The Planning Inspectorate

Report to the Secretary of State for Environment, Food and Rural Affairs

by I Jenkins BSc CEng MICE MCIWEM

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Date

ENVIRONMENTAL PROTECTION ACT 1990

THE CONTAMINATED LAND (ENGLAND) REGULATIONS 2006

CONTAMINATED LAND REMEDIATION NOTICE IN RESPECT OF LAND AT STONEGATE HOUSING ESTATE, WILLENHALL, WALSALL

APPEAL BY JIM 2 LIMITED

Inquiry opened on 8 December 2015
The Council House, Litchfield Street, Walsall.

Ref: APP/CL/15/3

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1 CASE DETAILS

Appeal Ref: APP/CL/15/3
Land at Stonegate Housing Estate, Willenhall, Walsall

- The appeal is made under section 78L(1) of the Environmental Protection Act 1990 (the Act) against a Contaminated Land Remediation Notice (Remediation Notice) served by Walsall Metropolitan Borough Council.
- The appeal is made by Jim 2 Limited (the appellant).
- The notice was served pursuant to section 78E(1) of the Act in relation to land identified as contaminated land by Walsall Metropolitan Borough Council under section 78B(1) of the Act.
- The notice identifies the appellant as an Appropriate Person, by reason of having caused or knowingly permitted the substances, or any of the substances, by reason of which the land is contaminated to be present in, on or under the land.
- The notice requires the appellant to carry out the remediation requirements set out in Schedule 2 of the notice and identifies the proportion of the cost of the activities for which it is liable.

Summary of Recommendations: That the appeal be allowed, with particular reference to grounds (a), (n), (m), (b) and (p), and the Remediation Notice quashed.

2 PREAMBLE

2.1 The appeal

2.1.1 The site sits within the administrative area of Walsall Metropolitan Borough Council (the Council) which is therefore, the enforcing authority for the purposes of Part IIA of the Act. The Council determined the site to be contaminated land on 27 March 2012 and served notice of that on the appellant, amongst others, on 28 March 2012. Following consultation concerning the identification of Appropriate Persons and the assessment of liability, the Council served the Remediation Notice subject of this appeal on Jim 2 Limited (referred to as Jim 2 or the appellant) on 17 March 2015. On the 7 April 2015 the appellant appealed against the Remediation Notice[1].

2.1.2 In its notice of appeal, dated 7 April 2015, the appellant cited as its grounds of appeal the following paragraphs from Regulation 7(1) of the *Contaminated Land (England) Regulations, 2006*: (a)(i) and (ii); (b)(i) and (ii); (c); (d); (e); (m); (n)(i) and (ii); and (p). In relation to ground (d) the appellant indicated that it would argue that there are other persons whom the Council ought to have identified as Appropriate Persons within

[1] ID11.

the Class A Liability Group and in that respect it identified the Council along with 4 other groups/parties. However, at the start of the Inquiry the appellant confirmed that it would pursue ground (d) only on the basis that the Council ought to have been identified as an Appropriate Persons within Class A. It withdrew its appeal on ground (d) in relation to the other 4 groups/parties[2]. I have considered the appeal on the basis of this latest position.

2.1.3 Prior to the Inquiry, the Secretary of State decided to recover the decision on this appeal due to: potential policy implications for contaminated land law; in view of the challenges raised on the application of the Environmental Protection Act 1990 and of the revised Statutory Guidance published in 2012; and, in view of the large number of people affected[3].

2.2 *The Inquiry and site visits*

2.2.1 I have been appointed by the Secretary of State for Environment, Food and Rural Affairs (the Secretary of State) to conduct an Inquiry into the appeal made by the appellant. I held the Inquiry at The Council House, Litchfield Street, Walsall on 8-11 and 15-18 December 2015. I carried out unaccompanied site visits to the locality of the appeal site on the 7 and 17 December 2015.

2.2.2 I adjourned the Inquiry on 18 December 2015, having dealt with all other matters, in order to allow those parties who appeared at the Inquiry to have an opportunity to respond in writing to suggested modifications to the Remediation Notice. I set a timetable for the submission of written representations on the matter and a resumption date for the Inquiry of 20 January 2016 was agreed. However, I confirmed that at the end of the timetable for submissions, unless I considered that correspondence received necessitated further discussion at the Inquiry, it would be my intention to close the Inquiry in writing prior to 20 January 2016. There were no objections to that approach. Having had regard to the correspondence received from the parties, I considered that the matters raised did not need to be discussed further and on 18 January 2016 the Planning Inspectorate notified the parties, on my behalf, that the Inquiry was closed.

2.2.3 During the proceedings, whilst proofs of evidence were taken as read, they were annotated to correct typographical and other errors where necessary. The proofs do not necessarily reflect the position at the end of the Inquiry, which is set out in the closing submissions used as the basis for my summary of case for each party.

2.2.4 On the 3rd day of the Inquiry the Council submitted a case study published

[2] ID7 Para 23 'b. The original leaseholders…… c. Triton Investments Ltd. d. Shenstone Properties Ltd. e. E Fletcher Builders Limited'.
[3] CD8.1.

by the Conland Expert Panel, established by the Department for Environment, Food and Rural Affairs (Defra), and I had regard to the appellant's concerns regarding the late submission of that evidence. I considered that: it was relevant to the matters under consideration; it could not have been submitted earlier, as it had not been published; and, the Inquiry afforded interested parties a reasonable opportunity to address it in their evidence. I determined therefore, that no party's interests would be unduly prejudiced through the introduction of that document, which was accepted into evidence.

2.3 *The scope of this Report*

2.3.1 This report contains a brief description of the site and its surroundings, the gist of the evidence presented and my conclusions and recommendations. Lists of Inquiry appearances, documents and abbreviations used are attached as appendices. Proofs of evidence were added to at the Inquiry through written and oral evidence. Italic text is used within the summaries of cases for my factual comments to assist the reader.

3 DESCRIPTION OF THE LOCALITY

3.1 The Remediation Notice[4] subject of this appeal relates to two zones, zones 4 (0.44 ha) and 7 (0.58 ha), within a residential development in Willenhall. The location within the wider area is shown on Figure 1 of CD16.1.7. Zone 4 comprises 26 properties that front onto either Oakridge Drive or Brookthorpe Drive. Zone 7, which is situated immediately to the south of zone 4, comprises 43 properties that front onto either Brookthorpe Drive or Kemble Close. These zones are shown on Inquiry Document (ID) 2 – *Drawing no. Figure 2A revision 2*.

3.2 The land forms part of land formerly occupied by the Willenhall Town Gasworks. Figure 3 of CD16.1.7 gives an indication of the spatial relationship between the existing residential properties and the location in the past of infrastructure associated with the former gasworks. The manufacture of gas ceased in 1957 and the site was then used for a number of years as a gas holder station, prior to residential re-development.

[4] CD6.8.

4 PROCEDURAL AND LEGAL SUBMISSIONS

4.1 *Statutory formalities*

4.1.1 At the Inquiry, the Council confirmed that all of the statutory formalities had been complied with and this was not disputed by any of the other parties present.

4.2 *Legal submissions*

4.2.1 Various matters of law have been raised in relation to Part IIA of the Environmental Protection Act (1990) as amended. Whilst these are for others to decide, I report them below and address them within the main body of my conclusions.

4.3 *Legal submissions on behalf of Walsall Metropolitan Borough Council*

4.3.1 In relation to a number of the grounds of appeal against the remediation notice (see reg. 7(a)(i) and (ii); b(i) and (ii); (c); (d) and (n)(ii) of the 2006 Regulations (CD1.2) the test is whether the Council failed to act in accordance with the statutory guidance or acted 'unreasonably'. The test of reasonableness is narrower than a completely open review of the merits, but at the same time not a ground as narrow as *Wednesbury* unreasonableness: see *Contaminated Land* (2nd edition) Tromans and Turrall-Clarke at para 6.57(a) (CAB1). The word 'unreasonable' is used in its ordinary meaning, as established by the courts in *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774 (CAB2).

4.3.2 On appeal under section 78L, the appellate authority may quash the remediation notice only[5] if there is 'a material defect in the notice' (see section 78L(2)(a)) but 'subject to that, may confirm the remediation notice, with or without modification' and may do so in a way that is less favourable to the appellant than the remediation notice appealed against: see section 78L(5)(c) (CD1.1) and the 2006 Regulations at regulation 11 (CD1.2).

4.3.3 Part IIA of the Act is based on taking a precautionary approach: see the Defra Environmental Protection Act 1990: Part 2A Contaminated Land Statutory Guidance (April 2012) (CD1.5) ('the 2012 Guidance') at p. 389; para 1.6, p. 392; and para 4.25(a), p. 408. In the context of environmental protection, but with equal application to the protection of human health, the Rio Declaration proclaimed at the UN Conference on

[5] Inspector's Note: the correct quote is as follows-CD1.1 section 78L(2) '*On any appeal under subsection(1)… the appellate authority (a) shall quash the notice, if it is satisfied that there is a material defect in the notice; but (b) subject to that, may confirm the remediation notice, with or without modification, or quash it.*'

Environment and Development in 1992, the definition of the precautionary approach in Principle 15 (quoted in CD16.2.28B, p. 4228):

> 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

4.3.4 In the BSE ('Mad Cow Disease') judgement, *United Kingdom v Commission of the European Communities* (C180/96) [1998] 2 C.M.L.R. 1125, at p.1163 (CAB3), the Court of Justice of the European Union formulated the precautionary principle at para. 63 as follows:

> 'where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.'

4.3.5 The UK Interdepartmental Liaison Group on Risk Assessment's document entitled '*The Precautionary Principle: Policy and Application'* (CD16.2.28B) notes as a key point that 'the purpose of the precautionary principle is to create an impetus to take a decision notwithstanding scientific uncertainty about the nature and extent of the risk' (p.4225). This document also notes as follows (p.4225):

(1) 'The precautionary principle should be invoked when:

- There is good reason to believe that harmful effects may occur to human, animal or plant health or to the environment; and
- The level of scientific uncertainty about the consequences or likelihood of the risk is such that the best available scientific advice cannot assess the risk with sufficient confidence to inform decision-making';

(2) 'Invoking the precautionary principle shifts the burden of proof in demonstrating presence of risk or degree of safety towards the hazard creator. The presumption should be that the hazard creator should provide, as a minimum, the information needed for decision-making'.

4.3.6 The precautionary approach is to be applied both in deciding: (a) whether or not to act; and (b) how to act. It is therefore relevant to grounds (a) (the existence of a Significant Possibility of Significant Harm (SPOSH)) and (b) (remediation requirements).

4.3.7 Part IIA seeks to attach liability based on the 'polluter pays' principle: see the speeches of the House of Lords in *R (National Grid Gas Plc) v Environment Agency* [2007] 1 WLR 1780 (CD2.4) at paras. 8; 21; 27 and 29. The principle being that the 'person responsible for contaminating the

land should be the person primarily liable to pay for its decontamination' (ibid, para. 28). Under the Act a 'polluter' is a person who 'caused or knowingly permitted' the contamination as defined in that Act.

4.3.8 The Act requires in a number of regards that local authorities exercising their functions under that Act 'act in accordance with guidance issued by the Secretary of State in accordance with section 78YA'. In this case that guidance was, until 10 April 2012, to be found in Defra *Circular 01/2006 Environmental Protection Act 1990: Part 2A Contaminated Land September 2006* ('the 2006 Guidance') (CD1.2); and thereafter was the 2012 Guidance (see above).

4.3.9 A number of grounds relied on in this case allege that the Council has failed to act 'in accordance with' the applicable statutory guidance. It is relevant to consider how the courts have interpreted this phrase in the planning context.

4.3.10 Under section 38(6) of the *Planning and Compulsory Purchase Act 2004*, 'if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise'.

4.3.11 In *R v Rochdale MBC, ex p Milne* [2001] Env. L.R. 22 (CAB4), considering the predecessor to section 38(6), namely section 54A of the *Town and Country Planning Act 1990* ('TCPA 1990'), Sullivan J. said at [48] that:

> 'it is not at all unusual for development plan policies to pull in different directions … there may be no clear cut answer to the question: 'is this proposal in accordance with the plan?'. The local planning authority has to make a judgement bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach … For the purposes of section 54A it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein.'

4.3.12 This passage was approved by Ouseley J in *Cummins v Camden LBC* [2001] EWHC Admin 1116, at para. 163 (CAB5). At para. 162, Ouseley J noted that 'the 'accordance' of this determination has to be 'with the plan'; it is not an accordance with each relevant policy of the plan'. At para. 165, he said as follows:

> 'There is a real risk that [the]suggestion that each individual relevant policy had to be examined against the proposal, and the implication that a breach of one necessarily shows a proposal out of accord with the development plan, would impose a legalistic straitjacket upon an appraisal which cannot sensibly be made in such a manner.'

4.3.13 The liability imposed by section 78F(2) of the Act on Class A persons is retrospective in the sense that the activities which constitute causing or

knowingly permitting the contamination may pre-date the entry into force of Part IIA (1 April 2000). 'This is an inevitable consequence of a regime which seeks to ensure the clean up of the country's historic legacy of contaminated land', resulting from activities such as those undertaken at the Gasworks site: see *National Grid Gas v Environment Agency* [2006] 1 WLR 3041 (the decision of Forbes J at first instance, which was overturned on appeal but not on this point) at para. 15 (CAB6).

Ground (a): The existence of SPOSH ('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 of the land to which the notice relates as contaminated land').

4.3.14 Local authorities have an obligation to inspect their area for the purpose of identifying contaminated land (see section 78B(1) of the Act). In performing these functions it must act in accordance with any statutory guidance issued by the Secretary of State under section 78YA of the Act.

4.3.15 If a local authority identifies any contaminated land in its area, it is under a duty ('shall') to give notice of that fact: see section 78B(3).

4.3.16 *'Contaminated land' is defined in section 78A(2) of the Act as being 'any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that – (a) significant harm is being caused or there is a significant possibility of such harm being caused*'. It is also provided that in '*determining whether any land appears to be such land, a local authority shall, subject to subsection (5) below, act in accordance with guidance issued by the Secretary of State in accordance with section 78YA below with respect to the manner in which that determination is made*'.

4.3.17 The phrase 'appears to' is designed to give the local authority a discretion which cannot be interfered with lightly. In *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455 (CAB7), 492-493, Lord Denning M.R. said:

> '*This brings me to the important question: What is the effect of the words 'If it appears to the Secretary of State'? This, in my opinion, does not mean that the minister's decision is put beyond challenge. The scope available to the challenger depends very much on the subject matter with which the minister is dealing. In this case I would think that, if the minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong….*'

4.3.18 Section 78A(4) defines 'harm' as meaning 'harm to the health of living organisms … and, in the case of man, includes harm to his property'.

4.3.19 Section 78A(5) (referred to in the definition of contaminated land in section 78A(2) above) provides that the questions: (i) what harm is to be regarded as significant; and (ii) whether the possibility of significant harm being caused is 'significant' shall again be determined in accordance with guidance issued under section 78YA.

4.3.20 In this case the guidance under section 78YA that was in force at the date the land was identified (that is to say 27 March 2012) as contaminated land was the 2006 Guidance. It was this guidance that the Council was thus obliged to act in accordance with. That this is so is clear from the express terms of the Act itself. But this is also supported by the general position in administrative law that a person can expect no more than to have his circumstances considered in light of the policy in force at the time of the consideration: *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 at para. 73 (CD2.2).

4.3.21 In terms of the emerging draft of what became the 2012 Guidance, this was not, as at the date the land in issue was formally identified, statutory guidance issued under section 78YA. In *R. v Bolton MBC Ex p. Kirkman* (1998) 76 P. & C.R. 548 (upheld on appeal by the Court of Appeal: [1998] Env. L.R. 719) (CAB8), Carnwath J held at p.551 and p.553:

> 'A distinction must be drawn between (1) formal policy statements which are made expressly, or are by necessary implication, material to the resolution of the relevant questions; (2) other informal or draft policies which may contain relevant guidance, but have no special statutory or quasi-statutory status…..
>
> Thus, informal policy statements or reports, or draft circulars, may be relevant depending on the circumstances. In practice, however, it is likely to be rare that an authority is held to have acted unlawfully simply by virtue of its failure to have regard to such non-statutory statements. Time will generally be better spent in this court if the argument is concentrated elsewhere.'

4.3.22 Defra has published non-statutory Guidance on the Legal Definition of Contaminated Land (July 2008) (CD1.10). The following points are relevant (*underlining added*):

1) The term 'contaminated land' is defined according to whether contamination poses a significant level of risk 'and local authorities are given considerable discretion to decide whether such risks exist having studied the details of each specific case' (para. 3);
2) The 2006 Guidance 'goes some way towards explaining the basis on which local authorities should decide whether there is a significant *possibility* of *significant harm,* whilst leaving them with considerable discretion' (para 13);

3) Defining contaminated land is 'not straightforward' (para 15);
4) The law takes a 'risk-based approach' (para. 18);
5) ' … science alone cannot answer the question of whether or not a given *possibility of significant harm is significant* the question of what is significant is a matter of policy judgement based firmly on scientific assessment taking account of all relevant and available evidence' (para 21);
6) 'In the absence of a practicable number-based threshold option (and in recognition of the site-specific nature of risks), Part IIA takes an approach where decisions on whether risks constitute a significant possibility of significant harm (SPOSH) must be taken on a case-by-case basis by local authorities' (para 23);
7) Local authorities 'can use their judgement and expert local knowledge to reach reasonable decisions in the face of complex issues and potentially large degrees of scientific uncertainty' (para. 24);
8) Defra also offered general advice where a decision of a local authority to determine land as contaminated is challenged:
    - 'The law makes local authorities responsible for deciding whether or not land is *contaminated land*. It gives them considerable leeway to exercise their judgement, provided decisions were taken reasonably …' (para. 43(i));
    - 'The law leaves judgements about what is SPOSH to the authority'; (para 43. (ii));
    - There will be cases where there are uncertainties about the risks a site presents and 'thus there may be no single 'correct' decision-making procedure (in terms of legal principle). As a result, it is quite possible that different suitably qualified people, each acting reasonably, could reach different conclusions and make different decisions when presented with the same evidence. Again, the law leaves the judgement to the authority' (para. 43(iii));
    - Authorities should 'seek expert advice' (para. 43(iv));
    - 'If someone were to challenge a local authority's decision, the decision is likely to be legally robust provided the authority can demonstrate that it acted reasonably in accordance with the law. For a challenge to be successful the person would have to demonstrate that the authority had behaved unreasonably (i.e. not just that a reasonable alternative method of making a decision could have yielded a different result' (para. 43(vi));
9) 'Local authorities can use their judgement to ensure that Part IIA focuses on the SPOSH it was designed to address …' (para.

47).

4.3.23 The issuing by the Secretary of State of the 2012 Guidance[6] on 10 April 2012 did not give rise to a legal obligation on the Council to review the determination it had already made. This is because:

1) There is no express provision for automatic review of existing determinations in the 2012 Guidance;
2) Indeed the 2012 Guidance expressly suggests that it does not apply to determinations made prior to the guidance coming into force. Paragraph 3.36 provides that 'Local authorities are not required to produce risk summaries … for land determined as contaminated land before this Guidance came into force.' This is important because it is agreed by the parties that one of the main changes as between the 2006 and 2012 Guidance was the introduction of a requirement for a risk summary: see the Statement of Common Ground[7] at para. 4.2; and Mr Witherington's proof (P8) at para.5.16 pp. 20 – 21);
3) For the purposes of the section of the 2012 Guidance concerning 'reconsideration, revocation and variation of determinations', the 2012 Guidance itself does not constitute 'further information' (see para. 5.20) requiring review, contrary to the submission at Jim 2 Statement of Case (SoC) CD7.3 para. 4.9.3;
4) The 2012 Guidance does not itself suggest alternative guideline values requiring reconsideration of the determination pursuant to para. B49 of the 2006 Guidance (CD1.3);
5) It cannot have been intended that the 2012 Guidance would require review of every determination previously made by local authorities since Part IIA came into force in 2000 and made in accordance with either the 2006 Guidance or the previous guidance, namely DETR *Circular 02/2000, March 2000*, this would involve huge cost, delay and administrative burden.

4.3.24 Moreover, it is necessary to distinguish between:

1) A review of the determination under the 2012 Guidance e.g. re-considering afresh whether the land in issue is contaminated applying the 2012 Guidance; and,
2) Consideration of the 2012 Guidance and deciding whether or not to undertake a review of the determination as in (1).

4.3.25 The Council did the latter, and not the former. It is wrong in law to suggest that the Council should have waited until the 2012 Guidance was published before determining the land as contaminated. The Council was, see above, under a duty to inspect its area and identify contaminated

[6] CD1.5.
[7] ID11.

land: section 78B of the Act. It was required to do so in accordance with the statutory guidance at the time: the 2006 Guidance: section 78A(2). Delaying a determination pending the publication of the 2012 Guidance would have put the Council at risk of breaching their duty under section 78B.

4.3.26 Under the 2006 Guidance, land should not be identified as contaminated land unless a 'pollutant linkage' exists. For a 'pollutant linkage' to exist, it must contain three elements: (1) contaminant; (2) pathway; and (3) receptor: para. A.17. The first element is self-explanatory. A 'pathway' is a route through which a receptor is or could be exposed to or affected by a contaminant: para. A.14. A 'receptor' is a living organism or group of living organisms, e.g. humans, or a piece of property, which is being or could be harmed by a contaminant: para. A.13.

4.3.27 The existence of a 'pollutant linkage' is not sufficient for land to be determined as contaminated. It is then necessary to determine that the linkage is either causing significant harm to the receptor, or presents a SPOSH to the receptor: para. A.19. If it meets this test, the linkage constitutes a 'significant pollutant linkage': para. A.20.

4.3.28 The above scheme on 'pollutant linkages' is replicated in the 2012 Guidance, although they are re-named 'contaminant linkages': paras. 3.8-3.9 (CD1.5).

4.3.29 Although the 2012 Guidance (CD1.5) was not applicable at the time of the determination in this case, it is illuminating to consider one of the key overarching statements on the Part IIA regime in the 2012 Guidance at para. 1.6:

> *'Under Part 2A, the enforcing authority may need to decide whether and how to act in situations where such decisions are not straightforward, and where there may be unavoidable uncertainty underlying some of the facts of each case. In so doing, the authority should use its judgement to strike a reasonable balance between: (a) dealing with risks raised by contaminants in land and the benefits of remediating land to remove or reduce those risks; and (b) the potential impacts of regulatory intervention including financial costs to whoever will pay for remediation (including the taxpayer where relevant), health and environmental impacts of taking action, property blight, and burdens on affected people. The authority should take a precautionary approach to the risks raised by contamination, whilst avoiding a disproportionate approach given the circumstances of each case. The aim should be to consider the various benefits and costs of taking action, with a view to ensuring that the regime produces net benefits, taking account of local circumstances.'*

4.3.30 Further, the 2012 Guidance also states as follows with respect to the need for the local authority to make a judgement (para. 3.32):

'*The uncertainty underlying risk assessments means there is unlikely to be any single 'correct' conclusion on precisely what is the level of risk posed by land, and it is possible that different suitably qualified people could come to different conclusions when presented with the same information. It is for the local authority to use its judgement to form a reasonable view of what it considers the risks to be on the basis of a robust assessment of available evidence in line with this Guidance.*'

Ground (b): Remediation requirements ('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').

4.3.31 This ground is focussed on the Remediation Notice which has the meaning given to it by section 78E(1) (see section 78A(9) of the Act). Section 78E(1) imposes a duty (see the heading to the section, CD1.1, p. 34 and the language used - 'shall') on enforcing authorities where it has identified any contaminated land in its area to serve on each 'Appropriate Person' (see below) a notice 'specifying what that person is to do by way of remediation …'.

4.3.32 Section 78E(4) provides that '*the only things by way of remediation which the enforcing authority may do, or require to be done, under or by virtue of this Part are things which it considers reasonable, having regard to— (a) the cost which is likely to be involved; and (b) the seriousness of the harm …*'.

4.3.33 'Remediation' is itself defined in section 78A(7) of the Act as:

> '(a) the doing of anything for the purpose of assessing the condition of—
>
> (i) the contaminated land in question …
>
> (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 …
>
> (ii) of restoring the land to [its] 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;
> And, cognate expressions shall be construed accordingly'.

4.3.34 The content of a Remediation Notice is provided for by Regulation 4 of the 2006 Regulations (CD1.2, p. 164-165). The remediation notice served in this case was in compliance with those requirements.

4.3.35 Section 78E(5) of the Act provides that in 'determining for any purpose of this Part (a) what is to be done … by way of remediation in any particular case, (b) the standard to which any land is, or waters are, to be remediated pursuant to the notice, or (c) what is, or is not, to be regarded as reasonable for the purposes of subsection (4) above, the enforcing authority shall have regard to any guidance issued for the purpose by the Secretary of State'.

4.3.36 The remediation notice is dated 17 March 2015. The relevant statutory guidance by which time was the 2012 Guidance.

4.3.37 The 2012 Guidance (CD1.5) in section 6 provides guidance on remediation of contaminated land. The following points are relevant:

1) The 2012 Guidance does 'not attempt to set out detailed technical procedures or working methods' (para. 6.4);
2) 'The broad aim of remediation should be: (a) to remove identified significant contaminant linkages, or permanently to disrupt them to ensure they are no longer significant and that risks are reduced to below an unacceptable level; and/or (b) to take reasonable measures to remedy harm or pollution that has been caused by a significant contaminant linkage' (para. 6.5);
3) In considering the reasonableness of remediation 'the enforcing authority may only require remediation action in a remediation notice if it is satisfied that those actions are reasonable. In deciding what is reasonable, the authority must consider various factors, having particular regard to: (a) the practicability, effectiveness and durability of remediation; (b) the health and environmental impacts of the chosen remedial options; (c) the financial cost which is likely to be involved; and (d) the benefits of remediation with regard to the seriousness of the harm or pollution of controlled waters in question' (para. 6.20);
4) 'The identity or financial standing of any person who may be required to pay for a remediation action is not relevant to the consideration of whether the costs of a remediation action are reasonable (although they may be relevant in deciding whether the cost of remediation can be imposed on such persons)' (para. 6.30);
5) 'In considering the benefits of remediation, the enforcing authority should consider, inter alia: (a) the seriousness of any harm and the various factors that led the land to be determined; and (b) the context in which the effects are occurring or might occur. In considering benefits the analysis can be undertaken in terms of monetary value on a qualitative consideration' (para. 6.31).

Ground (c): Liability of Jim 2 ('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').

General

4.3.38 The test is whether Jim 2 caused or knowingly permitted contamination to be 'present in, on or under' the land, rather than whether Jim 2 caused or knowingly permitted Benzo(a)pyrene (B(a)P) to enter the land: see section 78F(2). This is distinct from the now repealed section 85(1) of the *Water Resources Act 1991*, which concerns the *entry* of matter into controlled waters (CD1.9). This distinction is accepted by the Inspector in *St Leonard's Court*. CD 2.6, para. 896. See also the 2006 Guidance, CD1.3, para. 9.8.

Causing

4.3.39 Where, as in section 78F(2) of the Act, the legislative structure is to impose liability where a person has 'caused or knowingly permitted', the word 'caused' requires that the contamination was caused by something the person did, rather than merely failed to prevent: see *Environment Agency v Empress Cars* [1999] 2 AC 22 (CD2.1); that is to say a 'positive act' (see p. 27F – H per Lord Hoffmann). However, it was wrong to take an overly restrictive view of the requirement that the person must have done something (ibid p. 28D -E); thus, for example, maintaining lagoons of effluent or operating the municipal sewage system were 'doing something' even if where this led to pollution it was not the immediate cause. Accordingly a person can cause contamination without being the 'immediate cause' (ibid, p.35G-H). Furthermore, for the purposes of determining whether a party 'caused' the contamination, it is irrelevant that there might be other parties who 'caused' the contamination (ibid, p.35H-36A). Finally in this regard, causing is to be given a 'common sense' meaning (ibid p.29F and 31E), and this requires consideration of the purpose of attributing responsibility under the Act concerned.

