in the context of 'caused or knowingly permitting a substance' in this case, it relates to B(a)P and not to general contamination.

Caused

The Secretary of State supports the Inspector's findings at IR 8.4.4.9 that although preparation of zones 4 and 7 for development would be likely to have involved some infilling and movement of material, it cannot reasonably be said that such operations would have led to an increased level of contamination within those same zones.

The Secretary of State therefore agrees with the Inspector's conclusion at IR 8.4.4.10 that it is unlikely that Jim 2 caused or exacerbated contamination by B(a)P within zones 4 and 7, and Walsall's finding to the contrary was unreasonable.

Knowingly Permitted

The Secretary of State notes the Inspector's comment at IR 8.4.5.1 that the act of 'knowingly permitting' requires knowledge of a substance, the power to remove that substance, the opportunity to exercise that power and a failure to do so.

The Secretary of State agrees with the Inspector's findings at IR 8.4.5.2-8 that Jim 2 can be regarded as having knowledge of the presence of B(a)P and that it had sufficient opportunity to remediate the area (including the area later developed by Fletcher had they chosen to do so). The Secretary of State therefore agrees with the Inspector's conclusion at IR 8.4.5.9 that Jim 2 knowingly permitted B(a)P to be on the land and that Walsall's finding to that effect was reasonable.

Ground (d) – that the enforcing authority unreasonably failed to determine that some person in addition to the appellant is an Appropriate Person in relation to any thing required by the notice to be done by way of remediation

Ground (e) – that, and in respect of any thing required by the notice to be done by way of remediation, the enforcing authority failed to act in accordance with guidance issued by the Secretary of State under section 78F(6)

The Council

The Secretary of State agrees with the Inspector's findings at IR 8.5.2-7 on both grounds (d) and (e) that Walsall was not unreasonable to exclude itself from the liability group through the application of Exclusion Test 6, the purpose of which is to exclude from liability those who would otherwise be liable solely because of the introduction by others of the relevant pathways or receptors in the contaminant linkage that led to the determination and that it acted in accordance with the Statutory Guidance in this respect when formulating the Remediation Notice.

The gas companies

The Secretary of State agrees with the Inspector's findings at IR 8.5.3.2 that the West Midlands Gas Board and its predecessor, the Willenhall Gas Company, notwithstanding the fact that they are no longer in existence, would also be excluded from liability by reason of Test 6.

E Fletcher Ltd

The Secretary of State agrees with the Inspector at IR 8.5.4.1 that this company can be considered as a 'knowing permitter' for the same reasons given in relation to Jim 2 because it was responsible for introducing the receptors. However, the company was dissolved following notice by Walsall that it was regarded as a potential appropriate person and can no longer be found

Ground (n) – that the enforcing authority in considering for the purposes of section 78N(3)(e) whether it would seek to recover all or a portion of the cost incurred by it in doing some particular thing by way of remediation – failed to have regard to any hardship which the recovery may cause to the person from whom the cost is recoverable or to any guidance issued by the Secretary of State for the purposes of section 78P(2); or (ii) whether by reason of such a failure or otherwise, unreasonably determined that it would decide to seek to recover all of the cost.

Hardship

The Secretary of State supports the Inspector's findings at IR 8.6.4.3 and agrees with the Inspector that Walsall have acted reasonably and in accordance with the Statutory Guidance, and have not failed to have regard to the matter of hardship.

Apportionment

The Secretary of State acknowledges that under paragraph 8.25 of the 2012 Statutory Guidance consideration should be given to waiving or reducing costs recovery on the basis that a) another person who caused or knowingly permitted the contamination has been identified but cannot now be found; and (b) if that other person cannot be found, the proportion of the cost to the appropriate person seeking the waiver or reduction would

have been significantly less. The Secretary of State agrees with the Inspector at IR 8.6.5.2-3 that both criteria (a) and (b) have been met in respect of Fletcher and that it follows that Walsall should consider waiving or reducing its costs recovery from Jim 2.