4.3.40 Thus causing something can be by way of either an act, a series of acts, or a failure to act: see the 2006 Guidance, CD1.3 para. 9.9, p. 249 which still carries persuasive force. Further, this was the position adopted by the Inspector in *St Leonard's Court* CD2.6, para. 897. The Inspector's approach to causation on this point and on others at paras. 896-903 was approved by the Secretary of State at CD 2.6, p. 482-3, and also by the High Court in *R. (on the application of Crest Nicholson Residential Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2011] Env. L.R. 1 (CAB9). Sales J at paras. 31-32 supported 'a commonsense approach to the causative mechanisms identified by the inspector', and rejected the claim that the Inspector had failed to spell out his conclusions in more detail than he did. The High Court also dismissed a separate challenge, *R. (on the application of Redland Minerals Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2011] Env. L.R. 2

(CAB10), in which Sales J held that where there is no single simple causative mechanism at issue, 'a broad evaluative judgement on causation was required' (para. 37).

4.3.41 Causing under section 78F(2) does not require any *mens rea* in the sense of knowledge, negligence or intention: see *Empress Cars* (CD2.1) at 32B. This also follows from the legislative structure of section 79L(2) which imposes liability either for 'causing' or knowingly permitting.

4.3.42 A person can cause contamination by exacerbating the extent of existing contamination: *St Leonard's Court* at para. 896-903 CD2.6.

4.3.43 A number of acts / failures to act can constitute 'causing' contamination, including:

1) Spreading contaminated material around a site;
2) Levelling the contaminated ground of a site, whether by raising or lowering;
3) Preparing contaminated ground with a view to construction of buildings on it;
4) Demolition of a building associated with contamination;
5) Mixing demolition rubble into the ground;
6) Failing to remove contamination during the process of demolition and building operations;
7) Any other physical interaction with contaminated ground.

Knowingly permitting

4.3.44 Actual knowledge is not required. Contrary to what is alleged in the appellant's grounds of appeal, at CD7.1 para. 26, *Circular Facilities v Sevenoaks DC* [2005] Env LR 35 (CD2.3) is not authority for the proposition that actual knowledge is required. That case concerned the circumstances in which knowledge by an individual could be imputed to the company, and the issue was the sufficiency of clarity of the magistrates' reasoning. Jim 2 has admitted in correspondence that the case law is not definitive on whether constructive knowledge is sufficient: CD11.2, p.2.

4.3.45 Constructive knowledge is sufficient:

1) This was the approach taken by the Inspector in *St Leonard's Court* CD2.6 at para 933-934, with which the Secretary of State was 'minded to agree' CD2.6 at p.482, though he didn't need to decide the matter. The Inspector was concerned that to exclude constructive knowledge would mean that potential Class A appropriate persons would be 'encouraged not to look for contaminants'. He said, at para 933:

> '… the underlying principle [is] that it is only as a last resort that responsibility for cleaning up a site should fall to those who merely own or occupy the land. Clearly, it would be unreasonable to expect a site to be screened for the presence of anything and everything, but it is appropriate that persons who intend to develop the site should investigate the presence of contaminants that might reasonably be expected to be there, given the site's history.'

2) The underlying purpose of the Act, and an important public policy of reducing contamination, would be frustrated by a requirement of 'actual' knowledge. It would encourage developers of potentially contaminated sites to engage consultants to undertake their investigations in an inadequate way, and turn a blind eye to potential contamination on site.

3) The sufficiency of constructive knowledge has been accepted in a number of other related contexts, e.g.: *Schulmans Incorporated Limited v. National Rivers Authority* [1993] Env. LR D1 (CAB11) (Leggatt LJ in the Divisional Court, in the criminal context of knowingly permitting poisonous matter to be discharged into controlled waters).

4.3.46 Knowledge is only required as to the presence of substances, and not as to their harmful potential**:** *Circular Facilities* CD2.3, para. 41-3 (*obiter*), and *National Grid* (CD2.4) (paras. 12 and 19 – see below). To hold otherwise would frustrate the retrospective purpose of the legislation, because it would be extremely difficult for an enforcing authority to demonstrate knowledge of the contaminating effect of a substance in relation to activities occurring many years ago. See further in this regard the Inspector's conclusions at *St Leonard's Court* (CD2.6) at paras. 906 – 907.

4.3.47 A person who has caused or knowingly permitted the presence of Substance A, e.g. organic material associated with a gasworks, shall also be taken to have caused or knowingly permitted the presence of a Substance B, e.g. B(a)P, which is there as a result of a chemical reaction or biological process affecting Substance A: section 78F(9) of the Act.

4.3.48 Specific knowledge of the presence of an individual constituent component of a substance, e.g. B(a)P, is not required. It is sufficient that Jim 2 knew of the presence of the substance as a whole, namely partially combusted 'organic material' or 'gasworks waste'. In *Circular Facilities*, the 'substance' was 'organic material': para. 32 (CD2.3). To require specific knowledge would frustrate the purpose of the legislation, which is designed to be retrospective and not be hindered by the relative lack of scientific understanding in the past.

4.3.49 In this regard, it is significant that in *National Grid*, the significant pollutant linkage referred to 'polyaromatic hydrocarbons ('PAHs') including benzo(a)pyrene' (CAB6), and the House of Lords (CD2.4) (see below)

regarded a developer who purchased the site in 1966 as having 'knowingly permitted' the contamination. What mattered was instead knowledge of the existence of gasworks waste substances, i.e. coal tar residues, in general: see para. 12 of *National Grid* (CD2.4). The lack of specific knowledge of B(a)P in 1966 was not relevant.

4.3.50 The question as to what knowledge possessed by individual members of a company can be attributed to that company is to be determined by ordinary principles of corporate law: see e.g. *Circular facilities* at para. 35 CD2.3.

4.3.51 'Permitting' need not relate to giving permission for the original entry of contaminants onto land. It can also mean 'the permitting of a state of affairs, i.e. the continued presence of the contaminants in the land': see *Tromans* at para 5.45, CAB1.

4.3.52 A person permitted something if (see the 2006 Guidance CD1.3 para. 9.12, which still has persuasive force, as well as *Tromans* at para. 5.45, CAB1):

1) He had the power to take steps to prevent it;
2) He had a reasonable opportunity to exercise that power;
3) He did not exercise that power.

4.3.53 In the *National Grid* case (CD2.4), Lord Scott, with whom the other members of the House of Lords agreed, held that where a developer came to a site which had been the location of gas production (see para. 9), obtained planning permission and then built the houses without remediation the developer could arguably be said to have 'knowingly permitted' the contamination where it was aware of the presence of coal tar under the ground and allowed it to remain there (see para. 19). The factual background to this conclusion has some significant similarities to the present case, and it is therefore worth exploring it in detail. It is set out in the first instance decision of Forbes J (CAB6), as follows:

1) General context para. 25:

> *'From the early 19th century until the early 1970s, the commercial production of coal gas generated harmful residues that were often disposed of on site and were capable of leading to contamination. However, in the 1960s and 1970s, the commercial manufacture of coal gas across the UK was gradually replaced by the production of natural gas. Although those sites or parts of sites that were no longer needed were gradually remediated to the then prevailing environmental standards, potentially hazardous substances often remained*.'

2) The site was a group of 11 residential properties, on land which formerly hosted a gasworks: paras. 26-27.

3) The Gasworks site was sold by East Midlands Gas Board to a developer, who then sold it a few months later to another developer, who obtained planning permission for residential development. While the houses were under construction, seven of the eleven plots were sold on to the Secretary of State for Defence. Subsequently, the plots all passed into private ownership: para 29.

4) It was not known exactly when the contaminating substances were generated. However, it was common ground that the activities that in all probability gave rise to those substances (i.e. the production of coal gas) occurred when the site was in the ownership of the original operators of the Gasworks: para 30.

5) At para. 31, Forbes J said:

> '*It is not possible to say beyond doubt how the land came to be in its current pre-remediation works condition. However, the available evidence suggests the following. (i) In and around 1965, when the …site was first sold to private developers, the general practice of the area gas boards was to decommission sites prior to sale. (ii) At that time, it was accepted practice to draw off liquids as far as possible, leaving residues in underground containers that were either backfilled with rubble or capped and built over. (iii) Although coal tar was known to be carcinogenic, at the time it was not considered dangerous to leave coal tar residues under the land, provided they were properly contained.(iv) The records do not show whether [the Gas Board]decommissioned the …site prior to the sale to [the developer]in 1965: however, the conveyance to that company described the land being conveyed as including 'the underground tanks installed on part thereof'. (v) During the remediation works undertaken at the site in the latter part of 2005, two such tanks were discovered. Both were intact. (vi) An expert report prepared by an independent contractor engaged by the EA suggests that, during the development of the site, the developer spread the contaminating materials around the site*.'

6) In October 2001, a resident of a property on the site discovered a pit filled with a tar-like substance in his back garden. On further investigation by the council, this proved to be coal tar, a by-product of the gas making process. Forbes J noted that coal tar was commonly stored or disposed of at gasworks within underground brick-walled tanks [33].

7) Following investigation by the Environment Agency (EA), the local council determined the land as contaminated: para 34.

8) At para. 35: '*The site investigations found there to be a layer of made ground consisting of a mixture of natural sand and gravel materials, together with debris, wastes and structures derived from the former gasworks. The contaminants were*

present within the soil, and in particular as part of liquid coal tars found within the redundant gasworks infrastructure below ground.'

9) Forbes J noted that 'the statutory guidance requires the identification of 'significant pollutant linkages' ('SPLs'), i.e. a substance which is a potential source of harm because there is a pathway by which it may reach a vulnerable target or receptor. The record of determination by [the council] identified four separate such linkages', including: 'polyaromatic hydrocarbons ('PAHs') including benzo(a)pyrene which could reach human beings through dermal contact, ingestion, inhalation of dust or ingestion of vegetables grown in contaminated soil, thereby presenting a significant risk of significant harm' : para. 36.

10) In its decision document, the Environment Agency confirmed the conclusion concerning the above SPL: para. 37.

11) The Environment Agency's proposed remediation actions included, para. 38:

> *'… removal of all contaminated soils to a depth of at least 0.6 m, …placement of a 'geogrid' type separator at 0.6 m below ground to prevent future residents accidentally coming into contact with contamination at any lower depth, …replacement of excavated soils with clean material capable of use for domestic gardens and …restoration of the site amenity to conditions equivalent to those before the work (i.e. restoration of levels, drainage, boundaries and garden/domestic infrastructure).'*

12) The EA determined that the developers could not be 'found' for the purposes of the Act because, after inquiries were made at Companies House, it was revealed that the developers had been dissolved: para. 40.

13) The EA also held that, 'if the companies had still been in existence', it would not have considered the first developer, who merely held the land for a few months before selling it, to be a Class A appropriate person.

14) However, it would have regarded the second developer, who built the houses, to be a Class A person 'for having knowingly permitted the continued presence of the contaminating substances on the land, on the basis that the company had knowledge that the land had been used as a gasworks, that it is improbable that it would have been unaware of the presence of the contaminating substances during the development of the site and because it had obtained planning permission and developed the site and thus had had an adequate opportunity to remediate the site.'

15) The EA did not consider the council, who granted planning

permission, or the Ministry of Defence, who subsequently bought some of the plots, or any of the subsequent owners of individual properties, to have had knowledge of the presence of contaminants: paras. 41-42.

4.3.54 It is important to note that the House of Lords indicated support for the EA's conclusions on the 'knowingly permitted' point at para. 19 of Lord Scott's speech (CD2.4), despite earlier noting that '*it was not, in the mid-1960s when the [Gas Board] sold the site or previously, considered dangerous to leave coal tar residues under the land, provided they were contained'*: para. 12. The Lords instead drew attention to the fact that '*the conveyance to the developer described the site as including the underground tanks installed on part thereof*': para. 12. In other words, Lord Scott's conclusions on 'knowingly permitted' regarded the scientific knowledge or perceptions of 'dangerousness' as irrelevant. They were instead based on the mere awareness of the existence of the substance. This is consistent with the conclusion of Newman J in *Circular Facilities* at para. 43 (CD2.3).

Escape

4.3.55 If Person A is found to have caused or knowingly permitted a substance to be present in Land A, and those substances appear to the enforcing authority to have escaped into Land B, Person A shall also be taken to have caused or knowingly permitted those substances to be present in Land B: see section 78K(1) of the Act.

4.3.56 The question of any knowing or deliberate action is irrelevant. The 'escape' can be purely accidental and still engage section 78K. It can apply where it 'appears' to the authority that the substances have escaped. This element of discretion reflects the fact that determining the origin of contaminants is a highly complex technical issue. There must be some factual basis, but 100% certainty is not required: see, in the context of planning enforcement, which also uses the 'appears to' phrase, *Ferris v Secretary of State for the Environment* [1988] JPL 777 (CAB12).

Ground (d): Other persons ('subject to paragraph (2), 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') and 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)'

General

4.3.57 Regulation 7(1)(d) allows an appeal on the basis 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' but subject to regulation 7(2) which provides (so far as is relevant for these purposes):

> 'A person may only appeal on the ground specified in paragraph (1)(d) in a case where—
>
> (a) the enforcing authority has determined that he is an appropriate person by virtue of subsection (2) of section 78F and he claims to have found some other person who is an appropriate person by virtue of that subsection.'

4.3.58 Section 78F(6), to which ground (e) relates, provides '[w]here two or more persons would, apart from this subsection, be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued for the purpose by the Secretary of State whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing'. This is dealt with in section 7 of the 2012 Guidance (CD1.5).

Fletcher

4.3.59 There is no obligation in the statutory scheme on an authority to apply to restore a potentially liable but dissolved company to the register of companies under section 1029 of *the Companies Act 2006* (CAB14):

1) Section 78F(4) provides that the owner/occupier of contaminated land will only be liable if no person who caused/knowingly permitted the contamination 'has, after reasonable inquiry, been found'.
2) The 2012 Guidance (CD1.5) at paragraph 8.25 envisages that a dissolved company cannot be 'found' for the purposes of section 78F(4).
3) The House of Lords has held that dissolved companies cannot be 'found' for the purposes of section 78F: *R (National Grid Gas plc (formerly Transco plc)) v Environment Agency* [2007] 1 WLR 1780 CD2.4, at para 19. See also the first instance decision of Forbes J (CAB6) at para. 40.
4) During a debate in the House of Lords on amendments to the Act, Viscount Ullswater, on behalf of the Government of the day, explained that the situations in which 'the polluter could not be found … might include the case of a company having gone into liquidation': see *Hansard, HL Vol.562, col.209* (CAB13 – page 4 of 42).

4.3.60 In the alternative, even if it could be plausibly argued (which it cannot) that dissolved companies can, in some circumstances, be 'found' for the purposes of the Act, the position can only be that the authority is obliged to consider restoration, and conduct a 'reasonable inquiry'.

4.3.61 It is relevant to any obligation to consider restoration that another Class A appropriate person can be 'found' in relation to the same land: this promotes the intention of section 78F to ensure that owners/occupiers are only liable as a last resort. In circumstances where there is no other Class A person, the obligation to consider restoration may be more onerous.

4.3.62 The parties with standing to make an application for a restoration order include '*any person with a potential legal claim against the company'* and 'any person appearing to the court to have an interest in the matter': section 1029(2) of *the Companies Act 2006* (CAB14).

The Council

4.3.63 The Council has determined that it is excluded from liability by the Exclusion Test 6, set out at para. 7.57 onwards of the 2012 Guidance (CD 1.5, p.441). '*The purpose of this test is to exclude from liability those who would otherwise be liable solely because of the subsequent introduction by others of the relevant pathways or receptors in the significant contamination linkage'*: para. 7.57. The essential point is therefore the completion of a significant pollutant linkage by introduction of a pathway or receptor.

4.3.64 A receptor, for the purposes of applying Exclusion Test 6, must be a physical thing and cannot include a theoretical possibility, such as comes with the grant of an outline planning permission which is never implemented: see paras. 3.8(b) and 7.58(b) of the 2012 Guidance CD1.5. This is strongly supported by the 2012 Guidance on Test 6 at para 7.59(a). What is required in this context is a 'relevant action' by a member of the liability group (see para. 7.58(a)) and this is defined as including '*the making of any material change in the use of the land in question for which a specific application for planning permission was required to be made (as opposed to permission being granted, or deemed to be granted …*').

4.3.65 Jim 2's amended Grounds of Appeal (CD7.2) allege that the Council brought about a material change of use of the land to residential use (see para. 33a.). This is incorrect. The Council obtained planning permission but never implemented it.

4.3.66 For the purposes of section 91 of the Town and Country Planning Act 1990 (TCPA) (CAB15) (which limits the duration of a planning permission) '*development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out'*: see section 56(2) and (3) of the TCPA 1990 (CAB15).

4.3.67 Section 56(4) of the TCPA 1990 provides: '*in subsection (2) 'material operation' means - (a) any work of construction in the course of the erection of a building; (aa) any work of demolition of a building; (b) the digging of a trench which is to contain the foundations, or part of the*

foundations, of a building; (c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b); (d) any operation in the course of laying out or constructing a road or part of a road; (e) any change in the use of any land which constitutes material development.' The position was the same under the Town and Country Planning Act 1971: see sections 22, 41 and 43.

4.3.68 The obtaining of planning permission itself does not change the use of land. Only when there is a material operation is development begun. The use is only changed when the permission is implemented (i.e. more than merely 'begun'). To hold otherwise leads to the startling consequence that the non-implementation of a planning permission would constitute a breach of planning control, because the new 'permitted use' was not being complied with. This is plainly incorrect. A planning permission *permits* rather than requires implementation. Jim 2's position would also have the unfortunate result that a person could be liable under Part IIA without at any point owning, occupying or controlling the relevant land, because obtaining planning permission is not contingent on ownership/control/occupation of land.

4.3.69 In *Welwyn Hatfield BC v SSCLG and Beesley* [2011] 2 AC 304 (CAB16), Lord Mance rejected the submission that a change of use occurs at the moment when a permission is initiated. At para. 13, he held that 'even if the planning permission were to be treated as having been initiated or begun, it was not implemented in any further or substantial respect; so the building constructed was not a building which could be regarded as having any permitted use'. He noted that 'the word 'use' … is on its face used in a real or material sense, rather than in the legal sense of 'permitted use'': para. 14. Further, 'a use permitted by a planning permission but never implemented is irrelevant': para. 14.

4.3.70 It is again relevant to note the treatment of this issue by Forbes J in the *National Grid* case (CAB6). He notes at para. 44 of his judgement that the residents of the properties on the old Gasworks site 'were 'receptors' introduced by [the developer] as developer of the site'. In other words, the receptors were the residents themselves, rather than the mere theoretical possibility of residential development.

4.3.71 Jim 2 has sought to argue that the Council cannot rely on Exclusion Test 6 because of the activities it allegedly performed on site prior to Jim 2's ownership: paras 2.23-2.24 of Jim 2's Reply to the Council's Statement of Case CD7.5, p. 427. The precise nature of these activities is a matter of dispute, but it is submitted that the resolution of this factual dispute is irrelevant as a matter of law for the purposes of Exclusion Test 6. The only relevant question is who completed the significant pollutant linkage. In this case, Jim 2 introduced the receptors to the site. Any activity by the Council prior to Jim 2's introduction to the site is irrelevant.

Others

Triton Investments Limited, Shenstone Properties Limited and individual leaseholders

4.3.72 It is agreed with Jim 2 that the question of who built the houses is a question of fact: see para 2.25 of Jim 2's Reply to the Council's Statement of Case CD7.5, p. 428. However, the test under ground (d) is one of reasonableness. The Council therefore submits that the question is whether the Council gave a reasonable answer to the question of fact, given all of the available information. The relevant activities occurred in the 1970s, and it is therefore not possible to reach a conclusion on the facts with absolute certainty. The task for the Council was to act reasonably and in accordance with the guidance. This accords with the approach of Forbes J in *National Grid*, at para. 31 (CAB6), in which he said 'it is not possible to say beyond doubt how the land came to be in its current pre-remediation works condition'. Instead, Forbes J considered what the 'available evidence suggests'. The Council cannot reasonably be expected to have done more than this.

Ground (m) – Hardship ('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') and Ground (n): Costs recovery ('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')

4.3.73 Section 78N(3)(e) deals with a situation 'where the enforcing authority considers that, were it to do some particular thing by way of remediation, it would decide, by virtue of subsection (2) of section 78P below or any guidance issued under that subsection', that it would not seek to recover any of the reasonable cost or only seek to recover a portion of that cost.

4.3.74 Section 78P deals with costs recovery, and provides that the authority must have regard to any hardship which the recovery may cause to the person from whom the cost is recoverable.

4.3.75 If the authority is satisfied that its own powers of remediation are exercisable under section 78N(3)(e) on hardship grounds, it shall not serve a remediation notice: section 78H(5)(d).

4.3.76 Grounds (m) and (n) may be taken together, as they both relate to the alleged hardship and unreasonableness of a decision by the Council to recover full remediation costs from Jim 2.

4.3.77 The grounds are brought on the basis of (a) the allegedly poor financial position of Jim 2, and (b) the fact that other causers/permitters cannot be found (thereby engaging paragraph 8.25 of the 2012 Guidance CD1.5: see below).

4.3.78 As is clear from the wording of sections 78P, 78H and 78N, grounds (m) and (n) and para. 8.25 of the 2012 Guidance, costs recovery is a matter of discretion for the authority: see also *Tromans* at para. 6.28 (CAB1).

4.3.79 Although no longer in force, it is useful to consider the limited guidance on 'hardship' at paras. 10.8 to 10.9 of Annex 2 to the 2006 Guidance (CD1.3):

> '10.8 The term 'hardship' is not defined in Part 2A, and therefore carries its ordinary meaning –hardness of fate or circumstance, severe suffering or privation.
>
> 10.9 The term has been widely used in other legislation, and there is a substantial body of case law about its meaning under that other legislation. For example, it has been held appropriate to take account of injustice to the person claiming hardship, in addition to severe financial detriment. Although the case law may give a useful indication of the way in which the term has been interpreted by the courts, the meaning ascribed to the term in individual cases is specific to the particular facts of those cases and the legislation under which they were brought.'

4.3.80 The test of hardship is objective, based on what the reasonable person would regard as hardship: *Rukat v Rukat* [1975] 1 All ER 343 at 351 (CAB17).

4.3.81 Section 8 of the 2012 Guidance (CD1.5) 'sets out principles and approaches, rather than detailed rules. The enforcing authority should have regard to the circumstances of each individual case': para. 8.4.

4.3.82 Para. 8.5 provides as follows:

> 'In making any cost recovery decision, the enforcing authority should have regard to the following general principles:
>
> (a) The authority 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.
>
> (b) The 'polluter pays' principle should be applied with a view that, where possible, the costs of remediating pollution should be borne by the polluter. The authority should therefore consider the degree and nature of responsibility of the relevant appropriate person(s) for the creation, or continued existence, of the circumstances which lead to the land in question being identified as contaminated land.'

4.3.83 The general starting point is that the authority should recover all the

costs, which should only be departed from where hardship is demonstrated. Costs recovery is not an 'all or nothing' decision: para. 8.6.

4.3.84 Para 8.8-9 provides:

> '8.8 In general, the enforcing authority should expect anyone who is seeking a waiver or reduction in the recovery of remediation costs to present any information needed to support such a request.
>
> 8.9 In making any cost recovery decision, the enforcing authority should consider any relevant information provided by the appropriate person(s). The authority should also seek to obtain such information as is reasonable, having regard to: (i) accessibility of the information; (ii) the cost, for any of the parties involved, of obtaining the information; and (iii) the likely significance of the information for any decision.'

4.3.85 The burden is accordingly on Jim 2 to demonstrate that a waiver or reduction is justified. The authority is only required to obtain such information as is reasonable. Mere assertions of impecuniosity will not suffice: see the related planning context of compliance with an enforcement notice in *Kent CC v Brockman* [1996] 1 P.L.R. 1, at p.4F-G (CAB18).

4.3.86 *Tromans* at para. 6.33 (CAB1) provides:

> '… where the remediation actions required involve very substantial cost, and the authority is met with a claim by a polluter who is a major company that they should pay only a small proportion of that cost, or indeed nothing at all, on hardship grounds, then the authority may well be justified in making its own enquiries into the matter, and taking professional advice as to the validity of the company's hardship case. If it did not, the authority could properly be criticized for failing to take proper steps to safeguard the public purse, which would otherwise have to bear the cost of remediation.'

4.3.87 Para. 8.24 of the 2012 Guidance provides:

> '… the enforcing authority should consider whether or not the Class A person is likely to have profited financially from the activity which led to the land being determined to be contaminated land (e.g. as might be the case if the contamination resulted from a business activity). If the person did profit, the authority should generally be less willing to waive or reduce costs recovery than if no such profits were made.'

4.3.88 The existence of another Class A person that cannot be 'found' (in this case because the company has been dissolved) only requires the Council to 'consider' waiving or reducing its costs recovery: see paragraph 8.25.

4.3.89 It is not suggested that the appellant is a 'small or medium-sized enterprise'. However, it is revealing that, under the 2012 Guidance at

para. 8.16, costs recovery should not be waived or reduced by the enforcing authority where:

> '(a) it is satisfied that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation; (b) it appears that the enterprise would be likely to become insolvent whether or not recovery of the full cost takes place; or (c) it appears that the enterprise could be kept in, or returned to, business even if it does become insolvent under its current ownership.'

4.4 ***Legal submissions on behalf of Jim 2 Limited*** (the appellant)

4.4.1 These legal submissions address in particular Grounds (d), (e), (m) and (n) of the appeal.

Causing

4.4.2 The appellant agrees with the Council that the most helpful authority on causing is the *Empress Car* case,[8] which suggests that there must have been some positive action or activity by the appellant which caused the relevant substance to be present in, on or under the land. It is agreed that the appellant's actions need not have been the sole cause.

4.4.3 However, simply leaving in place a contaminant which some other party caused to be present is not causing its presence. It may be, depending on the facts, knowingly permitting its presence.

4.4.4 In the case of a person who redevelops land on which contaminants are present there must have been some positive action which caused the contaminant to be more extensively present, e.g. breaking up an impermeable surface so that rainwater drives contaminants downwards, as in the St Leonard's Court case, or moving contaminants from one place to another where they were not previously present. Redistributing contaminated material within an area where it is already present would not be causing it to be present, unless the effect was to increase the concentration of contaminants within part of the area to a level at which it becomes 'contaminated' for the purposes of Part IIA.

4.4.5 The issue in this appeal is therefore a factual one of whether there was some such positive action on the part of Jim 2.

Knowingly permitting

4.4.6 There is a primary and fundamental issue as to what the term 'knowingly permitted' relates to. Is it the initial entry of the substance onto the land

[8] Environment Agency v. Empress Car Co (Abertillery) Limited [1999] 2 AC 22 (CD 2.1)

or to their continued presence? Perhaps surprisingly, for such an important issue the legislation leaves it unclear. However, the prevalent view is that it can refer to continued presence,[9] and the appellant does not seek to argue otherwise.[10]

4.4.7 The appellant agrees with the Council that current authority supports the position that the knowledge required is of the presence of the substance in question and that there need not have been knowledge of its polluting characteristics or potential harmfulness: see *Circular Facilities (London) Ltd. v. Sevenoaks District Council*[11]. However, the focus is on knowledge of the actual substance in question, in this case B(a)P. Knowledge of the presence of a broader generic category of substances of which the substance in question might form part (e.g. 'gasworks waste')[12] or of a broad family of substances of which the substance in question is one (e.g. PAHs) is not sufficient[13]. The circumstances where a person may be regarded as an appropriate person in relation to a different substance than that which they caused or knowingly permitted to be present (substance A) are limited to different substances which are present as the result of a chemical reaction or biological process affecting substance A: see section 78F(9).

4.4.8 As the appellant is a company, an important issue is what knowledge should be attributed to the company. It is necessary here to apply company law principles of attribution of knowledge in so far as these are of any help: *see Meridian Global Funds Management Asia Ltd. v. Securities Commission*[14]. It certainly should not be assumed that the company is to be treated as having the knowledge of every employee or agent. The fact, for example, that the operator of a JCB excavating a site notices a substance does not mean that his employing company had that knowledge.

4.4.9 Clearly the starting point in any case will be whether there was actual knowledge of the presence of the substance. This might be either direct knowledge (e.g. identification of the substance visually or by smell, or by chemical analysis) or indirect knowledge (e.g. being informed of the presence of the substance by another person). The Council's primary case is that the appellant had actual knowledge by the Contract of Sale dated 14 January 1972. However, the only information which the Contract provided was that (a) the site was a former gasworks, and (b) the developer should bear in mind in preparing a layout that some parts of the land may be unsuitable for building. That is plainly insufficient as the

[9] See Tromans & Turrall-Clarke, Contaminated Land (2nd edition) paras. 5.27 – 5.32 (AAB6).
[10] Whilst later guidance, even statutory guidance, cannot of course affect the interpretation of the primary legislation, it is notable that the Guidance does in places refer to knowingly permitting the continued presence of a substance: see paras. 7.67 and 7.73 (CD1.5).
[11] [2005] EWHC 865; [2005] Env LR 35 at para. 43 (CD 2.3).
[12] See Council's SoC, para. 147(a) (CD7.4).
[13] This accords with the decision in St Leonard's Court (CD 2.6) where a clear distinction was drawn between the two substances in issue, bromide and bromate: see for example paras 35, 36 and 39 of the Secretary of State's decision.
[14] [1995] 3 WLR 413 (AAB1).

basis for an argument that the appellant had actual knowledge of B(a)P.

4.4.10 In the absence of actual knowledge of B(a)P, of significant importance in this case is whether 'knowledge' which falls short of actual knowledge of facts suffices for this purpose: this again is unfortunately not a straightforward question.[15] Broad arguments that knowledge that property had been used for some industrial purpose should be equated with knowledge of the presence of substances which might have been used or produced by that activity should be treated with caution. This is the Council's second string argument: that the appellant had constructive knowledge: it was purchasing a gasworks site and 'it must have been apparent … that there were substances in the ground that would warrant investigation'. The Council asserts that the appellant was '… shutting its' (sic) eyes to the obvious'.[16]

4.4.11 There may be situations where there are obvious indications that a contaminant is likely to be present (for example knowledge that there has been a leaking pipe or tank) and the developer shuts his eyes to the obvious and chooses not to investigate. In those circumstances of 'wilful blindness' it may be appropriate to treat the developer as having knowledge of what such investigations would have revealed had they been carried out. However, that is a very different case to saying that a purchaser and developer of a gasworks or other industrial site should be treated as having constructive knowledge of substances which might have been revealed by an intrusive investigation of the site. This is especially so when the development in question took place many years ago, when awareness of the risks of contamination, standard practice on site investigation and planning and other regulatory requirements were quite different (see the evidence of Mr Wielebski).

4.4.12 It is relevant here to consider the terms of the statutory guidance on liability in Section 7 of the 2012 Guidance.[17] Test 3 (sold with information) provides for the exclusion from liability of persons who caused or knowingly permitted the presence of a contaminant but sold the land at arm's length to another member of the liability group with sufficient relevant information. The buyer would of course have to be a 'causer/knowing permitter' in their own right for the test to operate. The Guidance (para. 7.47(c)) includes the requirement that before the sale became binding, the buyer had '… information that would reasonably allow that particular person to be aware of the presence on the land of the contaminant identified in the significant pollutant linkage in question, and the broad measure of that presence …'.

4.4.13 It may be noted that: (1) knowledge is knowledge of the specific substance identified in the pollutant linkage; and (2) awareness is awareness of the actual presence of the substance, not its likely or

[15] See Tromans & Turrall-Clarke, Contaminated Land (2nd edition) paras. 5.35 – 5.37 (AAB6).
[16] Council SoC para. 147(c) (CD7.4).
[17] The earlier version of the Guidance is in the same form on this point.

potential presence.

4.4.14 The Guidance goes on at para. 7.48(d) to provide that, '… in transactions since the beginning of 1990 where the buyer is a large commercial organisation or public body, permission from the seller for the buyer to carry out his own investigations of the condition of land should normally be taken as sufficient indication that the buyer had the information referred to in paragraph 7.47(c) above.' This is a form of imputed or constructive knowledge expressly provided for by the statutory Guidance. The need to make such provision in the case of large commercial organisations and public bodies from January 1990 onwards would tend to indicate that: (1) there is no such general principle of imputed or constructive knowledge flowing from failure to investigate; and (2) even for large companies and public bodies, there was no inference to be drawn that failure to investigate before 1990 was to be counted as constructive knowledge.

The land developed by Fletcher

4.4.15 In this case a substantial part of the land which was the subject of the determination and subsequent remediation notice was not developed by the appellant at all, but by E Fletcher Builders Limited (Fletcher). So far as that area of land is concerned there is on the appellant's case no basis for saying that the appellant either caused or knowingly permitted the presence of B(a)P unless the appellant had carried out some operation before the transfer to Fletcher which amounted to causing the presence of contamination. The Council accepts that Fletcher and the appellant each independently developed their own sites, implementing the planning permissions which each had obtained.[18]

4.4.16 It is possible, but not inevitable, under the Part IIA regime that an appropriate person may be liable for remediation going beyond the substances which they themselves caused or knowingly permitted to be present – for example different persons may have acted so as to cause or knowingly permit the contaminating substance in question to be present on the land over different periods of time. In that case the respective portions of the substance which each was responsible for cannot practically be differentiated for the purpose of remediation. There will then be joint responsibility, subject to apportionment under the Guidance.

4.4.17 Again the relevant provisions are not as clear as might be desirable.[19] The possibility of joint liability appears from the wording of section 78F – 'any of the persons' who caused or knowingly permitted 'any of the substances' by reason of which the land is contaminated is an Appropriate Person.

[18] Council SoC para. 34 (CD7.4).
[19] See Tromans & Turrall-Clarke, paras.5.15-5.18 (AAB6).

4.4.18 This is however to be read subject to section 78F(3) which states that a person shall only be an Appropriate Person by virtue of section 78F(2) '… in relation to things which are to any extent referable to substances which he caused or knowingly permitted to be in, on or under the contaminated land in question'. It is submitted that 'the land in question' is not necessarily the whole of the land which was identified as contaminated. Rather it is the land on which particular things are to be done by way of remediation. This follows from the overarching provision of section 78F(1) which provides that section 78F has effect for the purpose of determining who is the appropriate person to bear responsibility '… for any particular thing which the authority determines is to be done by way of remediation in any particular case'. The thing which the Council has determined shall be done is a scheme which relates to individual residential gardens. It is a pertinent question as to on what basis the 'things' which the Council has determined shall be done by way of remediation to gardens of properties which the appellant had no part in developing can be said to be to any extent referable to the substances present in other gardens, which (on the Council's case) the appellant did cause or knowingly permit to be present.

4.4.19 If the Council does not make out its case that the appellant either caused or knowingly permitted the presence of B(a)P in the gardens of the properties developed by Fletcher, then the actions required to remediate those gardens simply cannot be said to be referable to substances for which the appellant is responsible, and hence it would be unreasonable to determine the appellant to be an Appropriate Person in respect of those things. Para. 7.69 of the 2012 Guidance (para. D.80 of the 2006 Circular) states that if different persons were in control of different areas of land with no interrelationship, they should be regarded as separately responsible for the events making necessary the remediation actions referable to those areas of land.

4.4.20 The reason that the appellant has been fixed with 100% liability for the whole area is that the directors of Fletcher took the step of having it removed from the register and dissolved before the Council got around to serving a remediation notice on it.

4.4.21 The facts in this case as regards the existence of Fletcher are as follows. After determination of the land as contaminated on 27 March 2012, the Council formally notified Fletcher and the appellant that they had been identified as potential Appropriate Persons. Both denied liability. The Council then published a Preliminary Assessment of liability on 8 March 2013. On 23 January 2014 the Council wrote to the parties with its further views on liability, which maintained that the appellant and Fletcher were Appropriate Persons. On 21 October 2014 Fletcher was dissolved on its own application, though the first the Council knew of this was on 29 January 2015.[20] In a Memorandum produced on 16 March 2015 by the Council's Legal Services, it was decided that in the light of the dissolution of Fletcher, the appellant should 'be 100% liable for the land sold to

[20] Council SoC para. 71.

Fletcher', a decision apparently based on whether Fletcher's financial position pre-dissolution was healthy enough to justify an application by the Council to have it restored to the register of companies.[21] The Council then proceeded on 17 March 2015 to serve on the appellant a remediation notice covering not only the land which the appellant had developed, but also the Fletcher land.

4.4.22 The position regarding Fletcher is itself confusing. The appellant instructed a specialist accountant to advise on this (see evidence of Mr Pole). It appears that Fletcher ceased to trade in 1988, following the sale of its construction and plant hire businesses and from that point its assets were nil. On 2 June 2014 (by which time it had of course been notified that the Council's view remained that it was an Appropriate Person) it reduced its issued share capital by £1,599,999 to £1. On the face of it, this indicated that it would have had reserves of almost £1.6 million available for distribution. However, on closer examination this is not the case, as its reserve account still had a negative balance and it had no assets.

4.4.23 Fletcher then made an application to the Registrar of Companies on 25 June 2014 under section 1003 of the Companies Act 2006 for the company to be struck off the register, which has the effect that the company is dissolved.[22] This procedure should not be used if there are liabilities and a creditor objects. In support of the application, the directors of Fletcher made a statement of solvency on 20 May 2014, in which they stated that taking account of contingent and prospective liabilities they had formed the view that there was no ground on which the company could be found unable to pay its debts as at the date of the statement, and that if proceedings for winding up of the company were instituted within 12 months, the company would be able to pay or otherwise discharge its debts within 12 months of the commencement of winding up. Given that there was plainly a contingent or prospective liability as an Appropriate Person under Part IIA, and that Fletcher has nil assets, it is not clear on what basis that statement could properly have been made.

4.4.24 With the benefit of that information, it is accepted that it would not be in the Council's interests to seek to have Fletcher restored to the register. It would mean that Fletcher would be subject to 40% of the cost of remediation (on the Council's apportionment) which the Council might well have difficulty in enforcing, though since service of a notice on Fletcher would mean that non-compliance, without reasonable excuse, would be a criminal offence under section 78M(1), and the lack of funds would not in itself be a reasonable excuse,[23] it may well be that the directors of Fletcher would have to take steps to find funding from somewhere.

4.4.25 It does not in any event follow necessarily that because Fletcher was

[21] Council SoC para. 72.
[22] See Palmer's Company Law, Vol 4, para. 15.505 (Voluntary dissolution of private companies) (AAB5).
[23] See Saddleworth UDC v. Aggregate and Sand (1970) 114 SJ 931; Kent CC v. Brockman [1996] 1 PLR 1 (AAB2).

dissolved by its directors after the Council had identified it as an Appropriate Person that the appellants should be held 100% liable for remediation of the entire site. There are alternatives which would avoid such an unjust result.

4.4.26 First, it does not follow that the remediation notice served on the appellant needed to cover the properties developed by Fletcher. It could have served a notice on the appellant confined to the land which it had developed. In that case in relation to the Fletcher land it would then either have had to seek the restoration of Fletcher to the register, or accept that Fletcher could no longer be 'found', in which case either (a) the Council would be the sole Appropriate Person for that area and as such unable to benefit from exclusion Test 6[24] (see below); or (b) if the Council were not an appropriate person then under section 78F(4) the owners or occupiers of individual plots would be liable, subject to the Council considering reducing its costs recovery under paras. 8.30 – 8.32 of the 2012 Guidance. It is accepted that the Guidance (para. 7.6) would suggest that the presence of B(a)P across the whole area should be regarded as a single pollutant linkage, but it is submitted that this cannot override the basic requirement of referability in section 78F(3) and avoid the need to establish that action to remediate the Fletcher land is in some way referable to the actions or omissions of the appellant.

4.4.27 Alternatively, if the correct course was to serve the notice in respect of the entire area of land, the Council was required to consider waiving or reducing its costs recovery from the appellant under para. 8.25 of the Guidance, given that on the Council's own case Fletcher, which cannot now be found, also caused or knowingly permitted the contamination to be present. On any basis Fletcher should bear, if it were in existence, a significant part of the cost of remediation. The Council originally put this at 40%. Given that it is clear which properties were developed by which party, there is no reason why that notional apportionment should not simply reflect the number of properties developed by each (27 and 42) making Fletcher's share about 39%. This would reflect fairly the position if the appellant and Fletcher had each been served with a notice requiring remediation of the land they developed.

4.4.28 It is submitted that the Council should seek to act fairly and reasonably[25] and that there would need to be sound reasons for departing from the position suggested above. The Council's reasons in the Statement of Case (para. 174) for departing from its original 60/40 apportionment are that the appellant was a causer as well as a knowing permitter, that the appellant saw the original Contract of Sale whereas Fletcher did not, and that it would have been reasonable for the appellant to 'ensure that the gasworks waste was removed before selling part of the land to Fletcher'.

[24] The test is in the same terms under both the 2006 and 2012 Guidance versions.
[25] Para. 8.5(a) of the 2012 Guidance says that in making decisions on cost recovery, the authority should aim for an overall result which is as fair and equitable as possible to all who have to meet the cost of remediation, including national and local taxpayers.

4.4.29 The appellant disputes each of these reasons factually: it was not a causer; the Contract of Sale did not in any event provide information to put the reader on notice of the presence of B(a)P; and it is not reasonable to suggest that the appellant should have removed the gasworks waste (whatever that means) before selling to Fletcher.

4.4.30 These reasons being invalid, it is submitted that it was not reasonable to determine to recover the entire cost from the appellant (Ground (n)).

4.4.31 This then would have the consequential effect that the Council would have the power under section 78N(3)(e) to undertake remediation itself, subject to cost recovery powers under section 78P. This is a further, though admittedly parasitic, ground of appeal (Ground (m)).

The Council

4.4.32 The Council originally regarded itself as a potential Appropriate Person, but ultimately decided to exclude itself from liability on the basis of Exclusion Test 6.

4.4.33 Test 6 applies where one member of the liability group carries out a relevant action or makes a relevant omission the effect of which was to introduce the pathway or the receptor which forms part of the significant contaminant linkage (see paras. 7.57 – 7.59 of the 2012 Guidance). The relevant action can be either carrying out building or other operations, and/or the making of a material change of use. Those carrying out earlier actions are then excluded from liability.

4.4.34 The Council says (correctly) that a receptor is a physical thing.[26] The Guidance defines it as a person, organism, property, ecosystem or waters that could adversely be affected by the contaminant. The Council incorrectly says the receptor in this case is the housing itself. Plainly it is not the housing which is potentially affected by the B(a)P, it is the residents of such housing. The enquiry is therefore a wider question than simply who built the houses. The presence of residents on the land was the outcome of a series of activities which stemmed from the initial decision of the Council that the former gasworks site should be redeveloped. The Council obtained the necessary outline planning permissions and published Particulars of Sale.

4.4.35 At paragraph 7 of its SoC, the Council states that it acquired the gasworks from the West Midlands Gas Board for the purpose of providing housing accommodation under Part V of the Housing Act 1957 (HA 1957). Part V of the HA 1957 empowered local authorities to acquire land to provide accommodation. Section 96 of the HA 1957 states:

'A local authority shall have power under this Part of this Act—

[26] Council SoC para. 155 (CD7.4).

(a) to acquire any land, including any houses or buildings thereon, as a site for the erection of houses,'

4.4.36 Section 105(1)(a) of the HA 1957 deals with a scenario where a local authority has acquired or appropriated land for the provision of accommodation but rather than 'building it out' wishes to sell it. It states:

'(1) Where a local authority have acquired or appropriated any land for the purposes of this Part of this Act, then, without prejudice to any of their other powers under this Act, the local authority may, with the consent of the Minister—

(a) sell or lease the land or part thereof to any person for the purpose and under the condition that that person will erect thereon in accordance with plans approved by the local authority, and maintain, such number of houses of such types as may be specified by the authority and, when necessary, will lay out and construct public streets or roads and open spaces on the land, or will use the land for purposes which, in the opinion of the authority, are necessary or desirable for, or incidental to, the development of the land as a building estate in accordance with plans approved by the authority, including the provision, maintenance and improvement of houses and gardens, factories, workshops, places of worship, places of recreation and other works or buildings,'

4.4.37 It appears therefore that a condition of the sale was that Jim 2 would erect the houses in accordance with the plans which had been approved by the Council. It is therefore the case that the land did not merely come with the benefit of a planning permission from the Council but with a requirement that the planning permission be built out by Jim 2. This would have meant building houses with gardens. The Council was obviously aware that the site was a former gasworks.

4.4.38 It is therefore agreed that the building of the houses was one of the actions which led to the presence of human receptors on the land, but it was not the only such action. The structure and purpose of the test is to exclude those who caused pollution to be present but had no part in the introduction of the receptors, i.e. their own actions would not have resulted in the land being contaminated in the sense of there being a significant pollutant linkage, because the introduction of the receptors only came later.[27]

4.4.39 This is not the case here. The Council was plainly implicated in the introduction of the receptors. It took the decision that the site be developed for housing and its use changed to residential, it took actions pursuant to specific statutory powers to further that intention and required Jim 2 to build out the houses. It should not, in those circumstances be entitled to escape its responsibility by relying on exclusion Test 6.

[27] 2012 Guidance para. 7.57 and 7.58(d).

The 2012 Guidance

4.4.40 In identifying contaminated land, every local authority is required to act in accordance with any guidance issued by the Secretary of State in accordance with section 78YA (section 78B(2) of the Act).

4.4.41 The Council determined the land to be contaminated on 27 March 2012, shortly before the 2012 Guidance came into force (10 April 2012). That Guidance had been undergoing public consultation since December 2010 (see evidence of Mr Witherington). At the time of the determination it would have been laid before the House of Commons and House of Lords in accordance with section 78YA of the Act which states:

> *'(2) A draft of any guidance proposed to be issued under section 78A(2) or (5), 78B(2) or 78F(6) or (7) above shall be laid before each House of Parliament and the guidance shall not be issued until after a period of 40 days beginning with the day on which the draft was so laid or, if the draft is laid on different days, the latter of the two days.'*

4.4.42 The draft 2012 Guidance as laid before Parliament was a material consideration which the Council ought to have taken into account when they determined the land to be contaminated. It was unlawful for the Council not to take account of the existence of that draft guidance which would imminently render the 2006 Guidance obsolete (2012 Statutory Guidance, para 4).

4.4.43 That the Statutory Guidance was a material consideration is clear from the case of R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government [2011] EWCA Civ 639; [2011] 2 E.G.L.R.75. In that case the Court of Appeal confirmed that the Government's intention to abolish regional strategies was capable of being a material consideration to be taken into account in planning decisions taken under section 70(2) of the TCPA.

4.4.44 It was not in issue between the parties in that case that emerging policy could be a material consideration. At paragraph 20 of his decision Lord Justice Sullivan stated:

> *'Mr Village does not dispute the general proposition that a prospective change to planning policy is capable of being a material consideration for the purposes of ss.70(2) of the Act and 38(6) of the 2004 Act. The weight to be given to any prospective change in planning policy will be a matter for the decision-maker's planning judgement in each particular case. In principle, the means by which it is proposed to effect a change in policy, by new legislation, by amendment under existing legislation, or by administrative action such as the publication of a new Planning Policy Statement ('PPS'), goes to the weight, not the materiality, of the prospective change. If the change is to be effected by legislation, will Parliamentary approval be obtained, and if so in what form and within what*

timescale? Subject to the appellant's Padfield point, a change in policy that is proposed to be effected by legislation is not an immaterial consideration on the day before Royal Assent, and a material consideration on the day that Royal Assent is granted. The stage reached in the legislative process goes to the weight, not the materiality of the proposed change.'

4.4.45 In their Statement of Case, the Council relied upon the case of R v North and East Devon Health Authority ex p Coughlan [2001] QB 213.[28] This case is irrelevant for the purposes of this Inquiry. Coughlan considered the principle of 'legitimate expectation' and in what circumstances an individual could rely upon the promise of a public body. As stated by Jim 2 in its response to the Council's Statement of Case,[29] paragraph 73 of the *Coughlan* judgement has been taken out of context by the Council. It is no more than a statement that where a council has an extant policy a person may not be entitled to have their rights determined on the basis of any policy other than that policy. However it should be noted that paragraph 73 of the Coughlan decision makes clear that all relevant matters should be taken into account in making that decision. The 2012 Guidance, which was imminently to come into force, was such a material consideration. It should have been considered by the Council before making its determination, or alternatively the determination should have been reconsidered after it came formally into effect.

4.5 ***Appellant's reply to the Council's legal submissions***

4.5.1 The following notes address the principles of 'causing' and of 'knowingly permitting'. The fact that these notes do not address any particular submission made by the Council should not be taken as the appellant's agreement with the Council's submissions on such issues. It is confined to the main points arising.

Causing

4.5.2 For the avoidance of doubt, the appellant does not accept that the (non-exhaustive) list of 'acts/failures to act' at paragraph 43 of the Council's legal submissions can constitute 'causing' contamination. As stated in the appellant's legal submissions, each of those actions would only constitute 'causing' within the terms of section 78F(2) of the Act if they caused a contaminant either to enter the land or to be more extensively present. The Council's approach appears to conflate any site preparation activity with causing, which is far too wide. It is much too vague an approach – for example what is meant by demolishing 'a building associated with contamination' or 'any other physical interaction with contaminated ground'. Also 'failing to remove contamination during the process of demolition and building operations' is not 'causing' – it may

[28] CD2.2 p.401 para.108.
[29] CD7.5 p. 424 paras 2.8-2.10.

be 'knowingly permitting' if that test is satisfied. It is unsound to conflate the two limbs in this way.

Knowingly permitting

4.5.3 The appellant agrees with the Council that current authority supports the position that the knowledge required is of the presence of the substance in question and that there need not have been knowledge of its polluting characteristics or potential harmfulness: see *Circular Facilities (London) Ltd. v. Sevenoaks District Council*[30]. However, the focus is on knowledge of the actual substance in question, in this case B(a)P. Knowledge of the presence of a broader generic category of substances of which the substance in question might form part (e.g. 'gasworks waste')[31] or of a broad family of substances of which the substance in question is one (e.g. PAHs) is not sufficient.[32]

4.5.4 In its legal submissions the Council alleges that a person who has caused or knowingly permitted the presence of 'organic material' associated with a gasworks will also be taken to have caused or knowingly permitted B(a)P (para.47). To support this proposition the Council relies upon section 78F(9) of the Act. Section 78F(9) states:

> *'(9) A person who has caused or knowingly permitted any substance ('substance A') to be in, or under any land shall also be taken for the purposes of this section to have caused or knowingly permitted there to be in, on or under that land any substance which is there as a result of a chemical reaction or biological process affecting substance A.'*

4.5.5 Nowhere in its evidence has the Council sought to establish that B(a)P is the result of a chemical reaction or biological process affecting gasworks waste. As such, section 78F(9) is simply irrelevant for the purposes of this Inquiry. To the extent that B(a)P is present, it is an inherent constituent of such waste. Section 78F(9) is plainly intended to deal with a quite different situation, where, for example, a person causes biodegradable material to be present, which decomposes and produces hazardous gases such as methane.

4.5.6 The Council further states that: *'Specific knowledge of the presence of an individual constituent component of a substance, e.g. B(a)P, is not required. It is sufficient that Jim 2 knew of the presence of the substance as a whole, namely partially combusted 'organic material' or 'gasworks waste'.'* (para.48). However, the Council forgets that B(a)P is the contaminant which the appellant is said to have 'caused' or 'knowingly

[30] [2005] EWHC 865; [2005] Env LR 35 at para. 43 (CD 2.3).
[31] See Council's SoC, para. 147(a) (CD7.4).
[32] This accords with the decision in St Leonard's Court (CD 2.6) where a clear distinction was drawn between the two substances in issue, bromide and bromate: see for example paras 35, 36 and 39 of the Secretary of State's decision.

permitted' in this case, and on which the remediation notice is predicated.

4.5.7 The Council's reliance upon *Circular Facilities*[33] to support its case on this is misguided. In that case the fact that the land was contaminated was not in issue between the parties (see para.7 of the judgement). It appears as though the contaminant was 'organic material', however that matter was not explored by the Court (para.43). There had been a soil report which had noted the presence of 'black organic matter' and had referred to 'gasses bubbling through water' in one of the trial pits (para.32). Although unclear from the judgement, the presence of gas suggests that there had been a chemical reaction in that case, to which section 78F(9) properly applied. It may be that in some cases a broad terminology such as organic material could be a proper basis for determination, where there is no specific substance. However in this case, where the Council is relying on the very specific carcinogenic and genotoxic properties of B(a)P as its basis for regarding the land as contaminated, more specificity is necessary.

4.5.8 In fact, in *Circular Facilities*, Mr Justice Newman made obiter comments supporting the contention that the presence of a particular substance must be known. He stated:

> *'In my judgement this argument simply cannot stand in the face of the express terms of subs.(9) of s.79F. By the terms of the section, a person needs only to have knowledge of <u>a</u> substance (in this case organic material) and the statute provides that in any event, having knowingly permitted <u>that</u> substance, referred to as 'substance A', to be in, or under the land that person:*
>
> *'… shall also be taken for the purposes of this section to have caused or knowingly permitted there to be in, or under that land any substance which is there as a result of a chemical reaction or biological process affecting substance A'.*

4.5.9 The Council also relies upon the case of *National Grid*[34] as authority that knowledge of coal tar residues were what mattered on that case and '*the lack of specific knowledge of B(a)P in 1966 was not relevant*.' It is unclear to the appellant where the Council gets authority for that last statement from. The *National Grid* case concerned the definition of 'an Appropriate Person'. It simply does not address the nature of the contaminant and does not support the Council's argument.

4.5.10 The appellant further disagrees with the parallels which the Council seeks to draw between the instant appeal and the *National Grid* case. The facts of that case and the instant appeal are materially different and the 'case for the appellant' is set out below.

[33] CD 2.3.
[34] CD 2.4.

4.5.11 The Council further states that:

> *'to require specific knowledge would frustrate the purpose of the legislation, which is designed to be retrospective and not be hindered by the relative lack of scientific understanding in the past.'*

4.5.12 The legislation and guidance state explicitly that there must be knowledge of the presence of the substance. It was open to Parliament to impose a different test for 'knowingly permitting'. It hasn't done so. It is therefore impermissible for a decision maker to apply a different test. The purpose of the legislation is to get land which is genuinely contaminated, in the specific sense used in the Act, cleaned up. In that sense knowledge is irrelevant to designation. It is however, highly relevant to liability, certainly under the 'knowingly permitting' head.

4.5.13 Finally, as a matter of common sense, it is clearly not enough for the appellant to have been aware of the presence of a substance (i.e. gasworks waste) which may have contained another substance (i.e. B(a)P). Otherwise, it would be open for a Local Authority to rely upon knowledge of the presence of, say soil, as sufficient under the statute to prove knowledge of any substance contained within it.

4.5.14 It is clear then that there has to be knowledge of the particular substance unless section 78F(9) of the Act applies and nowhere in the Council's evidence is it alleged that a chemical reaction has taken place to change one substance into B(a)P.

The precautionary principle

4.5.15 The Council makes reference to the precautionary principle. To the extent that this is an issue of law at all, the appellant does not agree that the principle, while it no doubt underlies the legislation, can override or qualify the very specific test as to whether land is contaminated, or obviate the need for a strong case to be made before land is determined. Further submissions will be made on this in the 'case for the appellant', set out below.