The Secretary of State notes that Walsall are required only to 'consider' waiving or reducing costs and that they should be less willing to waive those costs if Jim 2 profited financially from the activity which led to the land being determined to be contaminated land (IR 8.6.5.9). It is also noted that under paragraph 8.5 of the 2012 Guidance Walsall should aim for an overall result which is as fair and equitable as possible to all who may have to meet the costs of remediation, including national and local taxpayers.

The Secretary of State also notes the Inspector's conclusions at IR 8.6.5.8 that in respect of the Fletcher land Jim 2 did not complete the significant contaminant linkage and that the Council warning, when it sold the land, was not a clear indication that the land may be contaminated.

After taking account of those considerations, the Secretary of State agrees with the Inspector's conclusion at IR 8.6.5.10 that Jim 2's overall liability amounts to 84%. This is calculated on the basis that Jim 2 is liable for 100% of the land it developed (60% of the area/houses it built across the two zones) and 60% liable for the remaining 40% of the houses E Fletcher built in those zones. The Secretary of State acknowledges that Jim 2 indicated its support for this approach in closing (IR 8.6.5.7).

Ground (m) – that the enforcing authority itself has power, in a case falling within section 78N(3)(e), to do what is appropriate by way of remediation

The Secretary of State acknowledges that under s.78N(3)(e) of the Act the enforcing authority, where it decides not to seek to recover all or only a proportion of costs from an appropriate person or persons, shall itself have the power to do what is appropriate by way of remediation.

As the Secretary of State agrees with the Inspector that Jim 2 is not liable for 100% of the costs of remediation, the Secretary of State supports the Inspector's findings at IR 8.7.1 that it follows that Walsall have the power to carry out remediation and to then recover the reasonable costs incurred from Jim 2 through the mechanism of a charging notice.

Ground (b) – that in determining a requirement of the notice the enforcing authority (i) failed to have regard to guidance issued by the Secretary of State under Section 78E(5); or (ii) whether by reason of such a failure otherwise, unreasonably required Jim 2 to do any thing by way of remediation

Ground (p) – that a period specified in the notice within which the appellant is required to do anything is not reasonably sufficient for the purpose.

The Secretary of State agrees with the findings of the Inspector at IR 8.8.1-8.8.5 that overall the remediation requirements set out by Walsall in the Remediation Notice for the purposes of breaking the significant contaminant linkage are reasonable.

Formal decision on appeal

Accordingly, for the reasons given above, the Secretary of State has found in favour of Jim 2 in respect of Ground (a) and considers that, notwithstanding the additional work undertaken by Walsall for the purposes of the Inquiry, the Remediation Notice should be quashed.

Formal decision on costs application

The Secretary of State notes at 2.1.2 of the Inspector's Report on Costs (IRC) that before the close of the Inquiry, Jim 2 made two applications for costs in writing against Walsall, pursuant to s.250 of the Local Government Act 1972, as applied by Schedule 20, s.5(1) of the Environment Act 1995. These being:

- A partial award in respect of Walsall's procedural conduct in respect of data and;
- A full award relating to Walsall's continuation and conduct of the appeal in light of Walsall's unreasonable determination of the land and/or determining the appellant to be the Appropriate Person to bear responsibility for the costs of remediation.

The Secretary of State notes at IRC 6.1.1 that both parties are in agreement that the costs section of the Planning Practice Guidance (PPG) that applies to planning appeals is applicable here by analogy and that it confirms that parties in appeals normally meet their own expenses. The Secretary of State agrees that it is appropriate to apply the PPG to this appeal. The PPG shows that all parties are expected to behave reasonably to support an efficient and timely process, for example in providing all of the required evidence and ensuring timetables are met.

Partial award

The Secretary of State notes that Walsall has accepted that errors in data have been made and that they acknowledge that the complex nature of the data surrounding the determination led to these errors. The Secretary of State agrees that this of itself does not amount to unreasonable behaviour.

The Secretary of State does however agree with the Inspector at IRC 6.2.6 that it was reasonable that Jim 2 spent time trying to understand the data on which Walsall's case was built and that this would have been made more difficult by the late submission of the data and the confusion over what data had been used. The confusion over which datasets had been relied on led to Jim 2 incurring unnecessary costs.