5 THE CASE FOR WALSALL METROPOLITAN BROUGH COUNCIL (the Council)

The gist of the material points made by the Council in its written (including relevant footnotes) and oral submissions were:

5.1 *Preamble*

5.1.1 The issue on this appeal is whether the Council acted reasonably and in accordance with statutory guidance in serving a Remediation Notice on Jim 2 Limited ('Jim 2') requiring it to remediate the land enclosed within the domestic curtilages of 69 residential properties (the site), which form part of the Stonegate Housing Estate.

5.1.2 The Site has been determined by the Council as contaminated land on the basis that substances in the soil present a SPOSH to residents of the housing estate. These substances are in the soil because the site used to form part of the Former Willenhall Town Gasworks.

5.1.3 Jim 2 challenges the existence of a SPOSH, the remediation requirements, their liability to remediate, and the Council's decision not to waive or reduce costs recovery. It is said that the Council has acted unreasonably and not in accordance with statutory guidance in relation to each of these four elements.

5.1.4 This Inquiry has given rise to some complex legal and factual issues, but the Council submits that the fundamental point is clear: the land was reasonably determined as contaminated, the remediation requirements are reasonable, Jim 2 caused and/or knowingly permitted the contamination, and there is nothing to justify interfering with the exercise of the Council's discretion not to reduce or waive 100% costs recovery against Jim 2.

5.1.5 There has been a lot of science, data and statistics discussed during this Inquiry. These are important matters, and the Council's final view on them will be developed. However, it is essential to remember that this case is fundamentally about the residents who are living on the Site. The Inquiry has heard the very important evidence of Mrs Fullwood, a resident of Kemble Close. Her short testimony was enough to convey her own nightmare, and how her experiences represent those of others in the same position. She described the feeling of being 'a prisoner in her own home'. The Council did not take regulatory action lightly in this case. After all, the under-use of the Part IIA regime by local authorities is well-known[35].

[35] The regime set up by the 1990 Act in respect of contaminated land is 'exceptionally complicated' in legal terms

5.1.6 Mr Jarrett, who appeared for the Council, also gave evidence on his contact with the residents, and conveyed how distressing the matter has been. What is clear is that the short-term inconvenience of the remediation process is certainly not the cause of the anxiety. Rather, it is the delays, the uncertainty, the fear of the health risk caused by the contamination, and the practical problems. Mr Jarrett has explained that one such practical problem, an inability to sell or mortgage a house, has lasted since 2006, long before the formal identification of contamination. It was enough that the environmental searches at that time revealed that a house was built on the site of an old gasworks developed without any apparent remediation having been carried out. The risk and uncertainty were sufficient to create a huge practical obstacle to residents[36].
This blight was pre-existing, it having arisen before the investigation even commenced[37]. The Council acted to try and remediate the homes of residents and to provide them with the assurance they need to move on with their lives by the taking of steps to evaluate the contamination and subsequently by the service of a Remediation Notice.

5.1.7 Jim 2 has sought to argue[38] that the Council failed to take into account the stress and anxiety caused to the residents by the determination, given the long legal process that would follow. This argument is troubling:

1) It assumes that it was a foregone conclusion that Jim 2 would appeal, irrespective of the reasonableness of the determination;
2) The implications of this argument are presumably that local authorities should *never* issue remediation notices, on the basis of the risk of an appeal (whether meritorious or not), and should instead *always* remediate the land and then, where appropriate, recover costs;
3) This, however, simply ignores the purpose of the Act, which has a scheme for determining liability, which should be applied in order to determine who should be responsible for remediation. Following investigation and determination, the authority should serve notice on the party identified as responsible pursuant to the provisions of the regime;
4) As pointed out by Dr Cole in cross-examination[39], the Council has kept the residents informed throughout the process, and has met with them to ensure that their views are heard. A whole section of

and as a result has been much under-used by enforcing authorities. Jim 2's opening pointed out that the 1990 Act 'has not been widely used in practice and relatively few remediation notices have been served, and even fewer have gone to appeal'. It cannot be forgotten, as Jim 2 pointed out in opening, that this is the second only ever appeal against a remediation notice to come to the Secretary of State. Moreover, in the only other appeal, in respect of St Leonard's Court, there was no dispute that the land was contaminated. This is thus the first ever appeal to look at ground (a) issues such as SPOSH.

[36] There has been an implicit argument from Jim 2 that the stress and anxiety has been caused by the Council's over-cautious determination. This is wrong for the reasons set out in this paragraph.

[37] As was accepted by Mr Morton, cross-examination, day 5. See also para. 57 of Mr Jarrett's PoE. Mr Witherington suggested that some developer-council strategy with the mortgage companies should have been devised. This may have been an option, but Jim 2 must be equally to blame for not raising a proposal to co-operate on blighting. Further, in any event the Council was obliged to disclose facts about the site.

[38] Via cross-examination of Dr Cole on day 5.

[39] Day 5

the Core Documents is devoted to this: section 13.

5.1.8 Central to the stress and anxiety expressed by Mrs Fullwood concerned the delay in getting a resolution. It is true that matters have been going on for a significant amount of time. Nearly 5 years ran from the initial AECOM desk study in April 2007 to the decision to determine in March 2012. It is regrettably a reflection of the complexity arising in the implementation of Part IIA. However, it should be noted that the delay in resolution since the determination in March 2012 has been significantly contributed to by Jim 2's persistent refusal to accept that the land is contaminated and that they have any responsibility for remediation.

5.1.9 It is said under ground (b) that even if the land is rightly seen as contaminated and Jim 2 is rightly held to be liable, the remediation requirements, designed to protect the residents from further risks of contracting cancer, are unreasonable and disproportionate. There was a refusal by Jim 2 to propose any alternative to ensure the safety of those at risk during the Council's consultation on the proposed requirements in March 2013, or at any time thereafter in the multiple opportunities leading to this Inquiry, and Jim 2 chose instead to wait until the close of day 4 of the Inquiry before submitting proposals.

5.1.10 It is further suggested[40] that Taylor Wimpey should be rewarded by a costs waiver for not voluntarily winding up Jim 2 in order to evade liability and force a local authority to pick up the tab. The suggestion that Jim 2 should be regarded as having 'behaved well' by not doing so is astonishing[41]. Not least of all because in relation to Fletcher it was Jim 2's own case that its actions were 'unlawful'[42].

5.1.11 As explained in opening, the importance of this appeal goes beyond the significance of the outcome to the affected residents. The regime set up by the Act is 'exceptionally complicated'[43], something which has contributed to the Act being under-used by enforcing authorities. The Secretary of State has recovered this appeal[44] in recognition of 'the potential policy implications for contaminated land law' and in 'view of the challenges raised on the application of the Environmental Protection Act 1990 and of the revised Statutory Guidance published in 2012'[45]. Thus, as pointed out in opening, a number of other authorities and affected persons will also be paying close attention to this Inquiry, and its outcome.

5.1.12 On all grounds of appeal, the Inspector should keep in mind the following key headlines, the detail of which is set out in the Council's legal submissions and are not here repeated:

[40] In cross-examination of Mr Jarrett, day 2.
[41] Cross-examination of Mr Jarrett, day 2.
[42] See e.g. Mr Pole's PoE at para 6.1.
[43] CD6.2 para. 3.3, p. 93.
[44] CD8.1.
[45] And also 'in view of the large number of people affected'.

1) The Inspector should recommend to the Secretary of State that the appeal be dismissed if, in his view, the Council is found to have acted 'reasonably' in navigating the complex legal and factual issues in this case, even if the decision-maker on appeal would have decided the question differently on one or more points[46].

2) The Council must be afforded 'considerable discretion', because it is required on many of the issues in this case to exercise a judgement based on what appears to be the case.

3) This is not a planning Inquiry. The jurisdiction given to the decision-maker is not to carry out a full *de novo* hearing of the merits of the case on each ground. Instead, the task is to review the reasonableness of the Council's approach in relation to each ground. The test of reasonableness is narrower than a completely open review of the merits, but at the same time not a ground as narrow, or so it is said, as *Wednesbury* unreasonableness: see *Contaminated Land* (2nd edition) Tromans and Turrall-Clarke at para 6.57(a) (CAB1). The word 'unreasonable' is used in its ordinary meaning, as established by the courts in *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774 (CAB2). For example, if it was a planning Inquiry and the Council had refused planning permission on the basis that the land was contaminated, if at Inquiry you considered it was not contaminated you would allow the appeal. The circumstances in this case are fundamentally different, as even if you say the land is not contaminated, it doesn't automatically follow that the Council's decision was flawed. You must consider if the Council's view was reasonable.

4) The requirement is to act in accordance with the statutory guidance as a whole, rather than with each and every individual paragraph or sentence[47].

5) Part IIA of the Act is based on taking a precautionary approach, the purpose of which is to justify taking action notwithstanding uncertainty about the risks[48]: see the 2012 Guidance (CD1.5) at p. 389; para 1.6, p. 392; and para 4.25(a), p. 408. It is accepted by Jim 2's expert Mr Witherington that the Council was required to take such an approach[49]. 'Invoking the precautionary principle shifts the burden of proof in demonstrating presence of risk or degree of safety towards the hazard creator. The presumption should be that the hazard creator should provide, as a minimum, the information needed for decision-making'[50].

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[46] This is not in any way a jurisdiction like that enjoyed by Planning Inspectors, and the Secretary of State, under the Planning Acts. There as appellate authority the decision-maker stands in the shoes of the local authority and looks at the merits afresh, ultimately determining whether permission should be granted or not. This appellate jurisdiction is very deliberately narrower. The 2008 non-statutory guidance (CD1.10) emphasises that decisions under Part IIA are for local authorities. They are given a wide margin of appreciation.

[47] See, in this regard, the analogous planning context at paras. 4.3.11-12 of the Council's legal submissions (ID10), to which there has been no reply in Jim 2's second set of legal submissions (ID24).

[48] See paras. 3-6 of the Council's legal submissions (ID10)

[49] Para 5.2 of Mr Witherington's Rebuttal.

[50] The Interdepartmental Liaison Group on Risk Assessment document entitled 'The Precautionary Principle: Policy

6) Part IIA seeks to attach liability based on the 'polluter pays' principle[51]: see the speeches of the House of Lords in *R (National Grid Gas Plc) v Environment Agency* [2007] 1 WLR 1780 (CD2.4) at paras. 8; 21; 27 and 29. The principle being that the 'person responsible for contaminating the land should be the person primarily liable to pay for its decontamination' (ibid, para. 28). Under the Act a 'polluter' is a person who 'caused or knowingly permitted' the contamination as defined in that Act.

7) Part IIA is designed to be retrospective – it seeks to attach liability on activities occurring before the legislation came into force. This is 'an inevitable consequence of a regime which seeks to ensure the clean up of the country's historic legacy of contaminated land', resulting from activities such as those undertaken at the Gasworks site: see *National Grid Gas v Environment Agency* [2006] 1 WLR 3041 (the decision of Forbes J at first instance, which was overturned on appeal but not on this point) at para. 15 (CAB6).

5.2 **Ground (a): The existence of SPOSH** ('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 of the land to which the notice relates as contaminated land')

5.2.1 'Contaminated land' is defined in section 78A(2) of the Act as being 'any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that – (a) significant harm is being caused or there is a significant possibility of such harm being caused' (emphasis added). It is also provided that in 'determining whether any land appears to be such land, a local authority shall, subject to subsection (5) below, act in accordance with guidance issued by the Secretary of State in accordance with section 78YA below with respect to the manner in which that determination is made'.
The phrase 'appears to' is designed to give the local authority a discretion which cannot be interfered with lightly[52]: see *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455 (CAB7), 492-493, per Lord Denning M.R. set out in the legal submissions.

5.2.2 The Council's submissions on ground (a) are structured as follows:

1) The 2008 guidance;
2) A summary of the Council's approach;
3) A response to criticisms by Jim 2;
4) An evaluation of 'reasonableness';

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and Application' (CD16.2.28B) p.4225.

[51] A polluter for the purposes of the 1990 Act being someone who caused or knowingly permitted the contamination.

[52] This was readily accepted by Mr Witherington at the outset of his cross-examination.

5) The evidence of Dr Cole; and,

6) The Inspector's and Secretary of State's discretion.

5.2.3 *1) Guidance on the legal definition of Contaminated Land (July 2008)*

5.2.3.1 This guidance[53] is conspicuously absent from the analysis of any of Jim 2's witnesses. Mr Morton confirmed[54] that he had not read and considered the implications of the guidance, nor what might be considered 'reasonable' in the present context, when writing his proof of evidence (PoE). Mr Witherington did not refer to it in his PoE[55] or in his Rebuttal (even after having seen Dr Cole's extensive references to it in his PoE[56]) and could not explain what he accepted was an 'omission' – it was a 'serious omission'. This is guidance issued by Defra, the Department of the very Secretary of State who will determine this appeal. It was in force when the land was identified as contaminated; and it remains in force today[57]. It provides guidance on the very issue that arises under ground (a) in this appeal. It is, after the statutory guidance, the most important document there is in relation to ground (a). The inference to be drawn from this is that Jim 2 regards it, justifiably, as highly damaging to its case.

5.2.3.2 As set out in Opening and in the Council's Legal Submissions, the following points are relevant (underlining added)[58]:

1) The term 'contaminated land' is defined according to whether contamination poses a significant level of risk 'and local authorities are given <u>considerable discretion to decide whether such risks exist having studied the details of each specific case</u>' (para. 3);

2) The 2006 Guidance 'goes some way towards explaining the basis on which local authorities should decide whether there is a significant possibility of significant harm, <u>whilst leaving them with considerable discretion</u>' (para 13);

3) Defining contaminated land is 'not straightforward' (para 15);

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[53] CD1.10
[54] Cross-examination, day 5
[55] Mr Witherington's PoE gives a detailed account of the law, policy and guidance relating to Part IIA. This detailed history though jumps from 2006 to 2009 (see paras. 3.9 – 3.10). Moreover, he expressly refers to the 'Way Forward' document (CD16.2.28C) (see paras 3.7 and 3.11 of his PoE) . He says having jumped from the 'Way Forward' in 2006 to 2009 that 'little else happened as an immediate follow up to the 'Way Forward' neglecting to mention the 2008 Guidance which was one of the outcomes of the 'Way Forward' (that was Dr Cole's oral evidence, and was accepted by Mr Witherington in cross-examination).
[56] Mr Witherington only dealt with it in his oral evidence-in-chief because it had been raised with Mr Morton in cross-examination the day before and deferred to him. It was too little, too late.
[57] As Mr Witherington accepted in cross-examination.
[58] Many of which were raised during cross-examination of Mr Witherington.

4) ' … science alone cannot answer the question of whether or not a given possibility of significant harm is significant the question of what is significant is crucial and is a matter of policy judgement based firmly on scientific assessment taking account of all relevant and available evidence' (para 21);

5) 'In the absence of a practicable number-based threshold option (and in recognition of the site-specific nature of risks), Part 2A takes an approach where decisions on whether risks constitute SPOSH must be taken on a case-by-case basis by local authorities' (para 23);

6) Local authorities 'can use their judgement and expert local knowledge to reach reasonable decisions in the face of complex issues and potentially large degrees of scientific uncertainty' (para. 24);

7) Defra also offered general advice where a decision of a local authority to determine land as contaminated is challenged:

   a) 'The law makes local authorities responsible for deciding whether or not land is contaminated land. It gives them considerable leeway to exercise their judgement, provided decisions were taken reasonably …' (para. 43(i))

   b) 'The law leaves judgements about what is SPOSH to the authority'; (para 43. (ii));

   c) There will be cases where there are uncertainties about the risks a site presents and 'thus there may be no single 'correct' decision-making procedure (in terms of legal principle). As a result, it is quite possible that different suitably qualified people, each acting reasonably, could reach different conclusions and make different decisions when presented with the same evidence. Again, the law leaves the judgement to the authority' (para. 43(iii), this is crucial guidance;

   d) In some cases, uncertainties underlying risk assessments may mean that authorities feel they cannot judge whether there is a SPOSH or not. In such cases, they should seek expert advice to confirm their understanding of the science (para. 43(iv))[59];

   e) 'If someone were to challenge a local authority's decision, the

[59] See also B31 of the 2006 Guidance (CD1.3): In discharging its duty to determine whether land is contaminated, it 'can choose to rely on information or advice provided by … a consultant appointed for that purpose'.

decision is likely to be legally robust provided the authority can demonstrate that it acted reasonably in accordance with the law. For a challenge to be successful the person would have to demonstrate that the authority had behaved unreasonably (i.e. not just that a reasonable alternative method of making a decision could have yielded a different result)' (para. 43(vi)); and,

f) 'Local authorities can use their judgement to ensure that Part 2A focusses on the SPOSH it was designed to address …' (para 47);

8) It also provides clear support for the use of Soil Guideline Value (SGV) exceedances in assessing SPOSH[60].

5.2.3.3 Mr Witherington reluctantly agreed to the effect of this guidance being to confer 'considerable discretion' on local authorities to exercise policy judgement in cases where two experts can reasonably disagree on the science[61]. He explained that the discretion must be exercised on the basis of a risk assessment. This is entirely accepted. The Council carried out such a robust and thorough risk assessment, as explained below[62].

5.2.4 ***2) Summary of the Council's approach***

5.2.4.1 In this section, the Council sets out its positive case for why the SPOSH determination for zones 4 and 7 was both reasonable and in accordance with statutory guidance. The section to follow will then present the Council's responses to the alleged inadequacies in the Council's investigation and determination.

5.2.4.2 The Council's SPOSH determination of zones 4 and 7 proceeded as follows:

2006: Council's Inspection

5.2.4.3 Following a wider inspection of the Council's area for potentially contaminated sites, in accordance with the Council's Contaminated Land Strategy, the housing estate built on the site of the former gasworks unsurprisingly ranked highly as a site warranting further investigation[63].

2007-2011: AECOM Investigation

5.2.4.4 In early 2007, the Council commissioned expert consultants Faber

[60] See further below on this.
[61] Cross examination of Mr Witherington, day 6.
[62] In response to the point that the 2008 Guidance is not referred to in the Record of Determination, the repeated response is that it was only a 'summary'.
[63] PoE of Mr Jarrett, para. 56.

Maunsell AECOM ('AECOM'), two technical directors of which gave evidence to this Inquiry[64], to undertake a scientific investigation of the soil on the site and the surrounding area. With repeated ground investigations and chemical sampling, of which there were six rounds[65], AECOM compiled a detailed evidence base in seven published reports[66] spanning over a four year period (2007-2011)[67].

5.2.4.5 The investigations focused on B(a)P because it is commonly used as an indicator or 'marker' compound for the mixture of compounds (Polycyclic Aromatic Hydrocarbons ('PAHs')) typically found in combustion products like gasworks waste[68], as was agreed by Dr Thomas in cross-examination and re-examination on day 3 of the Inquiry. It is also noted by Dr Pease in the ENVIRON report[69] to be the common practice and the approach employed by Defra. As explained by Dr Cole in response to a question from the Inspector[70], and contrary to the general charge of 'excessive conservatism' by Jim 2, the use of B(a)P as a marker involves 'inherent under-conservatism'.

5.2.4.6 There will be more discussion of B(a)P in due course. At this stage, it is only necessary to say that B(a)P is a persistent organic pollutant, which has been designated by the International Agency Research on Cancer as a Human Carcinogen (Group 1), which means that the evidence is sufficient to determine that the agent *is* carcinogenic to humans, as opposed to *probably* (Group 2A) or *possibly* (Group 2B) carcinogenic to humans[71]. The carcinogenic properties of gasworks waste were confirmed by scientific studies in the 1940s/50s[72], but known to be the case since the 18th century as a result of chimney sweeps having a higher propensity to contract scrotal cancer[73]. There is no 'safe' (i.e. zero risk) exposure level for B(a)P[74].

5.2.4.7 In the absence of any specified value of B(a)P that gives rise to a SPOSH in the guidance, AECOM used the Contaminated Land Exposure Assessment Model Version 1.04 ('CLEA') to derive a site specific assessment criterion ('SSAC') for B(a)P of 1.02 mg/kg, which uses the assumptions of a residential garden with home-grown produce, where the

[64] One of whom Mr Smart was responsible for numerous published reports, see below. The other, Dr Cole had no involvement in those reports and has reviewed in his PoE whether the Council acted reasonably in determining the Site as contaminated land.
[65] See Table 3.3 of the PoE of Mr Smart which summarises the ground investigations which consists of 6 boreholes, 58 probeholes/window sampling holes, 13 trial pits, 78 hand dug pits, and 218 soil samples.
[66] CD16.1.1 – CD16.1.7
[67] Further sampling of Zone 5 occurred in 2014 – and two further reports, not by AECOM, were published by technical consultants ENVIRON (20 June 2014 – CD16.1.13) and GIP (18 December 2014 – CD16.1.12).
[68] PoE of Dr Cole, para. 14.
[69] CD16.1.13, internal p.4. Dr Pease explained: 'One benefit of using … this approach is that a risk assessment using B(a)P measurements, as a surrogate marker of the genotoxic PAHs at any given site, gives assurance that the cancer risk from all PAHs present on the site, not just B(a)P, is covered off.'
[70] Day 5
[71] Statement of Common Ground, para. 4.5 (ID11).
[72] See CD16.2.9 at pages 3641 referring to Henry, 1946; Kennaway 1947; p. 3645; 3646 – 3647 and 3649.
[73] RSK Technical Report, CD7.3, p.114
[74] PoE of Dr Cole, para. 15, referencing CD16.2.23, p.4110-4111, and final page of the ENVIRON letter at CD16.1.13.

receptor is a young girl of 0-6 years[75]. An SSAC can be considered to be a concentration of a particular contaminant, below which it is unlikely that there is a significant risk to human health. Contaminant concentrations above an SSAC require further assessment but do not necessarily represent a SPOSH.

5.2.4.8 The use of the CLEA methodology to derive soil guideline values ('SGVs') is an approach supported in the 2008 Guidance. Jim 2 has suggested that exceedance of a multiple of a screening value is irrelevant. However, the 2008 Guidance indicates otherwise, by suggesting a 'general guide' as follows[76]:

1) For substances where there is an SGV, the more the SGV is exceeded, the more likely it is that an authority should consider the risks to be SPOSH.
2) Generally, the cautious nature of SGVs means that local authorities may conclude that SPOSH is unlikely to exist at concentrations close to SGVs.
3) In some cases, land with concentrations of contaminants which marginally exceed an SGV (say, up to a few times the SGV) might give rise to SPOSH if, for example, the receptor is particularly sensitive.

All of which endorse reference to exceedances of SGVs in assessing SPOSH.

4) In other cases an SGV may be exceeded by tens of times and there might be no SPOSH (e.g. if further assessment found that exposure was much lower than that estimated using the generic SGV).

5.2.4.9 Moreover the 2006 statutory guidance supports the use of exceedances of SGVs in assessing SPOSH, something Mr Witherington accepted in cross-examination[77].

5.2.4.10 During the investigation, the Council prepared a 'Checklist' on 6 April 2011 explaining how it had complied with statutory and non-statutory guidance in the contamination investigation necessary prior to formal determination[78].

March 2012: Evaluation

5.2.4.11 The Council, in discussions with AECOM, evaluated the reports, and arrived at a decision to determine the land in zones 4, 5 and 7 as contaminated. As required by the 2006 Guidance[79] (the guidance in force

[75] Council's SoC CD7.4, para. 39; PoE of Dr Cole, para. 18; Record of Determination CD6.3, p.112, para. 2.6; AECOM's 3rd Report, May 2009, CD16.1.3, p.238.
[76] CD1.10, para. 39.
[77] CD1.3 paras B47, 48 and 49. Cross-examination, day 6.
[78] CD6.4; there was no cross-examination at all of Mr Jarrett on either the existence or content of this document.
[79] CD1.3, B.52(b).

at the time of determination[80]), a summary (rather than a complete account) of the evidence upon which the determination is based was set out in the form of a Schedule to a Record of Determination (RoD)[81]. It is this document that constitutes the relevant summary of the Council's reasoning, and not, as was suggested in cross-examination of Dr Cole on day 5, the third AECOM report (in isolation from the other six reports).

5.2.4.12 The mere requirement for a *summary* is an important point when considering whether Dr Cole was right to regard as relevant the various discussions he had with the Council and AECOM concerning their investigations and determination. He refers to these discussions in his PoE in helping him to understand whether the Council and AECOM acted reasonably and in accordance with statutory guidance. He was criticised for doing so in cross-examination on day 5. He noted that it is 'not clearly stated in the 2006 Guidance what a council should or shouldn't record'[82]. This, he said, is unlike the 2012 Guidance, which states more clearly the need for a risk summary, which was not a requirement under the 2006 Guidance. On re-examination, the requirement for the Record of Determination to be in 'summary' form was referred to. This essentially supports the view that not every thought relevant to the Council's determination needed to be put to paper. Instead, discussions on the matter were still of significant relevance.

5.2.4.13 Bearing in mind that it was not intended to be an exhaustive account of the Council's reasoning, the RoD summarised as follows:

1) The depth below the surface of the soil samples[83];

2) The Council was careful not to mechanistically convert the scientific data into finding a SPOSH[84]. Instead, the Council had regard to[85]:
   a) The depth below the surface of the soil samples[86];
   b) The likelihood of residents being exposed to the soil[87];
   c) The uncertainties surrounding what may be considered a safe level of B(a)P in the soil[88];
   d) The fact that many samples from the top metre of soil exceeded the SSAC by an order of magnitude, and sometimes two[89];
   e) The fact that the average concentration was significantly

[80] There is more on this below.
[81] Record of Determination, CD6.3.
[82] Cross-examination, day 5.
[83] CD6.3 Record of Determination, p.113, para. 4.6
[84] See Record of Determination, para. 4.6 CD6.3.
[85] See also Dr Cole's PoE, para. 21.
[86] CD6.3 Record of Determination, p.113, para. 4.6
[87] Ibid.
[88] CD6.3, p.114, para. 4.7
[89] Ibid.

higher than the SSAC[90];

f) The extent of surface cover and treatment of soft landscaped areas[91] [92].

3) Taking into account these considerations, the RoD, as confirmed by Mr Jarrett in oral evidence, summarised as follows:

a) Zone 5b was not contaminated because only 4 out of 21 samples exceeded the SSAC for B(a)P.

b) Zone 6, despite 14 out of 21 samples exceeding the SSAC, with the maximum value being over 300 times the SSAC, was not regarded as contaminated land because 'the land use is open space rather than enclosed private gardens thus reducing the potential for exposure due to the use of the land' (this is itself a good example of the Council taking account of other factors beyond the mere exceedance of the SSAC)[93].

c) Zone 8 was not regarded as contaminated because although 8 out of 21 samples exceeded the SSAC, the maximum was only 1.8mg/kg, which is only slightly above the SSAC;

d) Zones 4 and 5 were selected as contaminated because (1) they comprised of private gardens, (2) over 40% of the samples exceeded the SSAC, and (3) the maximum value is over 20 times the SSAC for Zone 5, and 40 times the SSAC for Zone 4;

e) Zone 7 was identified as contaminated because (1) the land use was private gardens, (2) 14 out of 16 samples exceeded the SSAC, and (3) the maximum value was over 200 times the SSAC.

5.2.4.14 Mr Jarrett in evidence explained that the Council took a precautionary approach. Mr Witherington in his PoE agreed. Nonetheless, it was put to Mr Jarrett that he can't have used the precautionary approach, because the word 'precautionary' does not appear anywhere in the Record of Determination. The Council submits that it is plainly not necessary to expressly state something for it to be relevant to your decision. In this regard, it should be noted that the RoD is only required by the 2006 Guidance to be a '*summary* of the evidence upon which the determination is based'[94].

5.2.4.15 As explained above, the determination took account of the likelihood of

[90] Ibid, para. 4.8.
[91] Ibid, para. 4.9
[92] In cross-examination Mr Witherington accepted that (a); (b); (c); (d) and (e) were all plainly relevant to the Council's consideration of whether the land was contaminated, see Day 6.
[93] In Mr Witherington's oral evidence a bad point was taken about possible SPOSH issues with the public open space. The issue with this area concerns groundwater and is dealt with in CD16.1.7. When cross-examined on the actual position Mr Witherington did not demur.
[94] CD1.3, B.52(b).

residents being exposed to the soil. Mr Jarrett was asked whether he was 'seriously suggesting' that residents would dig up or uncover contaminated soil and allow their grandchildren and children to play in it (day 2). On day 3, Mrs Fullwood gave evidence of an example of *exactly this danger arising*.

5.2.4.16 The Council notified relevant persons of the determination in March 2012 (and August 2012).

April 2012: New statutory guidance

5.2.4.17 The Council considered the implications of the 2012 Guidance, which was published shortly after the determination, and took the view that it was under no obligation to review the determination in light of the 2012 Guidance, for reasons set out in full in due course[95].

March 2013: Further AECOM analysis

5.2.4.18 In response to comments from Jim 2 during consultation, the Council commissioned further analysis by AECOM, which resulted in a further report entitled 'Sensitivity Analysis and Supporting Data' and dated 4 March 2013[96]. AECOM were asked to consider sample depth, and concluded that 'there is no discernible variation in the concentrations of B(a)P with depth. Elevated concentrations have been recorded throughout the soil profile above 1m. … B(a)P values significantly in excess of the National Background Concentration (NBC) and the SSAC are present within the upper 1m of the soil profile'. High and low concentrations were found at all depths within the site.

5.2.4.19 As well as criticising AECOM's approach to depth, Jim 2 were concerned about the use of 'extrapolated data'. More will be said about this in due course, but it is important at this stage to note that AECOM set out figures for 'Mean B(a)P Concentrations Recorded in Samples Recovered from 1m … or Shallower Soils with Extrapolated Data Removed from the Data Set' as follows:

1) Zone 4: 9.19 mg/kg;
2) Zone 5: 4.16 mg/kg;
3) Zone 7: 38 mg/kg.

5.2.4.20 There has been some confusion over the datasets used for the calculation of these averages. However, that confusion was resolved between the experts in the Statement of Agreement and Clarification on Data Used in

[95] See also the Council's legal submissions, paras. 20-21 and 23-25 (ID10).
[96] CD16.1.11

the Assessments for Willenhall Gasworks (10 December 2015)[97].

5.2.4.21 In re-evaluating the data in light of Jim 2's concerns, AECOM concluded that 'significant risks to human health from the land remain and it is concluded that the land poses a significant risk of significant harm to the identified receptors.'

March 2014: Defra's 2014 Category 4 Screening Level Guidance

5.2.4.22 At the end of March 2014, Defra published new technical guidance on soil contamination ('the 2014 Guidance'), which indicated that soil concentrations of B(a)P below 5 mg/kg would meet the definition of 'Category 4' (i.e. land which poses a low risk to human health and does not warrant being determined as contaminated land)[98].

5.2.4.23 The Council sought expert advice on the implications of the 2014 Guidance from Dr Camilla Pease of ENVIRON, who responded by letter on 20 June 2014. Dr Pease used the mean values set out earlier[99], 38 mg/kg for Zone 7, 9.19 mg/kg for Zone 4 and 4.16 mg/kg for Zone 5. Whereas Dr Pease was satisfied that Zone 5 could no longer be classed as contaminated land due to non-exceedance of the category 4 screening level (C4SL), she noted that '*the outcomes for Zones 4 and 7 are more subjective in interpretation i.e. when the C4SL is exceeded, is this to be regarded as 'significant possibility of significant harm*?' and that evaluating the risk is a '*matter of judgement*'.

5.2.4.24 As to zone 4, Dr Pease regarded categorisation as contaminated to be possible, and qualified that the zone '*may* benefit'[100] from a more Detailed Quantitative Risk Assessment ('DQRA').

5.2.4.25 As to zone 7, Dr Pease noted that 'the true mean B(a)P concentration of the site is at 38 mg/kg B(a)P/soil, which is greater than 7 times the C4SL (more than 10 times NBC)'[101], and commented that this lies near the level known to increase the risk of gut cancer to mice by 10%. While not explicitly saying so, it is clear from her conclusion as to zone 4 that she regarded zone 7 as plausibly contaminated. She suggested that further analysis of the high data points 'could', not 'should' as suggested by Jim 2, be conducted.

[97] ID15.
[98] CD16.2.5 and CD16.2.6. PoE of Mr Jarrett, paras 132-155.
[99] There is agreement that the focus is on means, in cross-examination Mr Morton accepted that there was no guidance that advocated the use of the median in assessing health risk. His evidence in his PoE on this can be safely set aside.
[100] This word 'may' was ignored by Jim 2 in cross-examination of Mr Jarrett.
[101] Jim 2 in cross-examination of Mr Jarrett sought to criticise the Council for using a multiple of a screening level as a relevant consideration for determining SPOSH. This is a surprising line of criticism, given that the ENVIRON letter, written by a woman regarded by Jim 2 as a leading expert in the field, refers to a multiple of both the C4SL and the National Background Concentration.

February 2015: Evaluation pre-Remediation Notice

5.2.4.26 In light of the ENVIRON letter, the Council decided in February 2015 to remove Zone 5 from these proceedings pending further investigation. The Council maintained that Zones 4 and 7 were contaminated on the basis that the means of 9.19 mg/kg and 38 mg/kg respectively both 'significantly exceed' the C4SL value of 5 mg/kg[102].

5.2.4.27 Dr Cole commented on the suggestion of DQRA in the ENVIRON letter as follows (emphasis added)[103]:

> 'In considering the need or otherwise for further assessment work to further reduce the uncertainties in the risk assessment and decision-making process there are three paragraphs in the revised statutory guidance that I think are directly relevant to whether the Council has acted reasonably in making a decision on SPOSH based on the current available data. Firstly paragraph 4.25 includes the statement that a local authority can take action under Part 2A on a precautionary basis if it considers that a strong case exists based on available evidence, including expert opinion. Secondly, paragraph 3.32 which allows a local authority to acknowledge uncertainty in the risk assessment and use its judgement to form a reasonable view of what it considers the risks to be on the basis of a robust assessment of available evidence, and finally paragraph 3.3.1 which states that the local authority should seek to minimise uncertainty as far as it considers to be relevant, reasonable and practical. There is no absolute requirement to undertake multiple iterations of the assessment process to remove uncertainty completely, and a balance has to be made between the benefit of the additional information and the cost of those iterations, both monetary cost and time delay in the decision-making process.'

5.2.4.28 Mr Jarrett in re-examination explained that the Council's thinking regarding the ENVIRON letter matched that set out in Dr Cole's PoE at paras 102-103.

5.2.4.29 In carrying out this review, the Council had regard to the 2012 Guidance[104]. The risk assessment, in light of the 5 mg/kg value, was done in recognition of the precautionary principle, 'for example due to scientific uncertainty over the effects of substances, and the assumptions that lie behind predicting what might happen in the future': 3.31. In light of this uncertainty, the authority is given discretion (3.32):

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[102] Correspondence at CD11.22, Council's Memorandum, CD6.7, p.238, and Remediation Notice, CD6.8, Schedule 4, p.259. Jim 2 criticised the reasoning of Mr Jarrett in the minutes of the residents' group meeting CD13.4. It is clear that this is not the relevant document for the purposes of determining the underlying reasoning of the Council.
[103] Dr Cole PoE, para. 103.
[104] PoE of Mr Jarrett, para. 161.

> 'The uncertainty underlying risk assessments means there is unlikely to be any single 'correct' conclusion on precisely what is the level of risk posed by land, and it is possible that different suitably qualified people could come to different conclusions when presented with the same information. It is for the local authority to use its judgement to form a reasonable view of what it considers the risks to be on the basis of a robust assessment of available evidence in line with this Guidance.'

5.2.4.30 The Council also had regard to (notwithstanding Jim 2's denial in cross-examination of Mr Jarrett that stress and anxiety are relevant at all)[105]:

> '(a) The likely direct and indirect health benefits and impacts of regulatory intervention. This would include benefits of reducing or removing the risk posed by contamination. It would also include any risks from contaminants being mobilised during remediation (which would in any case have to be considered under other relevant legislation); and any indirect impacts such as stress-related health effects that may be experienced by affected people, particularly local residents. …'[106]

5.2.4.31 The authority is not expected under the 2012 Guidance to produce a detailed cost-benefit or sustainability analysis. Rather it is expected to make a broad consideration of factors it considers relevant to achieving the aims of the contaminated land regime[107]. Other than this, Dr Cole explained in cross-examination that there is no guidance as to what an impact and benefit assessment should be[108]. Some of the factors considered by Mr Jarrett to be relevant to this exercise are set out in para. 162 of his PoE.

5.2.4.32 Taking this history together, the Council submits that the determination of the land as contaminated in March 2012, and the revision in early 2015 following the 2014 Guidance, was reasonable, even notwithstanding the possibility that the investigation could have been carried out differently. The Council, with advice from expert consultants, exercised their judgement, taking account of the above principles, the statutory guidance, and the available evidence.

5.2.5 *3) A response to the criticisms by Jim 2 Limited*

5.2.5.1 Alongside those already touched upon, a series of criticisms are made against the Council. They will be rebutted in turn.

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[105] PoE of Mr Jarrett, para. 162, and confirmed this in his re-examination.
[106] This is one of the objectives of Part IIA of the 1990 Act: see para. 4.27 of the 2012 Guidance.
[107] CD1.5, para. 4.28 of the 2012 Guidance
[108] Day 5, cross-examination of Dr Cole.

Zoning

5.2.5.2 During AECOM's investigations of the land, zones were identified based on current use of the land, with regard being paid to historical use[109], and the reports gradually narrowed their focus on the zones yielding the highest concentrations of B(a)P in the soil samples. There were initially four zones[110], which were subsequently divided into 9[111], and then zone 5 was itself divided to create an additional zone 5b[112].

5.2.5.3 Zoning was endorsed in the 2006 Guidance[113] at B.32, in which it was said that a local authority may be faced with a situation in which 'separate designations of parts of a larger area of contaminated land may simplify the administration of the consequential actions'.

5.2.5.4 Mr Smart explained in oral evidence that the zoning was intended to be practical, and take account of the layout of the houses[114]. In Table D annexed to the Council's letter dated 23 January 2014[115], the Council explained the zoning of the sampling areas:

> '*Sampling was based around the current types of land uses and the likelihood that there may be plausible pathways for exposure to the contaminant of concern B(a)P. Typically, this followed the pattern of residential and other development, some consideration was given to the layout of the gasworks operations. ... ... the boundaries of land determined were tailored to correspond to locations where the contaminant in question was identified, where there is an existing sensitive land use and where there is or could be in the future a plausible contaminant linkage. For example, high values of contaminant in question are of less concern in areas used for roadways or public open space when compared with land used for domestic gardens*.'

5.2.5.5 Jim 2 has alleged a failure to look at historical uses of the site, with the consequence being, it is said, that AECOM failed to consider historical usage as a basis for zoning[116]. As explained in re-examination of Mr Smart, AECOM *did* look at site history in order to set the current situation in a historical context[117]. See, for example:

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[109] CD10.9, Table D, p.54; PoE of Mr Smart, para. 93; Council's Statement of Case ('SoC') CD7.4, paras. 94-96; PoE of Mr Jarrett, paras. 280-283, PoE of Dr Cole, parasection 78-79.
[110] CD16.1.2, para. 4.2 – this section contains clear reference to both current and historical use.
[111] CD16.1.3 p. 241
[112] PoE Mr Smart, para. 55.
[113] CD1.3. See also B33 and B36.
[114] Day 1. See also: CD16.1.3, p.261. It should be recognised that the whole of the area of Zones 4 and 7 and adjacent areas were used for the disposal of gasworks waste.
[115] CD10.9
[116] Mr Smart's cross-examination and re-examination day 1.
[117] In the light of Jim 2's cross-examination of Dr Cole on this same point – in which it was suggested that the Third AECOM Report (CD16.1.3) should be read in isolation – Dr Cole was re-examined and confirmed that the earlier reports had looked at the site history, and that each report incorporated the previous reports. It was therefore unfair of Jim 2 to examine an individual report in isolation.

1) The analysis of maps of historical usage[118];
2) The analysis of OS maps[119].

5.2.5.6 The criticism of Mr Smart in cross-examination focused on the first report (CD16.1.1), which was the result of only a desk study, and was followed by extensive further investigations.

5.2.5.7 The Council decided to use zones taking account of current use in order to ensure that the investigation concentrated on the location of the receptors.

5.2.5.8 The justification for arguing that the zones should be based on historical uses was that a log for a particular location, in CD16.1.7, p.1521, TP24, showed B(a)P and a very high level of hydrocarbons. Mr Morton's PoE[120] identified a 'key element' of the RSK conceptual site model as being that 'concentrations of B(a)P greater than 24 mg/kg are associated with the presence of hyrdocarbons including tar at depth'. The point being made was that the B(a)P concentrations were only ever close to principal historical sources of contamination. However, this is not the case: re-examination of Philip Smart[121] and cross-examination of Mr Morton[122] indicated a number of logs where there were elevated levels of B(a)P but no hydrocarbons – see, for example, p. 1532, p. 1534, p. 1537, p. 1569, p. 1586, and p. 1591 of CD16.1.7. Mr Morton accepted this was the case and that this meant that B(a)P could not only be found in areas of hydrocarbons, and that instead high B(a)P levels were found in the absence of hydrocarbons, perhaps because B(a)P can be found in ash and clinker as well as tar[123]. This means:

1) The contamination was clearly not localised to the principal historical uses, which undermines Jim 2's argument that zoning should have been based on historical uses; it supports Mr Smart's view in cross examination that the borehole logs indicate high and low B(a)P concentrations wherever you are on the site, and that they are not related to specific historical activity. He explained that across the site, the soil is of a similar albeit heterogeneous mix[124], and that there would be variations in the material at very small distances[125].
2) The approach of Mr Smart explained in cross-examination, that the investigation did not target the locations of specific historical uses and instead tried to look at the whole site, across which

[118] CD16.1.3 fig 3 and CD16.1.1, page 8, and Appendix A – p.143 – 144. Report 16.1.2 – purpose at 1.2, p.98, and p.144-148
[119] CD16.1.1, p.8, section 2.4.
[120] Morton PoE, para. 5.9
[121] Day 1
[122] Day 5
[123] See e.g. Dr Thomas' PoE at para. 59. The Statement of Common Ground records in terms (see para. 4.6) that '[b]oth parties can agree that it is known that B(a)P is present in gasworks waste (ash, coal, coal tar, soot, clinker) … '.
[124] See e.g. the SCG at paras 4.16 – 4.17; and Mr Morton's PoE at paras. 4.16 and 5.31.
[125] This is further evidence, it is submitted, of spreading: see ground (c) below.

contamination was found 'here, there and everywhere', was reasonable. The key point of Mr Smart was that the investigation rightly focused on the location of the receptors, in recognition of the fact that the site's current use was as a housing estate. It was therefore necessary to investigate the existence of contamination across the whole site, and not concentrate on the location of historical uses.

5.2.5.9 Even if the contamination had been localised, the obvious response to Jim 2's position must be 'so what?'. Jim 2 cannot mean to say that localised contamination should simply be ignored despite it being in residents' gardens. If their suggestion is that localised high readings should lead to re-zoning or further sampling, it is important to note that no alternative zoning analysis of contamination (or further sampling – see below) has been provided by RSK at any point either before or after the appeal was initiated[126]. This is a fundamental problem with their case. It is all very well to criticise the Council's approach but the attack is of limited potency if no zoning alternative is suggested[127].

5.2.5.10 Dr Cole has given evidence to the effect that the Council's approach to zoning was a reasonable one[128]. He explained that there are a number of different ways to zone. Whatever you decide, it needs to fit what is happening on the ground. In this case, we are looking at built development, and so this raises the development layout option. He explained that, given the nature of ground encountered, there is no right or wrong answer with zoning. However, a reasonable approach, as was done here, is a pragmatic approach to deal with what currently exists on the ground.

5.2.5.11 Dr Cole also explained[129] that the case study is relevant guidance on what amounts to reasonableness in zoning. Dr Cole noted that the zoning in the case study is based on two factors: built development and previous historical use. His view was that the present case takes a similar approach and that this approach is reasonable. Mr Witherington agreed that the 'determining factor' in the case study, which involved adjustment of zone boundaries so as not to intersect houses, was existing residential use[130]. He accepted that, whilst it appeared that the Council had not taken account of the historic location of individual pieces of gasworks plant, it had taken account, in more general terms, of the historic use of the land as a gasworks.

[126] This was confirmed by Mr Morton in cross-examination, day 5.
[127] Mr Witherington in cross-examination confirmed that the splitting he did in his rebuttal of zone 7 was not an alternative proposal, this was done on the basis of data alone and ended up in one zone with a mere 4 samples. Interestingly in Tromans at para. 3.204 it is said that an assumption based on further sub-division might be seen as questionable.
[128] Dr Cole, evidence in chief, day 4, and also para. 79 of his PoE.
[129] In response to a question from the Inspector and in re-examination, day 5.
[130] Mr Witherington, cross-examination, day 6.

Use of data points just outside the zones

5.2.5.12 Mr Smart explained at paras. 28-31 of his Rebuttal Proof[131] and in his evidence in chief that several of the data boreholes were specifically located to avoid disruption to the properties (in some cases access had not been permitted by residents), so the locations were chosen just outside of the properties, which sometimes meant slightly outside the zone in which that property was situated. He suggested that the use of these 'outside' data points for zones was valid because of the historical plans indicating that zones 4 and 7 were part of the land used for the disposal of gasworks waste. Given the nature of the ground, there was no reason why material on one side of a garden fence would be any different to the material on the other side.

5.2.5.13 The example given is of WS13, just north of 1 Brookthorpe Drive, which shows a significantly high B(a)P level. Mr Smart noted that the zones used for the investigation and assessment were slightly different from the zones in the Remediation Notice, which excluded roads, pavements and open space, i.e. the Remediation Notice zones did not extend beyond the curtilages of the properties. The boundary of the 'assessment' zone 7 is north of the road, so WS13 falls just outside, by about two metres, zone 7 as determined in the Remediation Notice. The simple reason for this was that a data point just outside the property was more convenient for the drill and less inconvenient to the resident.

5.2.5.14 For the reasons explained by Mr Smart, it was reasonable to include these 'outside' data points. Further, to exclude them would be inconsistent with the requirement to consider all the relevant and available evidence.

5.2.5.15 Mr Morton was cross-examined on WS13[132]. He accepted that it was within the assessment zone 7, but outside the determined zone. He accepted the explanation that this was because it was in a highway verge. He also accepted that it was very close to the garden of 1 Brookthorpe Drive. He further accepted that it was an interference with residents to go into their gardens for sampling purposes and that this required the use of statutory powers. However, his position was that it was *unreasonable* in all cases for the Council to fail to exercise statutory powers of entry and instead take a sample immediately outside the garden. The Council's submission is that Mr Morton has demonstrated in this answer a failure to appreciate the difficult position that a local authority can be placed in, and a failure to understand the margin of discretion as to what is reasonable in the circumstances, taking account of the proximity of a near-garden sample, and the avoidance of unnecessary interference with resident privacy.

[131] P2.
[132] Day 5

Shallow soil sampling – failure to focus on upper 0.5 metres

5.2.5.16 The Council's position is that it took samples from a range of depths, including below 1 metre. In the RoD[133], the Council had regard to the shallow depth of a number of the elevated readings. In the later review by AECOM in March 2013[134], the RSK criticism of depth was responded to by concentrating on samples within the top 1 metre. This analysis revealed that there were no variations in B(a)P concentrations by depth: see also Mr Smart's evidence in chief, day 1, which indicated that high values could be found at any depth. It is submitted that this collectively constitutes a reasonable approach.

5.2.5.17 Mr Smart has explained in his Summary PoE as follows:

> *'It is argued that insufficient samples have been taken from shallow depths and that vertical variations in contaminant concentrations or layering of the made ground have not been considered. The available data does not support this criticism. The made ground has a significant variation in its chemical characteristics both vertically and laterally. There is no obvious distribution or layering of the material. The depth of the samples is irrelevant, as high or low contaminant levels can and have been recorded at any depth. Similar variations in contaminant concentrations will be present wherever gasworks waste is present within the made ground across the site*.'[135]

5.2.5.18 It was added in oral evidence that a total of 104 soil samples from the upper 0.5 metres have been analysed for B(a)P across the site.[136]

5.2.5.19 Dr Cole in oral evidence in chief explained that it is still relevant to consider data from below the depth of 1m, on the basis of evidence that the material does not substantively vary with depth.

5.2.5.20 Mr Morton confirmed[137] that figure 2 in his PoE, page 43, indicated elevated levels in the top metre, which tends to suggest that the criticism relating to depth is irrelevant.

[133] CD6.3, para.4.7
[134] CD16.1.11
[135] Mr Smart, Summary PoE, para. 20.
[136] See Mr Smart's PoE, p 19: depth samples show significant B(a)P concentrations at any depth. Rebuttal Proof, table 1, page 2: Significant number of samples in the top half a metre.
[137] Cross-examination, day 5.

Missing' and 'extrapolated' data

5.2.5.21 This matter has now been resolved. It is accepted that in an ideal world it would have been resolved sooner. However, the Council submits that both parties are to blame for not managing to get the data clarified earlier, either in the without prejudice meeting in 2013 or the meeting for the Statement of Common Ground in 2015.

5.2.5.22 It is not surprising in some ways, given the size of the site investigation and the complexity of some of the technical issues, that there have been some complications surrounding the data.

5.2.5.23 Furthermore, Dr Cole's oral evidence (day 4) has explained that the changes to the data have not fundamentally altered his conclusion that the Council acted reasonably and in accordance with the statutory guidance. In cross-examination, he said that the presentation of data had been 'less than ideal' but fell short of 'unreasonable'[138]. Mr Smart, at para. 18 of his Rebuttal PoE, explained that in any event the extrapolated data made little difference to the outcome[139].

Unreasonable inclusion of outliers

5.2.5.24 Dr Cole addressed the question of outliers in his oral evidence in chief[140]. He started by suggesting the need for a conceptual understanding of the made ground, in terms of how is it comprised, and how it varies spatially. This can be obtained from borehole logs, and other aspects of site investigations, together with the chemical data. In this case, Dr Cole noted that the ground was very mixed in terms of composition, with various different constituents, with data showing a widely varied set of concentrations, i.e. high concentrations next to low concentrations.
When faced with that type of evidence, there are two options: (1) you can assume that all data is representative of the mixed population, which means you use all the data you have, including the outliers; (2) you identify the outliers and you then have to treat them separately.
What you cannot do is simply ignore them, which ultimately appears to be what Jim 2 is suggesting. Dr Cole explained that option (2) is not possible unless you can be confident that you have found all of the outliers.
Given this dataset, Dr Cole was confident that there could be no certainty about the existence or non-existence of other high concentrations in the ground. For this reason, he concluded that it's reasonable and justified to keep these high concentrations in the calculation of the average soil concentrations because they represent the inherent variability in the soil that people are being exposed to.

[138] Day 5, cross-examination of Dr Cole.
[139] Mr Smart also accepted in cross-examination, day 5, that the use of extrapolated data was not unacceptable in principle.
[140] Dr Cole, evidence in chief, day 4.

5.2.5.25 On the related subject of 'hotspots', Dr Cole explained[141] that a site investigation can reveal a delineable type of material or a more fluid material. In terms of the dataset in this case, he explained that it is impossible to delineate. There is a high concentration, then a low concentration, in samples taken in close proximity in several parts of the site. He said there was no sense in which you can delineate a hot spot.

5.2.5.26 In re-examination on day 5, Dr Cole confirmed his reply to the 'outlier' criticism in his PoE[142], which was to pose the question: 'what would be the odds of the random sampling undertaken by the Council picking out the high concentrations if those high concentrations were not prevalent throughout the soil?'.

5.2.5.27 Mr Morton was cross-examined on outliers[143]. He accepted, after being taken slowly through the many examples in Mr Smart's evidence[144], that the site was full of examples of samples with high B(a)P levels being situated very close to samples with lower B(a)P levels. Mr Morton was taken to the Chartered Institute of Environmental Health (CIEH) guidelines on outliers[145], and he explained that Jim 2 was not alleging that the outliers were an error. Instead, he returned to the point about zoning, which has already been considered, and the failure to undertake further sampling of zone 7, which is considered later. Crucially, the CIEH guidelines also make clear that in 'general' outliers should not be excluded, and that in most cases 'outlying data should be assumed to be genuine and reflective of the full range of soil concentrations to which receptors may be exposed.'

<u>Failure to consider topsoil, with respect to it representing a different layer, and a potential barrier to exposure</u>

5.2.5.28 Mr Smart's evidence on topsoil was that[146]:

1) Topsoil was identified in several, but not all, of the exploratory holes drilled across the site (Summary PoE, para. 9);
2) Where present, the topsoil generally is thin at less than 0.1m[147] and comprises the turf layer;
3) In most of zones 4 and 7, the soil layer is thinner than a spade depth;
4) Several exploratory holes drilled in areas of paving proved made ground directly below the slab with no topsoil;
5) There is a potential for mixing and bringing contaminated material in the surface;

[141] Dr Cole, oral evidence in chief, day 4.
[142] Appendix 9, 4th line in.
[143] Day 5
[144] See, e.g., paras. 89-92 of his PoE.
[145] CD16.2.4, p.3196
[146] See Rebuttal PoE of Mr Smart, paras. 11-14
[147] See the SoCG at para. 4.15, the topsoil in some places is 50-100 mm only (ID11).

6) Insufficient to provide an effective barrier; and,
7) There is no evidence of layering.

5.2.5.29 In re-examination, Mr Jarrett was asked about topsoil. He was taken to para. 5.2.4 of Appendix 10 of Mr Witherington's PoE, where it is explained that any digging by children and pets is anticipated to be no greater than 600 mm. Mr Jarrett noted Mr Smart's evidence that the topsoil varies across the site – from 50-100 mm, and up to 300 mm in places[148]. For this reason Mr Jarrett did not regard the topsoil as an effective barrier. He noted there would be 'opportunities for children to disturb that'.

5.2.5.30 Dr Cole also considered topsoil. He accepted that in hindsight it would have been useful to have some topsoil data. However, he indicated that it was only important where there is clearly delineable stratification in the soil, which is not the case here. Dr Cole explained that he had seen many other cases where the investigation had not taken topsoil data. He also noted that there will be mixing of any topsoil with made ground down to depths of 600mm, caused by *inter alia* (1) human activity (especially digging) and (2) earthworms, and that there is no guidance to the effect that you can rely on a thin cover system. For this reason, the variable and thin topsoil on this site is not a durable barrier.

5.2.5.31 Mr Witherington agreed as to the risk of mixing of soils via worms and other possibilities referred to in Appendix 10 of his PoE[149].

5.2.5.32 Mr Morton admitted that there was recognition of the topsoil in the AECOM reports[150], and that it was relevant to consider land use and the (lack of a) power to control use.

5.2.5.33 Mr Witherington in cross-examination accepted that the topsoil was less thick than he would have expected in places[151]. He accepted that essentially the question was a matter of whether the residents could be controlled, and that residents could do quite a lot in their gardens without requiring planning permission, for example ponds and digging foundations and building outbuildings up to a third the size of the garden. His views on the acceptability of the topsoil as a protective barrier are dependent on him seeking to issue a message to all residents: 'I would suggest caution if anyone wants to dig up the soil'[152]. This was volunteered by Mr Witherington in evidence-in-chief. He fails to understand the inability of the Council to control the use by residents of their own gardens: (1) the residents are entitled to do what they like in their own gardens; (2) people, especially children, do not always listen to such advice. Mr Witherington's advice of 'caution' causes the Council real concerns; it would doubtless also concern residents. Jim 2 argued that the land should

[148] See the SoCG at para. 4.15 (ID11).
[149] Cross-examination, day 6. Also pets, burrowing animals, plant roots etc.
[150] Cross-examination, day 5
[151] Cross-examination, day 6. See PoE Mr Witherington, para 7.12, and Statement of Common Ground, para. 4.15.
[152] Evidence in chief, day 6.

not have been identified as contaminated and yet its consultant advised residents to exercise 'caution' when digging in their own gardens. Stepping back for a moment from the detail in this case it is not difficult, given this 'advice', to see why the Council has taken the view that regulatory action is justified.