On this basis, the Secretary of State agrees with the Inspector's conclusion at IRC 6.2.8 that a partial award of costs to the appellant is justified on the basis that Walsall failed to make clear in a timely manner the datasets it used, both in support of its determination and

in its proof of evidence, and that this amounts to unreasonable behaviour. The costs should be limited to those costs incurred by Jim 2 due to time spent by its team in the lead up to the Inquiry in trying to understand Walsall's conclusions without clarification from Walsall on the datasets they used.

Full award

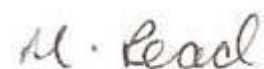
The Secretary of State agrees with the Inspector's conclusions at IRC 6.3.9 that Walsall's continued defence of the appeal does not amount to unreasonable behaviour, based on Walsall's demonstration, through its consistent response to evidence put forward by Jim 2, that evidence was not ignored and their submissions in respect of further work undertaken for the Inquiry. The Secretary of State also notes that the appeal was successfully defended by Walsall on some of the grounds and that the very small number of appeals under this statutory framework leaves a degree of uncertainty as to the correct approach.

On this basis, the Secretary of State agrees with the PI's conclusion at IRC 6.3.11 that Walsall's continuation and conduct of the appeal did not amount to the type of behaviour that would merit a full award of costs, notwithstanding and without prejudice to conclusions regarding Walsall's unreasonable determination of the land and that the Remediation Notice should be quashed.

Final matters

A copy of this letter has been sent to those listed in the Annex attached to this letter in accordance with Regulation 10(2) of the Contaminated Land (England) Regulations 2006.

Yours sincerely



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Land Use

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Appendix E – Non-Technical Summary

Land Quality Management Ltd

For

Walsall Metropolitan Borough Council

Stonegate Estate – Former Willenhall Gasworks

Non-Technical Summary of Inspection of the Stonegate and Trent Park Estates in Willenhall

LQM Report Number: **1339-2(1)**

Issue Number: **1**

Status: **Final**

Date: **January 2019**

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Report Title: **Non-Technical Summary of Inspection of the Stonegate and Trent Park Estates in Willenhall**

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The conclusions and recommendations contained in this report represent our professional opinions. These opinions were arrived at in accordance with accepted industry practices at this time and location and as such are not a guarantee that the Site is free from hazardous materials or conditions.

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2 NON-TECHNICAL SUMMARY OF INSPECTION OF THE STONEGATE AND TRENT PARK ESTATES IN WILLENHALL

(1) This document provides a non-technical summary of the investigation and assessment undertaken by Land Quality Management Ltd (LQM) on behalf of Walsall Metropolitan Borough Council (the Council) on land at Stonegate and Trent Park Estates, Willenhall(the Site) under the provisions of contaminated land legislation that came into force in 2000 as Part 2A of the Environmental Protection Act 1990 (as amended) (Part 2A). LQM's work is fully reported in two technical documents presenting the factual and interpretive aspects of our investigation and risk assessment (LQM, 2019a,b).

2.1 Background

(2) The Stonegate and Trent Park Estates, Willenhall, were developed on or adjacent to land historically occupied by the former Willenhall Town Gasworks.

(3) Land at the two estates has been investigated by the Council since approximately 2006. For the purposes of these investigations, the Council split the land into 10 zones. These investigations concluded that 89 properties in three zones (zones 4, 5 and 7) of the estates met the statutory definition of contaminated land, on the basis of concentrations of benzo[a]pyrene (BaP) within shallow soils (0-1m below ground level), and were formally determined as Contaminated Land by Council officers, under delegated powers, in March 2012 and the developer notified in August 2012. In March 2015, the Council served a Remediation Notice on the developer with respect to zones 4 and 7. This Notice was subsequently appealed by the developer in April 2015. In April 2017, the Secretary of State for the Environment upheld the developer's appeal and quashed the Council's Remediation Notice. The Secretary of State specifically found that the Council had "unreasonably identified the land as Contaminated Land".