Wrongful use of screening value to determine SPOSH

5.2.5.34 The Council's position is that it has not determined SPOSH purely on the basis of an exceedance of a screening value. This is expressed clearly in the RoD[153]. It is also clear from the evidence of Mr Jarrett orally (day 2) and in his PoE. The determination was based on a variety of considerations, of which exceedance of the screening value was only one. Further, it was not the mere exceedance of the screening value, but the fact that (a) certain values exceeded the screening value by an order of magnitude (10 or 100) and (b) the average was significantly in excess of the screening value.

5.2.5.35 In addition to denying what is clearly stated in the RoD and in the evidence of the Council, Jim 2 has suggested that it is wrong in any event to use a multiple of a screening value as a relevant consideration to determining SPOSH. However, this is the approach considered to be reasonable by both Dr Cole[154] and Dr Pease in the ENVIRON letter[155], and is expressly approved in the 2008 Guidance at paras. 38-39[156]. Taking account of the fact that (a) there is uncertainty in the quantitative risk estimates for cancer and (b) there is no number for SPOSH in the statutory or non-statutory guidance, Dr Cole in para. 88 of his PoE stated:

> 'I consider an intake an order of magnitude above the HCV certainly meets the requirements of the statutory guidance (an order of magnitude being a margin that should adequately account for the inherent uncertainty in the toxicology and provide an appropriate level of confidence that predicted exposure from soil is significantly higher than a minimal risk intake).'[157]

Failure to undertake an assessment to derive a SPOSH concentration

5.2.5.36 The Council's position, supported by Dr Cole, is that it is inappropriate to assign a definite 'threshold' value above which there is a SPOSH. Instead, a guideline value should only ever be 'relevant to the judgement' of SPOSH[158], and the data alone cannot give the final answer. In using

[153] CD6.3, para. 4.6
[154] Paras. 85 and 88 of Dr Cole's PoE.
[155] CD16.1.13, penultimate internal page
[156] Confirmed to be relevant by Dr Cole in re-examination, day 5. See also B47, 48 and 49 of the 2006 Guidance, which Mr Witherington accepted in cross-examination also supported such an approach.
[157] See CD1.10, para. 39.
[158] B48(a) ibid.

guideline values, it is also necessary to consider 'assumptions regarding soil conditions, the behaviour of potential pollutants, the existence of pathways, the land-use patterns, and the availability of receptors'[159].

5.2.5.37 Mr Jarrett in his evidence in chief explained that SPOSH is not a number. It is instead an evaluative judgement, a technically advised opinion based on a set of circumstances. He explained that what is a SPOSH in one place may not be a SPOSH in another. He adopted the simple example of Zone 6, which was not determined as presenting a SPOSH because, despite 14 out of 21 samples exceeding the SSAC, with the maximum value being over 300 times the SSAC, Zone 6 was not regarded as contaminated land because 'the land use is open space rather than enclosed private gardens thus reducing the potential for exposure due to the use of the land'[160].

5.2.5.38 It is of obvious significance that the panel of experts in the case study felt unable to give a number for SPOSH[161].

5.2.5.39 This allegation is arguably Mr Witherington's big point. It is a criticism made repeatedly by him. He is known in the industry as a proponent of the view that SPOSH can be given a number. He believes he is right about this. It is clear that some experts agree with him. However, it is also clear that other experts, including Dr Cole, disagree with him. It is a major matter of contention among the experts in the contaminated land community. It was considered and rejected in the Way Forward project and not included in the eventual 2008 Guidance. This is perhaps another reason why Mr Witherington shut his eyes to this guidance. The question is whether the Council acted unreasonably in preferring the view of one expert school of thought over another, and in accordance with statutory guidance. In cross-examination, Mr Witherington was asked repeatedly to refer to the part of the statutory guidance which requires SPOSH to be identified as either a number or a range of numbers. He reluctantly accepted that it did not do the former, and was unable to find a paragraph requiring the latter. Mr Witherington displayed a worrying tendency to regard his own position as the only reasonable position. This blinkered approach ('we are right and everyone else is not just wrong but unreasonable') has it seems infected Jim 2's case generally, and it certainly underlies its costs application.

5.2.5.40 In cross-examination, Mr Witherington was unable to dispute that SPOSH, under the 2012 Guidance, is not always determinable on the numbers alone, due to para. 4.27 of the 2012 Guidance requiring an impact/benefit assessment, a process which involves a high degree of discretionary policy judgement. In cross-examination Mr Witherington accepted that in this case no party was suggesting that the land within zones 4 and 7 was

[159] B48(b) ibid.
[160] Record of Determination at CD6.3
[161] As explained by Dr Cole in reply to an Inspector's question on day 5.

within category 1 or 4[162]. Thus in terms of the 2012 Guidance the debate here is whether given the now agreed data this land falls within category 2 or 3. Numbers alone cannot answer that question. Under the 2012 Guidance a site can be regarded as category 2 (that is to say contaminated land) rather than 3 (not contaminated land) on two alternative bases: (i) a strong case on the numbers; or (ii) a less strong case on the numbers, and an evaluative impacts-benefits assessment. Mr Witherington was also forced to accept that at no point had RSK undertaken their own impact/benefit assessment.

5.2.5.41 Further, a survey[163] carried out of 130 experts as to their views on a SPOSH number for the category 2/3 boundary indicated widely varying positions – the variation was of a factor of 100 (the lowest being 10 and the highest being 1,000), which is further evidence that science alone cannot answer the SPOSH question, and that there is considerable disagreement between experts on this issue.

Failure to undertake a toxicological risk assessment

5.2.5.42 In Mr Witherington's rebuttal, it is now accepted that Dr Cole has done this[164]. Indeed Mr Witherington records in terms that 'Dr Cole has presented an exposure and toxicological review of the site which is the robust and scientific approach that the statutory guidance calls for'[165]. He said in his evidence-in-chief he had no issues with the processes Dr Cole had undertaken albeit he disagreed with the outcome because he considered it too precautionary[166]. Moreover, as discussed elsewhere, the AECOM reports did contain a human health risk assessment.

Failure to undertake sufficient sampling and a sufficiently detailed investigation of Zone 7

5.2.5.43 Much criticism has been levelled at the Council's witnesses regarding the investigation of zone 7, which, unlike the other zones, did not receive further attention after the third AECOM report in May 2009. It was suggested that the soil samples of Zone 7 were fewer in number than those of Zone 4. However, according to the agreed data and confirmed by Dr Cole in oral evidence, this has now been shown to be incorrect. There were in fact more samples in zone 7 than in zone 4. Mr Witherington accepted this[167]. Mr Morton explained that their criticism was not of the number of samples – he accepted that a significant number of samples had been obtained – but that the samples had not been allocated correctly[168]. Mr Morton confirmed the contents of his PoE at

[162] He hesitated in relation to category 4 but ultimately accepted this.
[163] Para 5.28, p.26 of Mr Witherington's PoE.
[164] Rebuttal of Mr Witherington, para. 6.4
[165] Ibid.
[166] Dr Cole's evidence-in-chief explained why this was simply not so; in any event this is a matter of disagreement on judgement by experts.
[167] Cross-examination of Mr Witherington, day 6.
[168] Mr Morton, cross examination, day 5.

paras. 4.12 and 4.13 that Zone 7 included the highest B(a)P concentrations and 28 out of 33 exceeded the generic assessment criteria (GAC).

5.2.5.44 Alongside the incorrect allegation of fewer samples, the Council were generally criticised for not carrying out further investigations of Zone 7. Mr Smart explained that the reasoning behind this was that, in zone 7, AECOM had found a number of high levels, and the judgement was made that, given the similarly mixed nature of all the ground, if one property had elevated B(a)P, another property two doors away had B(a)P. Mr Smart was criticised for making such a judgement if the garden of one property is near a contaminating historical use, but another is not. For reasons explained earlier, Mr Smart's judgement was justified because a lot of samples had elevated levels that were not close to historical uses.

5.2.5.45 It is relevant when considering the reasonableness of the Council's decision not to carry out further investigations to draw attention to the Defra letter of March 2010, in Appendix D of Mr Smart's PoE[169]. This letter tells the Council to concentrate on other zones for further investigation, and does not mention zone 7. The context to this letter, as explained by Mr Jarrett in his evidence in chief, was an application to Defra for further funding to continue investigations in zones including zone 7. Aside from the letter itself, Mr Jarrett explained that his communications with Defra made clear that the zone 7 application would not be successful given the existing findings. Mr Jarrett further explained that, in the absence of Defra funding, it would not be feasible for the Council to have carried out further investigations into zone 7 due to resource constraints. Mr Morton agreed that it would be 'rather unfair' if the Secretary of State were to find the Council's investigation of zone 7 to be unreasonably inadequate having itself declined to provide further vital funding for such investigation[170]. Mr Witherington in re-examination tried to argue that it was reasonable and practicable to carry out more examination of hotspots but this wholly ignores the absence of funding[171].

5.2.5.46 Mr Tromans re-examined Mr Morton[172] on the Defra contact, asking questions that should plainly have been asked to Mr Jarrett instead. The questions actually asked of Mr Jarrett did nothing to call into question his evidence that Defra had informed him that a funding application for further investigation of zone 7 would not succeed. The Secretary of State would of course be free to make her own inquiries on this matter.

5.2.5.47 Much of the cross-examination of Mr Jarrett and Mr Smart on this point, as with other points concerning the adequacy of the Council's overall soil investigations, rests on the assumption of limitless resources, which may well be a legitimate assumption where the investigator is a subsidiary of

[169] As accepted by Mr Morton, cross-examination, day 5.
[170] Cross-examination, day 5
[171] Day 6
[172] Cross-examination, day 5

Taylor Wimpey. However, it is necessary to consider the inevitable resource constraints on a local authority when considering the reasonableness and adequacy of the Council's investigations.

5.2.5.48 It is also necessary to consider the evidence of Mrs Fullwood, and that of Mr Jarrett regarding his interactions with the residents. The chief concern has been delay. It is unacceptable for Jim 2 to argue that yet more time should have been spent analysing the soil beyond the already lengthy and detailed investigation by AECOM.

5.2.5.49 It is noteworthy that at no point has RSK or Jim 2 undertaken sampling of the public open space – which they own[173] - or approached the Council or residents to request permission to undertake their own investigation of private areas, if they genuinely believe the Council's investigation to be inadequate and the samples to be unreflective of the reality. All of the data in this Inquiry has been provided by the Council, and none by Jim 2. Mr Morton confirmed this[174], he could give no explanation when pressed as to why this was the case, and agreed that it was one way, perhaps the best way, for the Council's case to be proved to be unreasonable.

Averaging of Zones 4 and 7

5.2.5.50 The evidence of Mr Jarrett is clear on this point. The purpose of averaging was not to replace the determination of the zones on an individual basis. It was instead to reinforce the justification for determination. It was permissible to average the zones due to (a) the similar current use and (b) the similar mix in terms of soil composition, and (c) the location of the zones as adjacent to one another. Mr Morton accepted that this was the position, with reference to both the RoD[175] (where there is no averaging), and the Remediation Notice[176], where there is merely reference to there being 'some justification' for averaging. This is in short a 'non-point'.

The conceptual model

5.2.5.51 Mr Morton's PoE[177] contained some criticism of the AECOM conceptual model[178]. In cross-examination he accepted that in terms of the essential elements: contaminant, pathways and receptor there was agreement. The other criticisms proved to be little more than pettifogging. Thus to take one example Mr Morton criticised the AECOM conceptual model as not recognising the heterogeneous nature of the made ground. He accepted though that a conceptual model is not just a drawing, it can be described in text. He also accepted that throughout the report the heterogeneous nature was fully recognised.

[173] Cross-examination of Mr Witherington, day 6.
[174] Cross-examination, day 5
[175] CD6.3, p.113
[176] CD6.8, p.259
[177] See paras. 5.1 – 5.12.
[178] See CD16.1.7, figure 8.

Failure to treat the draft 2012 Guidance as a material consideration

5.2.5.52 In this case the guidance under section 78YA that was in force at the date the land was identified (that is to say 27 March 2012) as contaminated land was the 2006 Guidance. It was this guidance that the Council was thus obliged to act in accordance with. That this is so is clear from the express terms of the Act itself. But this is also supported by the general position in administrative law that a person can expect no more than to have his circumstances considered in light of the policy in force at the time of the consideration: *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 at para. 73 (CD2.2).

5.2.5.53 In terms of the emerging draft of what became the 2012 Guidance, this was not, as at the date the land in issue was formally identified, statutory guidance issued under section 78YA. In *R. v Bolton MBC Ex p. Kirkman* (1998) 76 P. & C.R. 548 (upheld on appeal by the Court of Appeal: [1998] Env. L.R. 719) (CAB8), Carnwath J held at p.551 and p.553:

> 'A distinction must be drawn between (1) formal policy statements which are made expressly, or are by necessary implication, material to the resolution of the relevant questions; (2) other informal or draft policies which may contain relevant guidance, but have no special statutory or quasi-statutory status.
>
> …….
>
> Thus, informal policy statements or reports, or draft circulars, may be relevant depending on the circumstances. In practice, however, it is likely to be rare that an authority is held to have acted unlawfully simply by virtue of its failure to have regard to such non-statutory statements. Time will generally be better spent in this court if the argument is concentrated elsewhere.'[179]

5.2.5.54 The Council was required to act reasonably and in accordance with statutory guidance. The statutory guidance at the time of the determination on 27 March 2012 was the 2006 Guidance[180]. The 2012 Guidance[181] did not come into force until 10 April 2012.

5.2.5.55 Jim 2 argues that the Council should nonetheless have taken account of the imminent replacement of the 2006 Guidance with the 2012 Guidance, which was published on 10 April 2012. The draft 2012 Guidance, it is said[182], was a 'material consideration'. It is also suggested that when it

[179] Jim 2's legal submissions see para. 43 and 44 as supporting the view that a proposed change in policy can be a material planning consideration. That is correct, but the submissions quotes only partially from para. 44 of the judgement of Sullivan LJ who having recognised that a proposed change can be material says that such a proposal would rarely if ever carry much weight. The learned Judge suggested that it could not say there were 'no circumstances' where such a consideration might be decisive but it was going to be an 'extreme case'. That supports the Kirkman approach (ID3).
[180] CD1.3
[181] CD1.5
[182] Jim 2's legal submissions, paras. 40-45 (ID3).

was duly published, this necessitated a review of the determination.

5.2.5.56 The draft 2012 Guidance was laid before Parliament at the time of the determination. The purpose, at least in theory, is that Parliament will scrutinise the draft and perhaps seek amendments to it. Parliament, as recognised by Mr Witherington, has 'the final say'[183]. It would therefore be wrong in principle to pre-determine what Parliament is expected to debate and conclude, in full knowledge that there could be potentially significant changes made.

5.2.5.57 Mr Witherington also accepted that no date of publication was announced in advance with respect to the 2012 Guidance[184]. This obviously means it was very difficult for local authorities to know when it would enter into force. Further, Mr Witherington was able to offer no evidence to counter the position set out by Mr Jarrett in correspondence in May 2012[185] that 'Defra had indicated that local authorities should continue to have regard to current documentation until such time as replacement documents were ratified and published'.

5.2.5.58 It is not clear how the Council was supposed to act in accordance with two different sets of guidance, the 2006 Guidance and the draft 2012 Guidance, even if the latter was only a 'material consideration'. This leads to the following conundrum. If the 2006 Guidance and 2012 Guidance are seen as substantially similar, then it makes no difference if a decision maker didn't have regard to the latter and only looked at the former. If, on the other hand, the two pieces of guidance are different, and the Council had regard to the 2012 Guidance, then it runs the risk of not acting in accordance with the 2006 Guidance, which is a statutory ground of appeal.

5.2.5.59 In another paragraph of the Council's legal submissions, it is suggested that the Council needed only to 'consider' the draft 2012 Guidance prior to determination. This is precisely what the Council did[186].

Failure to delay determination until the publication of the 2012 Guidance

5.2.5.60 The oral evidence in chief of Mr Jarrett was that the publication of the 2012 Guidance had been delayed a number of times, and there was no certainty about when it would be in place[187]. He also noted that, reviewing the draft guidance, it would not significantly alter the approach to determining contaminated land.

5.2.5.61 He also explained that the process leading to the formal determination

[183] Cross-examination of Mr Witherington, day 6.
[184] Ibid.
[185] CD11.4
[186] PoE of Mr Jarrett, para. 114
[187] Mr Witherington confirmed in cross-examination, day 6, that there was no pre-published date for publication in advance of the 2012 Guidance being published.

took time, and that it had been in motion prior to 27 March 2012. The Council had been considering the existence of a SPOSH since the final AECOM report in July 2011. This would have presented difficulties in terms of postponing determination until after the new guidance was published, given that all of the work leading up to that determination had been carried out in accordance with the 2006 Guidance.

5.2.5.62 Mr Jarrett in evidence also recognised that the Council 'had a duty to carry out its statutory function'.

Failure to review the determination following publication of the 2012 Guidance

5.2.5.63 The issuing by the Secretary of State of the 2012 Guidance on 10 April 2012 did not give rise to a legal obligation on the Council to review the determination it had already made. This is because:

1) There is no express provision for automatic review of existing determinations in the 2012 Guidance;
2) Indeed the 2012 Guidance expressly suggests that it does not apply to determinations made prior to the guidance coming into force. Para. 3.36 provides that 'Local authorities are not required to produce risk summaries … for land determined as contaminated land before this Guidance came into force.' This is important because it is agreed by the parties that one of the main changes as between the 2006 and 2012 Guidance was the introduction of a requirement for a risk summary: see the Statement of Common Ground at para. 4.2; and Mr Witherington's PoE (J1.2) at para.5.16 pp. 20 – 21);
3) The Impact Assessment on the 2012 Guidance[188] looks at the costs of the changes. It refers to 'modest transitional costs', and the need for 'time to become familiar with the guidance'. The total cost for all authorities collectively is estimated at £120,000. Had it been a requirement or intention of the 2012 Guidance to review all pre-existing pre-2012 Guidance determinations, it is submitted that the Impact Assessment would have mentioned it. Mr Witherington said that 'you could read it that way'[189].
4) For the purposes of the section of the 2012 Guidance concerning 'reconsideration, revocation and variation of determinations', the 2012 Guidance itself does not constitute 'further information' (see para. 5.20) requiring review, contrary to the submission at Jim 2 SoC CD7.3 para. 4.9.3;
5) The 2012 Guidance does not itself suggest alternative guideline values requiring reconsideration of the determination pursuant to para. B49 of the 2006 Guidance (CD1.3);

[188] CD16.2.8 (which had RSK involvement – para.76), at p.3503.
[189] Cross-examination of Mr Witherington, day 6.

6) It cannot have been intended that the 2012 Guidance would require review of every determination previously made by local authorities since Part IIA came into force in 2000 and made in accordance with either the 2006 Guidance or the previous guidance namely DETR Circular 02/2000 (March 2000) – this would involve huge cost, delay and administrative burden.

5.2.5.64 Moreover, it is necessary to distinguish between:

1) A review of the determination under the 2012 Guidance e.g. re-considering afresh whether the land in issue is contaminated applying the 2012 Guidance; and
2) Consideration of the 2012 Guidance and deciding whether or not to undertake a review of the determination as in (1).

5.2.5.65 The Council did the latter, and not the former. It is wrong in law to suggest that the Council should have waited until the 2012 Guidance was published before determining the land as contaminated. The Council was, see above, under a duty to inspect its area and identify contaminated land: section 78B of the Act. It was required to do so in accordance with the statutory guidance at the time: the 2006 Guidance: section 78A(2). Delaying a determination pending the publication of the 2012 Guidance would have put the Council at risk of breaching their duty under section 78B.

Failure to refer the case to the CL:AIRE Conland Expert Panel

5.2.5.66 This is a new allegation arising during the Inquiry and not made in any of Jim 2's formal documents for the Inquiry.

5.2.5.67 The panel was established by Defra in October 2012. This is after the determination in March 2012. Dr Cole explained in cross-examination that it is 'not normal' for local authorities to refer cases to the panel post-determination. He went further in re-examination by explaining that of the four cases considered by the panel, none were from local authorities asking them for guidance after having made the determination.

5.2.5.68 Dr Cole also explained that a referral is entirely voluntary. For these reasons, it is difficult to understand how the Council can be said to have acted unreasonably in not referring their case to the panel.

Failure to provide the UKAS accreditation certificates

5.2.5.69 The request for the certificates was raised for the first time late on at the Inquiry, despite RSK having been involved in this case since 2010. It was never in dispute that all the certificates were provided for Phases II and III of the investigation. The request only related to Phase I. The Council has

sought to comply with this request and has provided all but six[190] of the certificates for the 26 samples in Phase I. Complying with the request has been difficult given that the certificates relate to samples tested by the laboratory over seven years ago.

5.2.5.70 In response to a question from the Inspector, Dr Cole explained that the samples would have been analysed in a batch using the same method. It is only a few samples within a batch that are missing. It is the method that is the subject of accreditation, and applies to every sample analysed under that method. Therefore, the certificates for a majority of a batch can give assurance for those missing certificates. Mr Smart has produced two notes on these issues; and following consideration of the second one Mr Witherington confirmed[191] this was not a 'major issue'[192].

5.2.6 *4) An evaluation of reasonableness*

5.2.6.1 Having set out the Council's approach and rebutted the criticisms levelled by Jim 2, it is necessary to ask whether, using the word in the ordinary sense, the Council acted 'reasonably' in determining zones 4 and 7 as contaminated land. In answering this question, the following matters should be at the forefront of the Inspector's and Secretary of State's minds:

1) Some contaminated land cases will be straightforward. This is not one of those. The technical evidence is complex. The Council realised the need for expert advice and, in accordance with both the 2006 and 2008 Guidance, instructed AECOM to provide their expert assistance. AECOM carried out an extensive investigation and presented their results. The question is therefore, in principle, a simple one: is it reasonable (in the ordinary meaning of that word) for a local authority to rely on the expert advice given to it by contaminated land specialists? That question has only one answer: 'yes'.
2) RSK have sought to suggest that AECOM didn't do a proper risk assessment. What this means in reality is that one expert, RSK, disagrees with the approach of another expert, AECOM. It is clear from the seven AECOM reports (which had a chapter on 'human health risk assessment'[193]), together with subsequent further analysis, that AECOM did carry out a risk assessment. A 'risk assessment' for these purposes can cover a wide range of tasks from devising a conceptual model, identifying pollutant linkages, screening data against guideline values, right up to a detailed quantitative risk assessment. The statutory guidance is silent on how far or how complex the risk assessment should be. For the reasons given above, the criticisms of AECOM's assessment are not made out.

[190] Of the 6 samples for which certificates have not been provided, only the samples from TP12 and WS18 were used in the assessments of Zones – both were used in the Zone 7 assessment.
[191] Day 7, discussions in Inquiry.
[192] That rather puts into context the reliance on this point in the costs application.
[193] See, e.g., section 4 of CD16.1.3 and also CD16.1.7 section 5.

It was surely reasonable for the Council to rely on it[194].

3) The effect of the 2008 Guidance, which was considered in detail earlier, is to leave to the local authority a 'considerable discretion' to exercise a policy judgement in a difficult field where experts wholly disagree and there is much uncertainty.

4) Whereas most local authorities in the Council's position would, and probably do, just accept without further evaluation the recommendations of their experts, the Council in this case went above and beyond. The RoD shows that the Council did not blindly rely on the reports but undertook its own assessment. The detailed evidence of Mr Jarrett indicates that the Council, in accordance with the 2008 Guidance, brought his expert local knowledge[195] to bear on the case. The RoD, being a summary of the Council's analysis, demonstrates that the Council 'added value' to the assessment, and strengthened the reasonableness of the Council's overall approach.

5) Dr Cole, as will be seen below, has carried out in the first part of his PoE a detailed evaluation of the Council's and AECOM's investigation and assessment and, while accepting that it is 'less than ideal', on the whole regarded it as reasonable and in compliance with statutory guidance.

6) The approach of Jim 2, as set out above, has been wholly negative, critical and un-constructive. It is relevant when considering the reasonableness of the Council's determination that at no time has Jim 2, despite their significant financial support:

    a) Carried out their own site investigations on public open space or taken steps to seek permission to investigate private gardens, despite it being a major part of their case that the site investigation is inadequate and does not reflect the nature of the risk in the ground.

    b) Devised an alternative zoning analysis, despite it being a major part of their case that the Council's zoning is wrong and that a different zoning approach would better reflect the site.

    c) Conducted a Detailed Qualitative Risk Assessment (DQRA), despite alleging that this is something the Council was required to do prior to concluding their analysis prior to serving the Remediation Notice.

    d) Carried out their own cost/benefit analysis to show why or how the Council's was unreasonable.

    e) Defined what they regard as the SPOSH number on this site, despite it being a key part of their case that such a number is essential and that the Council was unreasonable for failing to

[194] Moreover, it cannot be 'unreasonable' for there to be such reliance even if it is later revealed that those reports contain some errors. That cannot render reliance on such reports unreasonable. Jim 2's approach would require in every case that having obtained expert advice a Council then obtained further expert advice (from other experts) to verify the first advice. Where would this end?

[195] That involves almost 30 years working locally in pollution control, and nearly 10 years as a Principal Pollution Officer. He has also been working on the site in issue for 10 years: see his PoE at paras. 1 – 4.

determine one.

f) Explained how the determination could or should have been different had it been made under the 2012 Guidance rather than the 2006 Guidance, or how it is possible for the Council to comply with both simultaneously.

7) It is relevant, when considering the reasonableness of the Council's determination, to consider what other authorities are doing. There are two sources for this. First, Dr Cole explained that in his experience other sites in the UK were being determined as contaminated land based on wide ranging B(a)P concentrations – the lowest being around 5 mg/kg. At para. 92 of his PoE, he said that the decision to determine the land in this case is consistent 'with decisions made by other local authorities at the time, based on my experience of reviewing local authority applications for capital funding for the remediation of residential gardens as part of my role as a national technical advisor to the Environment Agency'[196]. Second, there is the case study, which must be considered now.

5.2.6.2 The Conland Expert Panel case study, published on day 3 of this Inquiry, 10 December 2015, is an item of evidence to which the Inspector should attach substantial weight. The Inspector need only consider Jim 2's reaction to the publication of the case study on day 4 of the Inquiry to realise just how damaging the case study is to Jim 2's case. Allegations of impropriety were made in strong terms[197], and yet, in the evidence given to the Inquiry by Mr Morton and Mr Witherington, it was subsequently suggested that the case study was perhaps distinguishable from this case, or of little relevance. In its costs submissions the appellant suggests that the case study supports its case. It is difficult to understand how these positions are reconcilable.

5.2.6.3 Substantial weight should be attached because:

1) In cross-examination of Dr Cole, Mr Tromans admitted that the case was 'very closely analogous' to the present case.
2) It is the view of a panel of leading experts in the field of contaminated land.
3) The remit of the panel is to assist local authorities in deciding whether or not land may be contaminated.
4) The panel was set up by the Secretary of State, the decision-maker

[196] In re-examination on day 5, Dr Cole confirmed that the Council's approach had been consistent with the approaches of the other authorities he had seen.

[197] At least they were in submissions, in the end what was put to Dr Cole was rather gentle and hardly reflective of the strong terms employed in the submissions; moreover applications to cross-examine Sharon Bennett-Matthews and Mr Jarrett on these issues were quietly abandoned. The allegations made were always wholly unfounded; and should never have been made. Take just one example. The timing of the release of the case study was said to be 'suspicious' because it came out just before the Council's 'star witness', a member of the panel, gave his evidence. The timing of release was though in Defra's hands. Moreover, Dr Cole was due to give his evidence on day 2. If he had he would have completed his evidence before the case study was released. But it was Mr Tromans himself who asked to swap the order of the Council's witnesses and deal with Mr Jarrett first to allow the data issues to be resolved.

of this appeal.

5.2.6.4 It is suggested by Jim 2 that limited weight should be given to the case study because of the non-provision of the data underlying the analysis. In response:

1) It is still an expert panel giving their view having considered all of the evidence;
2) All the essential information is present;
3) There are confidentiality issues preventing publication of certain information.

5.2.6.5 The 'role and remit' of the panel, as set out on their website[198] is as follows:

> 'The expert panel has been formed by Defra to assist Local Authorities (LA) in deciding whether or not land may be contaminated within the meaning of Part 2A. … The panel is used … to provide some independent assistance to local authorities.
>
> The intention of the panel is to assist local authorities in the 'difficult cases' relating to human health issues only which are viewed to be borderline category 2/category 3 and which the LA has not been able to resolve. Please note that due to the panel's voluntary nature, assistance can only be provided to a limited number of cases and the selected sites will cover a cross section of scenarios.'

5.2.6.6 The intention is that 'the work of the panel will be used to develop case studies that will be made available to the wider sector as evidence of best practice, helping to promote consistency in decision-making'. The aim of publishing a case study is that 'other local authorities will be able to draw on the experience and understand the process in relation to the sites'.

5.2.6.7 In this case study, 'the panel has provided a view on whether it is reasonable to determine a site based on the information that they have been provided.'

5.2.6.8 It is necessary first to draw attention to some of the similarities between the case study and the present case:

1) The factory in this case had been demolished and redeveloped in the 1970s.
2) Very variable concentrations of B(a)P in made ground were found to be underlying the site as a result of industrial ash, coal fragments and coal-tar based paint residue.
3) The topsoil was variable, thin and not specifically sampled.

[198] ID21.

4) Average concentrations were used for made ground within the upper 1 metre.
5) It was noted that concentrations were greater than local and national background levels;
6) It was noted that concentrations exceeded the C4SL.
7) The panel deliberately chose not to comment specifically on whether the value of SPOSH of 10 mg/kg derived by consultants constituted the boundary between category 3 and category 2;
8) There were two zones with different average soil concentrations but containing similar material.
9) The data was not determinative of a strong case so it was supported by a benefit/impact assessment.
10) The conclusion was that the benefit of regulatory intervention outweighed the negative aspects of remediation.
11) The panel concluded that a SPOSH determination in the case study would be reasonable.

5.2.6.9 Dr Cole, in response to a question from the Inspector, explained that the panel didn't take a view on whether 10mg/kg was the threshold number for a SPOSH because there were varying views among members as to whether there is a 'universal' SPOSH number. He noted that the statutory guidance doesn't require a SPOSH number, and that it is a matter of policy judgement. The panel, en mass, did not think it was appropriate. This appears to confirm the inherent uncertainty and margin of discretion open to an authority in determining SPOSH.

5.2.6.10 Before turning to Dr Cole's evidence in detail, it is noteworthy to say that much of the cross-examination by Mr Tromans of all the Council's witnesses ran up against a brick wall in admitting 'I hear what you say, and I'll ask my own witnesses about this point'. This indicates that much of the content in dispute in this Inquiry is content about which different suitably qualified people could come to different conclusions.

5.2.6.11 The cross-examination of Dr Cole[199] also served to indicate that Jim 2 cannot match the learning of Dr Cole on this subject. For example, Dr Cole was criticised for failing to test his results by modifying the assumption about 'exposure frequency'. Dr Cole's reply was to point out that such a modification would require him to assume that people no longer live in their houses. A list of such suggested flaws were put to Dr Cole, who could immediately give a reasoned dismissal for each one, together with the summary that it's wrong to just 'change stuff for the sheer hell of it' and that there was 'no sound evidential basis' for any of the suggested modifications. Mr Witherington in cross-examination[200] accepted that he had no evidence to challenge this. Dr Cole was the only

[199] Day 5.
[200] Day 6

specialist witness in human health risk assessment.

5.2.6.12 Furthermore, cross-examination of Mr Smart concluded by a criticism that Mr Smart had drawn 'conclusive assumptions' that could not be relied on. This belies the flaw in Jim 2's approach, which is to assume that the Council has sought to make definitive conclusions about the site. This is wrong. All it has done is to attempt to ascertain the most likely explanation, rather than strive for certainty, which, in this context, is impossible.

5.2.6.13 For all the above reasons, the Council submits that the decision to determine zones 4 and 7 as contaminated land was reasonable and in accordance with statutory guidance, and, as a matter of policy judgement, fell within the bounds of the considerable discretion afforded to the Council by the Part IIA regime.

5.2.7 ***5) Dr Cole's evidence***

5.2.7.1 Having considered the Council's case, responded to criticisms, and evaluated the reasonableness of the Council's approach, it is now necessary to consider the evidence of Dr Cole, which constituted a fresh and independent look at the case. Mr Witherington indicated that he agreed with Dr Cole's process for undertaking an exposure and toxicological review of the site, but just disagreed with the conclusions. This is the territory considered by the 2008 Guidance in which two experts can reasonably disagree.

5.2.7.2 As will be seen, Dr Cole's evidence has two important consequences:

1) The analysis he has carried out, although not done at the time prior to serving the Remediation Notice, must be considered relevant to assessing the reasonableness of the Council's approach, in that it reaches, via a more detailed analysis, the same conclusion as to the determination of zones 4 and 7 as contaminated.
2) In the alternative, if it is determined that the Council was unreasonable not to have carried out the analysis supplied by Dr Cole at the time prior to serving the Remediation Notice, then Dr Cole's evidence is of considerable relevance to the Secretary of State's exercise of her discretion not to quash the remediation notice. This will be developed once a summary of Dr Cole's evidence is set out.

5.2.7.3 Dr Cole was asked by the Council in these proceedings to give his expert opinion as to whether the Council's determination of the existence of a SPOSH was reasonable[201]. Before considering his evidence, it is necessary to respond to some of the points made by Jim 2 concerning Dr Cole's

[201] Dr Cole is an expert in human health risk assessment. In cross-examination, Mr Witherington accepted he was not.

status.

5.2.7.4 An allegation was made by Jim 2's counsel on day 4 of the Inquiry that Dr Cole, a Director of AECOM, could not undertake an impartial review of another Director of AECOM (i.e. Mr Smart). He was then cross-examined about this on day 5. This point must be rejected for the following reasons:

1) Dr Cole's evidence was that he approached this matter 'in as neutral a way as I possibly can'. He explained that, had he considered Mr Smart to be guilty of professional negligence, he would have felt able to say so.
2) Dr Cole explained that he had no involvement in the process at the time of the investigation and writing of the reports.
3) Jim 2 could have raised this issue when the PoEs were first exchanged, but chose to wait five weeks and make the allegation half way through the Inquiry.
4) Dr Cole's PoE and his answers in cross-examination were both at times critical of AECOM and the Council's approach[202]. This indicates that he conducted a fair and impartial review, ultimately arriving at the conclusion that the Council had been reasonable in determining a SPOSH, notwithstanding the 'less than ideal'[203] approach.

5.2.7.5 Another allegation was that Dr Cole could not be impartial because he was and remains a member of the Conland Expert Panel. In response:

1) Dr Cole's evidence in re-examination (day 4) was that there is no conflict of interest. He was merely giving his expert opinion on two different cases.
2) The only situation in which there could be any concern over impartiality is if a member of the panel for one case were also to act as an expert in the same case.
3) It is ludicrous to suggest that a member of the panel is conflicted from looking at a case for a different local authority because they are advising another local authority about a similar contaminant, especially B(a)P[204]. The idea of the panel is they are experts so are likely to be involved in a number of cases round the country, for local authorities, land owners or potential appropriate persons.
4) In suggesting that appearance is as important as reality, Mr Tromans has elided 'bias' and 'conflicts of interest'[205].
5) Some of the panel members are local authority officers. The implications of Jim 2's position are that such members would be

[202] E.g. on topsoil sampling Dr Cole said in retrospect this should have been done albeit that it did not affect his overall view.
[203] Evidence of Dr Cole in cross-examination on day 5.
[204] Dr Cole's evidence was that the vast majority of Part IIA cases involve B(a)P.
[205] There is no such thing as the 'appearance of conflict'. There is either a conflict or there is not. Here there was plainly none.

unable to act for their authority in any case, e.g. a case about B(a)P, where they have sat on the panel considering a case about B(a)P.

5.2.7.6 If Jim 2 is correct, it will spell the demise of the panel, because it is unthinkable that any expert would seek to jeopardise their impartiality, and therefore their career, by sitting voluntarily on the panel.

5.2.7.7 Turning now to his evidence, it was, in summary, as follows:

1) First, he looked at the 2012 determination under the 2006 statutory guidance and the 2008 non-statutory guidance. He assessed everything and determined that the Council had complied with the guidance and had acted reasonably.
2) Next, he reviewed the remediation notice in light of the 2012 Guidance, the 2014 (C4SL) Guidance, the ENVIRON letter and his own DQRA. In light of all this, he concluded that the Council had acted reasonably and in accordance with the guidance.
3) With regard to the data, his position is that it's not ultimately important whether the average B(a)P value for zone 7 is 29mg/kg, 34mg/kg or 38mg/kg. On all these numbers, he regards the Council as having reasonably determined SPOSH. This is because SPOSH is about more than a number.
4) His evidence at para. 103 of his PoE, which fits with the evidence of Mr Jarrett, is that a DQRA was not necessarily required. He nonetheless undertook one in his PoE for the purposes of this appeal. It made no difference to his conclusions.

5.2.7.8 His PoE, which consists of a DQRA with a focus on the human health impact[206], undertakes a comprehensive review of the Council's position and concludes that the Council, notwithstanding (a) criticisms of the investigation and (b) adjustments to the data making the case for contamination in both zones 4 and 7 'less strong', reasonably concluded the existence of a SPOSH. In the latter part of his PoE, he has undertaken a thorough analysis[207] of the impacts and benefits of remediation.

5.2.7.9 Dr Cole's evidence goes beyond anything carried out by Jim 2's witnesses[208]. It is therefore difficult for them to challenge it; and largely they haven't.

5.2.7.10 Jim 2 have instead sought to argue that it is effectively 'too little too late'. However, Dr Cole has been careful in the first part of his PoE to assess the

[206] Mr Witherington agreed that Dr Cole's PoE is the robust scientific approach called for by the statutory guidance: day 6, cross-examination, and Mr Witherington's Rebuttal, para. 6.4.
[207] See his PoE at para. 118ff
[208] Dr Cole explained in re-examination, day 5, that he was a more advanced statistician than Mr Witherington, with reference to para. 2.3 of Mr Witherington's Rebuttal Proof, where he accepts that his statistical understanding is not sufficient to address Dr Cole's statistical analysis. Mr Witherington in cross-examination accepted that the statistical analysis in his PoE was written with the assistance of a statistician. However, as that person was not called, greater weight must be given to Dr Cole's evidence.

Council's determination on the basis of the available guidance at the time. The DQRA occurs in the second part, where he is considering what such an assessment might look like. He pointed out in cross-examination that no guidance on the DQRA was available at the time of the determination.

5.2.7.11 Jim 2 also cross-examined Dr Cole on the Council's failure to carry out the kind of statistical analysis contained in his PoE before the Remediation Notice was served[209]. Again, Dr Cole's evidence was that there was no guidance requiring such statistical analysis. Mr Tromans argued that 'although it is not required, it would have been a helpful thing to do'[210], to which the obvious response must be: 'was it unreasonable of the Council to not do something it was not required to do?'. It is notable that Jim 2 carried out no statistical analysis of it own.

5.2.7.12 The key headlines of Dr Cole's evidence were as follows:

1) At the time the Council were assessing the data (2009-2012) there was no clear consensus on what SPOSH was and how the guidance should be interpreted;
2) There was no singular definition provided in the 2006 statutory guidance;
3) There is no consensus amongst industry and regulators;
4) The SGV Way Forward in 2006 had suggested some ideas, but these were dropped in Defra's outcome of the Way Forward document in 2008 and replaced with the legal definition document (CD1.10).
5) Guidance from the Health Protection Agency at the time was critical of certain proposed approaches to a way forward for being insufficiently precautionary (CD 16.2.17).
6) A number of other sites in the UK were being determined as contaminated land based on wide ranging B(a)P concentrations – the lowest being around 5 mg/kg[211].
7) The overarching guide was a broad aim of striking a reasonable balance between protecting people's heath whilst ensuring that unnecessary socio-economic and environmental burdens are kept to a minimum.
8) The 2012 Guidance is not directly relevant to the Council's determination in March 2012 because it had not yet come into force. This is especially the case because the consideration of C4SLs and use of the Margin of Exposure approach to assess SPOSH wasn't developed until 2014. Dr Cole explained in oral evidence that substantial uncertainty about what SPOSH is remained, and that there had been no attempt in the 2012 Guidance to define Category 2 except for para 4.25, which requires a strong case on a

[209] Contrary to Jim 2's case on costs some statistical analysis was carried out in the AECOM reports, see eg App I of CD16.1.7.
[210] Cross- examination of Dr Cole, day 5.
[211] In re-examination on day 5, Dr Cole confirmed that the Council's approach had been consistent with the approaches of the other authorities he had seen.

precautionary basis. There was no clarity in toxicological threshold, and no clarity on what sort of soil concentration might be SPOSH.

9) The disputes about the precise data and the average concentration values were regarded by Dr Cole as not making a lot of difference[212]. This was because the changes in the overall numbers were not significant enough. Furthermore, because the data is only one part of the analysis, it is misleading to focus exclusively on it. Dr Cole further noted that he did not think the differences in the numbers made any difference to Jim 2's witnesses views[213].

10) In light of scientific uncertainty it is appropriate in making a judgement on SPOSH to consider two additional Government principles that related to the protection of health: (1) the Precautionary principle; (2) the 'As Low as Reasonably Practicable' ('ALARP') principle. These are explained at paras 89-91 of Dr Cole's PoE.

11) Dr Cole in oral evidence clarified that evidence for zone 7 is 'less strong' for the purposes of the 2012 Guidance as a result of the jointly agreed average soil concentrations. However, in cross-examination, he acknowledged the inherent uncertainty and subjectivism of the 'judgement call' by saying that 'one man's strong case is another man's less strong case'. In re-examination, he clarified that although his view is that the case on zone 7 is 'less strong' it is close to the borderline between 'less strong' and 'strong'[214]. In any case, Dr Cole accepted that consideration of para. 4.27 is therefore relevant to both zones. Dr Cole's assessment under para. 4.27 is seen at para. 118 of his PoE. He said in evidence in chief that this paragraph of his PoE now applies to both zones.

12) Dr Cole has carried out an evaluative impacts-benefits assessment[215].

5.2.7.13 Overall, the Inspector should take from Dr Cole's evidence that the Council's approach, while not perfect, was not unreasonable, and that his further analysis only serves to reinforce the Council's conclusions.

5.2.8 *6) The Inspector's and Secretary of State's discretion*

5.2.8.1 If it is determined that the Council was not reasonable, and the ground (a) appeal is allowed, the Inspector/Secretary of State has discretion not to quash the Remediation Notice. The evidence of Dr Cole has, it is submitted, proven the Council to have been right to determine zones 4

[212] Oral evidence in chief, day 4.
[213] This was confirmed when they did give evidence in week 2.
[214] Day 5.
[215] In cross-examination the only point put to him on his analysis concerned the failure to consider the blighting effect of identifying land as contaminated. It is clear though in this case that there was pre-existing blight and that has to also be weighed in the balance. The way to solve the long-standing blight issues on the Stonegate Estate (and which pre-date investigations or identification) is remediation. But for this appeal that might now have been achieved.

and 7 as contaminated land. The Inspector/Secretary of State should, on the basis of Dr Cole's evidence, exercise their discretion not to quash.

5.2.8.2 Section 78L(2)(b) of the Act, by use of the word 'may', confers a discretion on the Secretary of State to not quash the Remediation Notice even if ground (a) is made out. This was rightly accepted by Mr Tromans on day 6.

5.2.8.3 In judicial review, the Administrative Court has a similar discretion. The same applies in statutory challenges: see, e.g., section 288 TCPA 1990, under which the court 'may' quash.

5.2.8.4 The Inspector's jurisdiction in this case is not the same. The Administrative Court hears no oral evidence and is reviewing only the lawfulness. The Inspector here has a wider jurisdiction to determine 'reasonableness', in the ordinary meaning of the word, and hears live oral evidence. He is also himself an expert tribunal, unlike the Administrative Court. This collectively means that the Inspector has even more leeway than a court when considering the exercise of his discretion.

5.2.8.5 Having said that, it is relevant to consider the case law on the jurisdiction of the Administrative Court not to quash. The relevant principles can be found in *Michael Fordham QC's Judicial Review Handbook (5th edition, 2012)* p. 271 – 272[216]:

1) The discretion is a wide one;
2) It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy, the nature and importance of the flaw in the challenged decision, the conduct of the claimant.

5.2.8.6 Further, the court must refuse to quash 'if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred': section 31(2A) of the *Senior Courts Act 1981* (as amended by section 84(1) of the *Criminal Justice and Courts Act 2015*).

5.2.8.7 Applying these principles to the present case, if the Inspector finds that the Council acted unreasonably, but that in light of Dr Cole's evidence a decision made now would be that this land could be reasonably designated as contaminated land, then there is no utility in quashing. Put another way, the Inspector might conclude that any unreasonableness by the Council makes no difference to the end result, which is that the land is contaminated. Furthermore, to quash in these circumstances and to force the Council to start again would have a considerable impact on residents, and could lead to years more delay before remediation.

[216] ID43.

5.3 **Grounds (b) and (p): Remediation requirements** ('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') and ('that a period specified in the notice within which the appellant is required to do anything is not reasonably sufficient for the purpose')

5.3.1 The submissions in relation to ground (b) and (p) will be kept short.

5.3.2 Reliance is placed on the following:

1) The Council's legal submissions on ground (b);
2) The Council's comments on Jim 2's proposals for remediation;
3) The discussion of the remediation notice and modifications on Day 7 of the Inquiry;
4) The alternative draft notices to be submitted[217];
5) The PoE of Mr Jarrett at paras. 167 – 186 and 343 and of Mr Smart at paras. 95 – 96.

5.3.3 The Council's approach to determining the remediation requirements took account of:

1) The precautionary principle;
2) The nature of the contaminant being genotoxic carcinogens[218];
3) The nature of the soil. The sampling revealed that the contaminant is very mixed in the soil, with high and low concentrations immediately adjacent to one another[219]. The soil has varying levels of made ground[220], and variable quantities of contaminant within the area of each garden;
4) The practical impossibility of removing the receptors, or controlling the use of the residents' own gardens[221];
5) The concerns of residents about contamination, difficulties in selling properties, restrictions on use and enjoyment of property, and the need for reassurance[222];
6) Issues of cost, practicability, disturbance to residents and the possibility of exposure during remediation[223].

5.3.4 The remediation requirements are proportionate:

[217] ID51.
[218] CD6.8, Remediation Notice, Schedule 4, p.259; PoE of Mr Jarrett, para. 172.
[219] PoE of Mr Jarrett, para. 177
[220] See PoE of Mr Smart, Figure 6
[221] PoE of Mr Jarrett, paras. 178-179.
[222] Ibid, para. 182.
[223] Ibid, para. 181.

1) They don't require remediation of soil below hard landscaped areas[224];
2) The cost and temporary inconvenience were taken into consideration, but outweighed by the positive health benefits, reassurance to owners, and practical benefits including a removal of obstacles to selling the properties or obtaining a mortgage[225];
3) The requirements include a built-in option for the liable person to propose an alternative method[226];
4) The requirements ensure that the time for compliance for each stage runs from the date of completion of the previous stage;
5) The time limits permit flexibility – there is an in-built review mechanism.

5.3.5 The Council had consulted on the proposed requirements as early as March 2013[227]. No alternatives were suggested by Jim 2[228] until the end of day 4 of the Inquiry. Neither Mr Morton nor Mr Witherington could think of any reason to explain this[229]. It shows a regrettable lack of co-operation.

5.3.6 It is relevant to note that, according to Mr Morton, RSK designed the remediation requirements for another site, which included a requirement to remove the soil to a depth of 600 mm[230].

5.3.7 Moreover, the case study provides additional support for what is proposed by the Council here is proportionate. The panel went further than is proposed here. Thus it is said that the panel encouraged the local authority to look at 'removal of any garden patios and driveways to allow remediation of impacted soils beneath' in order to 'ensure that no residual contamination remained that could pose an unacceptable risk in the event garden layouts changed in the future'[231].

[224] Ibid, para. 174, and CD6.8, Schedule 4, p.259. Only those hard landscaped areas which are likely to be returned to soft landscaping are targeted as explored in cross-examination of Mr Witherington. Thus a typical front garden area may consist of a footpath provided as a permanent access way and drive providing permanent access to a garage or parking space and other currently hard landscaped features such as paving or slabs or decorative gravel etc. The footpath for access and the drive, are considered as permanent features have been considered as not needing to be remediated as even if they were to be dug up they would be replaced as a necessity and thus any risk from materials under them would be minimal. Other areas covered by paving, slabs or decorative materials could be returned to soft landscaped condition while retaining the hard standing needed for access. It is these areas that have been termed 'potentially soft landscaped' i.e. areas that are currently hard covered but could in the normal course of domestic use be returned to soft landscaped.
[225] Ibid, para. 173.
[226] Ibid, para. 186; CD6.8 Remediation Notice, Schedule 2, p.249.
[227] CD6.6
[228] Ibid, para. 175.
[229] Day 5, cross-examination.
[230] Day 5, cross-examination.
[231] See p. 4.

5.4 **Ground (c) Liability of Jim 2** ('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')

5.4.1 There are a number of general remarks to be made first:

1) The test is whether Jim 2 caused or knowingly permitted contamination to be 'present in, on or under' the land, not whether Jim 2 caused or knowingly permitted B(a)P to enter the land: see section 78F(2)[232]. This distinction is accepted by the Inspector and the Secretary of State in *St Leonard's Court (*CD 2.6, para. 896. See also the 2006 Guidance, CD1.3, para. 9.8).
2) The parties are in agreement that Jim 2's actions need not be the sole cause[233].
3) The test, as with the other grounds, is whether the Council 'reasonably' determined Jim 2 to be liable on the basis of having caused or knowingly permitted the contamination to be present.
4) It is inherently difficult to know with absolute precision what occurred between Jim 2's acquisition of the site and the building of the housing estate. The Council, having identified the land as contaminated, came under a duty to determine what happened (e.g. what caused the contamination) in order to identify whether there were any Appropriate Persons. It is thus forced by Part IIA of the Act into difficult territory. It can only be expected to adopt a reasonable conclusion of what is likely to have happened based on the available evidence[234]. That there is only limited direct evidence of what happened well over 40 years ago is not surprising. This will be a common situation in cases under Part IIA given the retrospective nature of the regime. In cross-examination, Mr Wielebski repeatedly retreated to a safe refuge by answering questions using phrases such as 'it's impossible to be sure' and 'I can't say definitively'. This betrayed his misunderstanding of the task of the Council, and of this Inquiry.[235]
5) This accords with the approach of Forbes J in *National Grid*, at para. 31 (CAB6), in which he said 'it is not possible to say beyond doubt how the land came to be in its current pre-remediation works condition'. Instead, Forbes J considered what the 'available evidence suggests'. The Council cannot reasonably be expected to have done more than this.

[232] This is distinct from the now repealed s. 85(1) of the Water Resources Act 1991, which concerns the entry of matter into controlled waters (CD1.9).
[233] See Jim 2's legal submissions ID3 at para. 2.
[234] See Council's legal submissions, para. 53(5).
[235] For example, when asked how he thought the Gas Works waste ended up on the other side of Tar Brook, Mr Wielebski said it was 'plausible' that Jim 2 or Fletcher put it there, but that 'we don't have the complete picture'. He was then forced into a bizarre conclusion that it was equally likely that the Gas Works waste in Zone 8 had originated from (a) immediately adjacent on the Gas Works site and (b) somewhere else, despite accepting the relevance of the fact that the made ground to the east was very similar in composition terms to made ground in the west. Mr Morton was rather more forthcoming. He accepted in cross-examination that much of what was put to him about the history was indeed a 'possible' interpretation of the facts.

5.4.2 ***'Caused'***

5.4.2.1 To summarise the legal submissions on determining whether a person 'caused' the contamination[236]:

1) It is not necessary for Jim 2 to be the 'immediate cause';
2) It is irrelevant that there may be other causers[237];
3) Causing something can be by way of either an act, a series of acts, or a failure to act;
4) Causing is to be given a 'common-sense' meaning, and calls for a 'broad evaluative judgement'[238];
5) Unlike 'knowingly' permitting, causing does not require any *mens rea*;
6) A person can 'cause' contamination by exacerbating existing contamination[239]. The *St. Leonard's Court*[240] decision is a good illustration. The developer there Crest did not cause any contamination to enter the land, it did not increase the net amount of contamination present on that land. But what it did do by its actions (demolishing buildings and leaving the ground open for some years) was to cause the contaminant to run deeper down into the land. That was enough for the Inspector and Secretary of State to conclude that Crest 'caused' the contamination (see further below).

5.4.2.2 Jim 2 has said in legal submissions[241] that it should only be liable to remediate contamination where the presence of that contamination is referable to Jim 2's actions: see section 78F(2)-(3). However, this fails to take into account an important part of that section. The Council draws attention to section 78F(10), which provides as follows:

> 'A thing which is to be done by way of remediation may be regarded for the purposes of this Part as referable to the presence of any substance notwithstanding that the thing in question would not have to be done—
>
> (a) in consequence only of the presence of that substance in any quantity; or
>
> (b) in consequence only of the quantity of that substance which any particular person caused or knowingly permitted to be present.'

5.4.2.3 The Inspector in *St Leonard's Court* noted this provision at para. 12 of his report, and went on to hold that, based on the wording of section 78F, and

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[236] Council's legal submissions paras. 39-43 (ID10).
[237] Agreed in Jim 2's legal submissions, para. 2 (ID3).
[238] As explained in the Council's legal submissions these principles have the support of High Court authority dealing with Part IIA (ID10).
[239] Agreed in Jim 2's legal submissions, para. 4 (ID3).
[240] CD2.6.
[241] See paras. 18, 19 and 26 (CD2.6).

section 78F(10) in particular, when determining whether a person 'caused' contamination, the quantities involved are irrelevant. In other words, Jim 2 should be held to have caused contamination in zones 4 and 7 if it is determined that it only exacerbated contamination to a very small extent (e.g., being responsible for the exacerbation of contamination in one garden)[242]. The Inspector, in reaching this conclusion, cited the submission at para. 710 that the question of quantity only arises when there are more than one persons in the liability group, and there is a need to apportion.

5.4.2.4 It is also necessary to note that in *St Leonard's Court*, the Inspector was satisfied that there had been causation notwithstanding the recognition that some of the assumptions underlying the position may be flawed[243]. The Secretary of State agreed with the Inspector on causation.

5.4.2.5 The key periods in this case are as follows:

1) What occurred during the operation of the Gasworks between 1902 and 1957/8;
2) What occurred between the end of operation and the transfer of the Gasworks to the Council in 1965;
3) What occurred between the transfer to the Council and the sale of the land to Jim 2 on 29 February 1972;
4) What happened on the site between Jim 2 taking possession and Fletcher acquiring part of the site on 6 June 1972;
5) What happened after Fletcher acquired part of the site[244].

1902 - 1957: the Operational years

5.4.2.6 There has been evidence from both Mr Smart (especially the OS survey maps[245]) and Mr Jarrett (commenting on the RSK aerial photographs[246]) about the operational life of the Gasworks. What they both indicate is a gradual filling of the land to the east and north east up to but not beyond the edge of Tar Brook[247]. It is also clear that the area of land to the north of the Gasworks cylinders (what is now referred to as zones 1 and 2) was never used for operational purposes of any sort (including waste disposal) during the operation of the Gasworks[248].