2.2 LQM Investigation

(4) LQM were commissioned by the Council in July 2017 to advise on whether or not the Stonegate and Trent Park Estates meet the definition of Contaminated Land in the updated 2012 legislation and statutory guidance. LQM reviewed the available site investigation data and identified the need for further detailed risk assessment based on additional sampling of natural and manmade soil at up to 89 residential properties within the determined zones 4, 5 and 7 and monitoring of groundwater and ground vapours within public open spaces. In February 2018, the Council commissioned LQM to undertake this additional site investigation.

(5) Site investigation works, conducted during February – March and May 2018, involved sampling from hand-dug pits in the rear gardens of the majority of the 89 properties and the installation of groundwater and ground vapour monitoring wells in public open space areas. Permission for soil sampling was not granted for 6 properties, 3 of which had limited historical contamination data. The ground conditions consisted of manmade soil (made ground) beneath, in most locations, a layer of topsoil. Made ground was very variable and contained fragments of brick, masonry or materials associated with the gasworks such as coal and occasionally coke or clinker. Samples taken were tested for substances associated with the heating of coal on former gasworks sites, including polyaromatic hydrocarbons (PAHs); metals (namely arsenic, lead, chromium and hexavalent chromium); cyanide compounds (total, free and thiocyanate); asbestos and soil properties, including pH and Soil Organic Matter (SOM). Groundwater and ground vapour samples were also taken between May and September 2018 from boreholes installed within the public open space. Samples were analysed by a laboratory using accredited test methods.

(6) The site investigation data collected by LQM and the previous investigations were combined to produce a dataset comprising analyses of soil samples, primarily collected from shallow (within the first metre below ground level) top soil and made ground within rear gardens of the determined properties. LQM used this information to carry out a risk assessment to help the Council decide if the land was Contaminated Land under Part 2A.

(7) Under Part 2A, the Council needs to decide whether land poses a "significant possibility of significant harm" (SPOSH) before it can be determined as Contaminated Land. A detailed risk assessment, including the toxicological assessment and assessment of potential hotspots, suggested by the Secretary of State, was therefore carried out by LQM.

(8) Gasworks waste materials contain mixtures of substances made of carbon and hydrogen that are known as polyaromatic hydrocarbons (PAHs). LQM showed that this was the likely source of contamination and the PAHs in the soils were therefore linked to the incomplete combustion of coal during the operation of the former gasworks rather than any other process. LQM showed that the risks from PAH mixtures in soil could be understood by assessing benzo[a]pyrene (BaP), the most important PAH. Elevated concentrations of BaP (and other PAHs) appear to be associated with the discrete fragments of clinker, coke and coal observed in the soils. LQM showed that the toxicity of the PAHs could be represented by the toxicity of benzo[a]pyrene (BaP) alone. LQM evaluated the combined site investigation evidence and concluded that it did not indicate the presence of hotspots of contamination.

(9) As part of the risk assessment process, LQM calculated exposure to soil contaminants at the Site using standard Environment Agency software and compared the estimated exposure against doses

reported in scientific literature as being harmful; a ‘toxicological assessment’. This showed that exposure as a consequence of normal domestic activities was unlikely to represent SPOSH.

2.3 Conclusions

(10) The work undertaken by LQM concluded that there are greater than background concentrations of contaminants at the Site associated with historical industrial activities including waste disposal from the gasworks. However, LQM’s site investigation and subsequent assessment of the combined results has found the concentrations of contaminants in the soils at the Site do not represent an unacceptable risk to human health when considered in light of the Statutory Guidance. This means the land should not be considered ‘Contaminated Land’ under Part 2A of the Environmental Protection Act 1990.

3 REFERENCES

LQM (2019a) ‘Stonegate Estate – Former Willenhall Gasworks: Factual report of site investigation works (Feb-May 2018)’ Dated Jan 2019 (Ref: 1339-1(1))

LQM (2019b) ‘Stonegate Estate - Former Willenhall Gasworks: Interpretation of ground conditions and Part 2A Opinion’ Dated Jan 2019 (Ref: 1339-1/2(1))