[242] Para 903, p. 458.
[243] Para 903, p. 458.
[244] The areas most in dispute are (4) and (5).
[245] Appendix B of Mr Smart's PoE
[246] CD7.3, Figures
[247] See: CD16.1.7, p. 19, and Council's SoC, paras.137-138. This position was readily accepted in cross-examination by Messrs Morton and Wielebski and also by Dr Thomas. It should be noted that Mr Ash said Tar Brook was called 'Gas Tar Brook' when he was a child.
[248] Again this was readily accepted in cross-examination by Jim 2's witnesses.

5.4.2.7 Dr Thomas' evidence[249] explains the ways in which the Gasworks operations would have contaminated the ground with hazardous compounds including B(a)P.

1957 - 1965: the Decommissioning years

5.4.2.8 A dispute between the parties has concerned the number of buildings that were demolished. Mr Jarrett explained in oral evidence[250] that para. 19 of his PoE was in error, because the RSK aerial photos indicated that a number of buildings had been demolished prior to Jim 2's arrival.

5.4.2.9 Based on Mr Morton's PoE and also the PoE of Dr Thomas, paras. 25-26, Mr Jarrett gave oral evidence that the most likely time during which these buildings were demolished were pre-1965 when the Council acquired the land, because it is usual practice to see buildings demolished as part of the decommissioning process of a gasworks, leaving only those structures associated with gas storage and distribution[251].

1965 – 29 February 1972: the Council years

5.4.2.10 The Council's case, given in Mr Jarrett's oral evidence, is that these buildings were unlikely to have been demolished as late as during the Council's ownership. Whilst not conclusive, this is certainly consistent with the aerial photographs for 1963 and 1971[252].

5.4.2.11 The only evidence the Council has on record of itself carrying out works on the site is a letter noting that it pulled down a single dangerous building and filled in a tank: see CD3.2. There is no evidence that shows where this building and tank were[253].

5.4.2.12 On day 2 of the Inquiry, the Council presented three newly obtained photographs taken in 1968[254].

5.4.2.13 Mr Jarrett was asked questions about what can be surmised from these photographs. His conclusions were that:

1) A substantial number of buildings remained on site, see especially photo 3;
2) The site was not level, noting in particular the set of stairs and low

[249] Day 3
[250] Examination in chief, day 2
[251] Mr Morton confirmed this to be likely in cross-examination, day 5.
[252] These show buildings having been removed between 1963 and 1971 and, of course, between 1963 and 1965 the Gas Works site was under the control of the gas companies themselves.
[253] Cross-examination of Mr Morton, day 5.
[254] The local history centre has these logged under 1968, and the photographer himself was contacted and confirmed the date. Mr Morton accepted there was no reason why Jim 2 could not have obtained these from the local history centre at any earlier stage.

retaining wall in photo 1[255];

3) Demolition material very likely coming from buildings demolished on the site had been left in place, or close by.

4) There appeared to be other waste materials on site, including what may be coke (see below).

5) The site was plainly not sufficiently prepared for the construction of housing (see below).

5.4.2.14 The Council has noted the evidence concerning the Stourbridge Paving Company, who are thought to have occupied the site for a period during the Council's ownership, and Mr Jarrett's position in evidence is that nothing is known about the paving company's activities and so any comment on their involvement in the site would be pure speculation[256].

5.4.2.15 What is clear from the evidence of Mr Jarrett, and supported by Mr Smart, is that a significant number of Gasworks buildings remained when Jim 2 acquired the site. This is apparent from:

1) The 1971 aerial photograph[257];

2) The 1968 photographs especially photo 3;

3) The Particulars and Contract of Sale which required demolition of the Gasworks (see CD3.4 and 3.5)[258].

5.4.2.16 In addition to the continued existence of buildings, it was also Mr Jarrett's evidence[259] that the decommissioning would have potentially left significant amounts of foundation structures in the ground, which would necessarily require removal prior to any residential development of the site.

5.4.2.17 There is no evidence of the Council undertaking any site preparation whatsoever[260]. The Council does not believe this to be disputed.

<u>29 February 1972 – 6 June 1972: the Jim 2 months</u>

5.4.2.18 Mr Jarrett in his re-examination[261] explained all the things that Jim 2 would have needed to do in order to prepare the site for development:

1) Demolish the substantial remaining Gasworks structures and buildings;

[255] In cross-examination Mr Wielebski accepted that there is no change of level at that location on the site as it now is.
[256] Mr Morton accepted this in cross-examination, day 5.
[257] CD7.3, Figure 7, p.192
[258] The Particulars state that 'The purchaser of lot 1 will be required to demolish the Gas Works and the cost thereof and the value of scrap materials will no doubt be taken into account when offers are being formulated'. The reference to scrap possibly affecting the price is itself indicative of the amount of built form remaining on site.
[259] Evidence in chief, day 2
[260] Nor any evidence of the Council changing site levels etc.
[261] Day 2

2) Grub out the foundation material of those structures etc;
3) Grub out any foundations of the structures demolished prior to Jim 2's arrival;
4) Fill voids;
5) Remove pipework (Dr Thomas in cross-examination accepted[262] that pipework on site would have been largely below ground and would have required excavation to remove);
6) Dig new foundations for residential development (again this would involve excavation of material);
7) Improve the ground so it is structurally sound;
8) Level the ground.

5.4.2.19 This list was put to Mr Wielebski[263] in cross-examination[264], who confirmed that all of these acts would have needed to be done by Jim 2 prior to building the houses. That much is thus agreed. He agreed that it was quite clear that levelling, and to the east ground raising, had at some point pre-development been undertaken. Mr Morton also agreed that there had been ground raising to the east of Tar Brook in preparation for development of the site[265], and that this was consistent with his PoE, which stated that the deepest made ground was in zones 4 and 7[266].

5.4.2.20 It is frankly stated in Mr Morton's PoE that 'other material may simply have been spread over the whole site at time of demolition, and gasholder tanks and other voids were often used to dispose of wastes generated in construction'[267]. This is important evidence. He also, in agreement with Mr Wielebski in oral evidence, noted that it can worsen the situation of gasworks pollution depending on the manner in which demolition takes place[268].

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[262] Day 3.
[263] Much of Mr Wielebski's evidence was given without having seen the key documentation: see, e.g. paras. 3.3 and 7.9 of his PoE. He has no idea why he wasn't given the relevant documentation.
[264] Day 3
[265] cross-examination, day 5.
[266] Para 5.24 of Mr Morton's PoE.
[267] Mr Morton's PoE, para. 3.1. Supported by CD16.2.9 para 2.7 p 3545 and para 2.9 p 3547.
[268] Ibid, para. 3.14, and accepted in cross-examination, and see also the DETR document at CD16.2.9 at paras. 2.7, p 3545-6, ('When a gasworks or by-products plant was closed, certain materials were, inevitably, left in the process equipment, particularly spent or part-spent oxide. During the demolition and clearance of the works, these residual materials may have been: - disposed of as waste; - stored pending such disposal, sometimes in a suitable place on-site such as a gas-holder tank; or generally spread around the site') and para. 2.9, p. 3547, ('When a coal carbonisation works was demolished, the more obviously contaminated materials were usually taken off-site for disposal, but other material may simply have been spread over the whole site. Thus it is not always possible to correlate areas of contamination with site plans in order to decide where to sample, as the original pattern of contamination will sometimes have been obliterated. Gas-holder tanks, effluent sumps, lime-mud dewatering basins etc were often used to dispose of wastes generated during demolition, and therefore may now contain building rubble, spent oxide, etc. Any site investigation work should include examination of the former gas holder area and any other known void spaces. Much general debris from site clearance is found at former coal carbonisation sites. This will date from redevelopment during the operating life, as well as the final demolition. Items may include: …- bricks, slates and tiles; - concrete; … - timber..' (emphases added)

5.4.2.21 The Contract of Sale indicates that Jim 2 were required to demolish the gasworks. This they did. It is suggested by Jim 2 that all this effectively meant was the demolition of the Gas Holders. However, the 1968 photographs of Mr Haddock indicate a substantial number of buildings still on the site.

5.4.2.22 The Particulars and Contract of Sale also indicate that Jim 2 was obliged, in providing public open space, to level the ground. Two observations can be made:

1) This requirement to level strengthens the Council's view that the site must have been uneven and in need of levelling before development;
2) This requirement to level applies to *public open space*, where the need for level terrain is not nearly as important as for actual housing development, where structures require level ground for building foundations. It was accepted by Mr Wielebski[269] that there are no significant changes of level across the Stonegate Housing Estate at present. Mr Jarrett's evidence was to the same effect[270].

5.4.2.23 The culvert is an important element of the factual history. On historical plans up to the early 1970s, a ditchcourse is shown running north to south immediately to the east of the site. This has been culverted and now runs at a depth of approximately 3.5m to the rear of Kemble Close[271]. It is necessary to note:

1) The culverting continues northwards, onto land developed by Jim 2.
2) Jim 2 applied for planning permission for the area north of the Fletcher land in December 1971, and obtained it in February 1972[272], four months prior to the transfer of the Fletcher land to Fletcher.
3) There is an absence of any condition regarding culverting the brook in the Fletcher planning permission[273] or in the transfer to Fletcher[274].
4) The plan in the replacement CD3.6, showing the agreement between McLean and the Midlands Electricity Board, is from 1972 and already includes houses to the north (suggesting speedy, or as Mr Wielebski noted 'rushed', development by Jim 2 of that land to the north of the Fletcher land).

5.4.2.24 This is all evidence to support the Council's view that the brook was culverted in one operation by Jim 2 prior to Fletcher's involvement in the Fletcher land.

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[269] Cross-examination day 3.
[270] Evidence in chief day 5.
[271] Mr Smart's Summary PoE, para. 14
[272] CD4.2
[273] CD4.3
[274] CD3.5A

5.4.2.25 In zones 1 and 2 to the north, there is contaminated material. This is beyond the footprint of the Gasworks site. It was accepted by Dr Thomas in cross-examination on day 3 and Mr Morton on day 5 that there is no evidence of spreading of gasworks material during the operation of the Gasworks or, based on the 1971 aerial photograph, during the Council's ownership of the site. The only party to have involvement in zones 1 and 2 was Jim 2. The only explanation for the existence of gasworks[275] waste in these zones – as accepted by Dr Thomas[276] and Mr Morton[277] – is therefore that they were spread there when Jim 2 acquired the site and prepared it for residential development. This is supportive of the Council's position that Jim 2 carried out spreading of material around the *whole* site readying it in preparation for residential development by it and others to whom it sold on. Given the clear evidence of spreading in zones 1 and 2, this makes it more likely than not that Jim 2 were also responsible for spreading on another part of the site, that is the Fletcher land.

5.4.2.26 Both Dr Thomas and Mr Morton during cross-examination also confirmed that there was no evidence of any movement of substances relating to the gasworks processes onto Zone 8, east of Tar Brook, during the operation or decommissioning of the Gasworks. It was accepted that whatever had occurred to put Gasworks waste (assuming that was what it was[278]), including structural material, in zone 8[279], must have occurred in the period following Jim 2's arrival.

6 June 1972 onwards: the Fletcher and Jim 2 years

5.4.2.27 The Council's case is that from 6 June 1972 onwards, Fletcher built houses on the Fletcher land, which had been prepared and levelled by Jim 2 prior to 6 June 1972.

5.4.2.28 On the basis of the above chronology, the Council makes the following case with regard to why Jim 2 caused contamination on (a) the land developed by Jim 2, and (b) the land developed by Fletcher.

The Jim 2 land

5.4.2.29 In relation to the land developed by Jim 2, the evidence suggests that Jim 2 carried out significant physical operations to alter the land in order to prepare it for housing development and, in doing so, exacerbated the contamination on the Jim 2 land:

[275] The contaminants found in these zones are consistent with it being Gas Works Waste, as Mr Morton accepted in cross-examination. The question then is whether the elevated B(a)P and PAH readings are as a result of Gas Works waste or some other (unspecified) source. Given the proximity of zones 1 and 2 to the Gas Works and the similarity of the made ground the most likely explanation is that it is Gas Works waste.
[276] Day 3, cross-examination.
[277] Day 5, cross-examination.
[278] Again the evidence is consistent with this being Gas Works waste and that is the most likely explanation, see above.
[279] Mr Morton agreed that it was possible the material was related to the Gas Works, day 5, cross-examination.

1) Mr Wielebski in cross-examination[280] explained that ash is commonly used by developers for drainage for lawns in gardens, and that a developer on this site would have moved ash found on site and placed it in gardens.
2) The Contract of Sale[281] expressly requires 'levelling' of even the public open space. If even the public open space required levelling, then *a fortiori* the land upon which houses were to be built must also have required levelling, due to the greater need for structural stability.
3) Mr Wielebski accepted[282] that demolition and site preparation were subject to a 'more relaxed planning regime' and that the former did not require planning permission in 1972.
4) The 1968 photographs taken by Mr Haddock: the evidence of Mr Jarrett and Mr Wielebski was that these clearly indicate that the site was unready for development. The photos indicate:
    a) The existence of stairs and a low retaining wall in photo 1 – these are no longer present on site, which suggests levelling of the site.
    b) The grainy substance in photo 2 – Mr Jarrett thought it was coke, and he was cross-examined as to whether he agreed with Mr Morton that it was more likely to be 'road planing'. Mr Jarrett said he did not think that road planing was in practice at the time. Mr Wielebski in examination in chief confirmed this and dismissed the suggestion that it was road planing[283]. Mr Morton was not asked about it. The end result appears to be that the substance could well be derived from activities on the site, rather than imported from elsewhere.
5) Moreover Jim 2 would have had to demolish remaining structures, grub out foundations for these and previously demolished buildings, fill voids, remove underground pipes and refill, dig new foundations and improve ground where necessary (see above).
6) There is certainly no explanation for the existence of contamination in zones 1 and 2 other than it being moved there by Jim 2. It was accepted by Dr Thomas and Mr Morton in cross-examination that the aerial photographs did not indicate any movement of materials north of the Gasworks buildings into zones 1 and 2 during the operation of the site, or in the 1971 photo. They agreed that contamination can only have been placed there after Jim 2 acquired the land. This is indicative that one of the operations of Jim 2 on the site was to move around material across the site.
7) It is reasonable to infer that only Jim 2 had an incentive to

[280] Day 3
[281] CD3.5
[282] Wielebski PoE, para. 7.11.
[283] Because he said planing machines did not exist in 1968. The suggestion that these were road planings was made in cross-examination by Mr Tromans as being a suggestion made by Mr Morton but when called he did not give any evidence to this effect.

physically alter the land, because it was Jim 2 who sought to develop the land by building houses on it. Spreading contaminated material in order to level the site for building was the most cost- and time-efficient option for Jim 2, instead of seeking to remove the contaminated material/soil and import clean soil from outside.

5.4.2.30 It is suggested that Jim 2 did not 'cause' contamination to be present in the land it developed because all it can be said to have done was move existing contamination around a site. It allegedly did not spread the contamination beyond the area in which it already existed.

5.4.2.31 First, the Council submits that it did spread contamination beyond the space in which it was formerly present. If there is a void in a piece of land that is not itself specifically contaminated and materials are excavated from one part of the site and placed in that void (which on the evidence set out above is highly likely to have occurred) then once filled that is a part of the land which is also contaminated and which has been caused by the person filling the void. The quantity is irrelevant, see the legal analysis above and in particular the *St Leonard's Court* decision.

5.4.2.32 Second, even if all it had done was 'move contamination around' within a defined area, this is enough to constitute 'causing' for the purposes of Part IIA. This is because it is inevitable that in moving the contamination around, it will be present in places where it formerly was not.
The presence is still exacerbated, even by moving around in a pre-existing generally contaminated area. Such a view is consistent with the decision in *St Leonard's Court*[284].

5.4.2.33 On Jim 2's case, it would be possible to artificially define the parameters of a portion of land, and then submit that a developer had not moved the contamination beyond those parameters, and accordingly not exacerbated contamination. Thus, by way of example, consider land A and land B combined. If a developer's actions lead to contamination moving from land A into land B, this does not amount to 'causing' for Jim 2 if the defined parameters of the land include both land A and land B. However, if land A and land B are treated separately, e.g. because they are different neighbouring residential gardens, then it is clear that the contamination has been spread.

5.4.2.34 Even if contamination were to be moved around a small site, with concentrations on various parts of the site fluctuating up and down, the key point is that it will be located on land upon which it was not formerly located.

5.4.2.35 It had been suggested by Mr Wielebski[285] that made ground would not have been used to fill voids on other parts of the site, including the

[284] CD2.6
[285] In evidence in chief.

Fletcher land, because it would have been structurally unsafe. However, he accepted during cross-examination that if the ground was just being used to fill voids in garden space, it would have been adequate due to the absence of a need for structural stability. He also accepted that such practice would be cheaper than removing the material and sending to landfill. This accords with the evidence of Dr Thomas, who suggested in his PoE that if voids on site were uncovered, demolition and excavation materials from on-site would be used to fill the voids[286].

5.4.2.36 The Council reasonably concluded that given all of the above physical operations occurring on the Jim 2 land, it must be taken to have 'caused' contamination, even if the net result involves only a small exacerbation of pre-existing contamination.

The Fletcher land

5.4.2.37 In relation to the land developed by Fletcher, it was reasonable for the Council to infer that Jim 2 spread contaminated material, and/or carried out some other physical operation, on the Fletcher land, with the effect that contamination was exacerbated and spread, even if by a small quantity, before selling it on to Fletcher[287]:

1) The contract of sale from the Council to Jim 2 required Jim 2 to demolish the Gasworks. It was reasonable to interpret this as including a responsibility to deal with any stockpiled gasworks waste in Zones 4 and 7 (such as those shown in the 1968 photographs). This obligation was on Jim 2, and it is reasonable to have expected Jim 2 to have complied with it, by levelling out zone 7 and spreading across the culverted brook to zone 8.
2) The contract of sale from Jim 2 to Fletcher makes no reference to the Gasworks[288], suggesting that the land being transferred had been levelled and prepared for development rather than being left highly uneven due to the presence of large stockpiles of gasworks waste to the west of Tar Brook.
3) It was reasonable to infer from the presence of structural demolition rubble in zone 8 that it originated from remnants of the Gasworks buildings demolished by Jim 2 (or others before it)[289] and spread onto Zone 8 by Jim 2 during preparation and levelling[290].
4) It was reasonable to infer that it was Jim 2 who culverted the brook before or during the transfer of the land to Fletcher on the basis that:

[286] Dr Thomas PoE para. 25.
[287] See CD10.9, p.59 and CD16.1.7, p. 19. Jim 2's legal submissions on this point are dependent on the absence of any physical operation by Jim 2 on the Fletcher land: paras. 15-19, and 26-30.
[288] Contrast the sale documents for the sale from the Council to Jim 2; and it is notable that part of the land sold to Fletcher was within the operational area of the former Gas Works.
[289] Mr Morton agreed that this was possible in cross-examination, day 5.
[290] Mr Smart in his evidence in chief, day 1, explained that demolition materials had been found in zone 8 – part of the land developed by Fletcher. See also CD16.1.7, p. 1482 – 3, 1st para of p 1483: found to contain ash, clinker and slag; hydrocarbons and also construction waste: bricks and concrete.

a) There is no condition of sale in the transfer to Fletcher[291] referring to the brook or requiring Fletcher to culvert the brook;

b) There is no indication of the existence of the brook in the plan attached to the sale documentation[292];

c) There is no condition in Fletcher's planning permission referring to the brook[293];

d) Jim 2 had obtained a planning permission in February 1972 for land, including the brook, immediately to the north of the Fletcher land[294]. To implement this permission, it is reasonable to assume that Jim 2 had to culvert the brook, which ran immediately alongside the proposed development and was located where a road was to be constructed. This was four months before Fletcher had the Fletcher land transferred to them. The plan in the replacement CD3.6, showing the agreement between McLean and the Midlands Electricity Board, is from 1972 and already includes houses, suggestive of speedy or 'rushed' development by Jim 2 of that land to the north of the Fletcher land.

e) It is reasonable to infer that only one party took responsibility for culverting the brook, rather than inefficiently sharing responsibility for their relevant sections. It is logical to conclude that the party with the earlier permission was the first to undertake physical operations, especially given what the plan in CD3.6 shows. Mr Wielebski indicated that in the late 60s/early70s there was a 'rushed environment' in the house building sector, resulting from a widespread desire to expedite housing delivery. Mr Morton accepted that and that it was possible in a short space of time, very extensive work was done[295]. It is therefore reasonable for the Council to conclude that it is more likely than not that Jim 2 culverted the whole brook pre-transfer of land to Fletcher.

f) Mr Wielebski gave oral evidence about the need for culvert consents[296]. This is inconclusive as no such consents have ever been found and yet Tar Brook was culverted. In his evidence it was suggested that consent would take 6 weeks to obtain. In fact the relevant legislation sets a maximum time for determination of 6 weeks so a consent could be obtained faster. He also said that for a consent an applicant needed planning permission. Having examined the relevant Acts handed to the Council, it is not clear that this is so.

[291] CD3.5A
[292] CD3.5A – Mr Morton agreed in cross-examination.
[293] CD4.3
[294] CD4.2
[295] Wielebski on day 3, and Morton on day 5, with reference to CD3.5A-Transfer of land from Mclean to E. Fletcher Builders Limited, dated 6 June 1972, which makes reference to 'the right to connect to the 36' foul water sewer and 66' storm water sewer now laid beneath the land', which run alongside Tar Brook.
[296] Day 3

But in any event Mr Wielebski accepted that an outline planning permission would do and such was in place from 1971[297]. He also accepted that a developer could pursue culvert consents and detailed planning permission together, and pre-purchase. Of course, Jim 2 were applying for detailed planning permissions before they bought their part of the site, as were Fletcher.

5) As was accepted by Mr Morton[298], the transfer document to Fletcher[299] retains a right to the transferor (i.e. Jim 2) 'to connect to the 36 inch foul water sewer and the 66 inch storm water sewer now laid beneath the land at such points as the Transferor shall select …' (emphasis added). Mr Morton agreed that the word 'now' suggested that it was done immediately before the transfer, and that the inference to be drawn was that Jim 2 had done it between February 1972 and June 1972 when it owned the site.
This suggests land levelling and ground raising changes, with consequent potential minor exacerbation of contamination, in the time that Jim 2 owned the land.

6) See also the evidence above on filling voids, which is equally applicable to the Fletcher land.

7) The samples obtained from the Fletcher land were of a similar composition to those obtained in other zones not developed by Fletcher[300]. It was reasonable for the Council to infer from this that the spreading / preparation of the ground had been carried out as part of a single operation by a single party, namely Jim 2.
The technical reports AECOM has produced for the Council refer to the evidence of heterogeneous made ground in all the samples, and conclude that material was spread across the whole of the site when it was levelled and prepared for development[301].

8) This is consistent with the case advanced to this Inquiry by

[297] CD4.1
[298] Cross-examination, day 5
[299] CD3.5A
[300] PoE of Mr Smart, paras. 70 and 96. PoE of Mr Jarrett, paras. 45 and 308-310. See also: CD16.1.3, p. 241 and CD16.1.11, p 1844. In oral evidence, Mr Smart confirmed that in terms of zone 8 and the part of zone 7 developed by Fletcher, the similarities in the made ground when compared with the made ground in other areas not developed by Fletcher tended to support the view that all the ground on the site was levelled and made ready at the same time.
[301] See CD16.1.7 p. 1485 'Historically the majority of the site has been used as a gasworks prior to redevelopment as a housing estate and it is considered that this is the most significant source of potential contamination. However based on the findings of the three ground investigations undertaken to date, it is considered likely that the contamination is not restricted to the former gasworks site. It is probable that during the redevelopment of the area, contaminated material stockpiled on the gasworks site was spread across the development area to achieve the required ground levels, such that contaminated ground is not confined to discrete areas and but now may be present outside the footprint of the former gasworks'; CD16.1.3, p. 241 'Generally B(a)P concentrations are lower in samples recovered from locations further away from zone 7, suggesting waste stock piled in the zone 7 area was spread across the site during redevelopment works'; CD16.1.7 CD16.1.11, p 1844 '[t]he depth profile assessment shows that there is no discernible decrease in B(a)P concentration with an increase in sample depth. This supports the conclusion that during the re-development of the site, the gasworks waste was probably mixed with 'clean' natural material and spread across the site as it was levelled and prepared for development; resulting in heterogeneous made ground across the whole development site'.

Aggregate Industries[302].

9) A significant profit of £10,000 (over £125,000 today) was enjoyed by Jim 2 on the re-sale of part of the land to Fletcher only four months after Jim 2's initial purchase of the site[303]. A reasonable explanation for the price uplift is that Jim 2 readied the land for development, including by culverting the brook which divides Zones 7 and 8, and the uplift reflects Jim 2's costs of levelling/preparation of the Fletcher land[304].

5.4.2.38 All of this evidence points to physical operations by Jim 2 on the Fletcher land prior to transfer, which are attended by the reasonable likelihood of contamination exacerbation, i.e. contamination being present in places where it wasn't present before, albeit not on a substantial scale.

5.4.3 ***'Knowingly permitted'***

5.4.3.1 The Council's submissions on the relevant law are set out in full in the legal submissions[305]. In particular, attention is drawn to the *National Grid* case[306]. The relevant aspects of the case are set out in the Council's legal submissions. The essence is that the Environment Agency, the High Court and House of Lords considered that where a developer came to a site in the 1960s which had been the location of gas production, obtained planning permission and then built the houses without remediation, the developer could arguably be said to have 'knowingly permitted' the contamination where it was aware of the presence of coal tar under the ground and allowed it to remain there. It was about awareness of coal tar under the ground, rather than B(a)P, despite the fact that the significant pollutant linkage identified the substance as 'PAHs including B(a)P'[307]. More will be discussed on this later. The facts and issues are clearly very analogous to the present case.

5.4.3.2 Unlike 'causing', the dispute concerning whether Jim 2 'knowingly permitted' contamination involves no distinction between the land developed by Jim 2 and the land developed by Fletcher. If Jim 2 knowingly permitted contamination on the Jim 2 land, it also knowingly permitted the contamination on the Fletcher land. The timing of the transfer of the Fletcher land was wholly within the control of Jim 2.

5.4.3.3 It is not in dispute that 'knowingly permitting' requires:

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[302] See Appendix AM3 to Anthony Morton's PoE at paras. 11 – 14.
[303] Total land sold to Jim 2 (see CD3.5): 21.6 acres sold for £266,500. Fletcher land (see CD3.5A): 9.6 acres sold for £129,680. 9.6 divided by 21.6 is approximately 44%. 44% of £266,500 is £118,444. This results in about a £10,000 uplift.
[304] In re-examination Mr Tromans sought to suggest the uplift might be explained by the fact that the transfer of the land to Fletcher came with other associated rights. This is a bad point though because that transfer also contained a number of rights granted by Jim 2 to Fletcher. There was thus a quid pro quo on this already and so this cannot explain the uplift in the price.
[305] Council's legal submissions, paras. 44-54 (ID10).
[306] The House of Lords' decision is at CD2.4, and the first instance decision at CAB6.
[307] See CAB6, para. 36

1) Knowledge of a substance;
2) The power to remove that substance;
3) The opportunity to exercise that power;
4) A failure to do so.

5.4.3.4 Jim 2 have not sought to suggest that, if knowledge is found, there was no power or opportunity to exercise that power. Indeed it should be noted that Jim 2's legal submissions record, correctly, that 'simply leaving in place a contaminant which some other party caused to be present … may be … knowingly permitting its presence'[308]. The key issue is therefore requirement (1). In *Tromans & Clarke*[309], at para 5.30, reference is made to the Hansard debate on Part IIA as supporting a wide approach to knowingly permitted. Thus the Minister explained that it was intended to cover 'somebody who has had active control over contaminants on a site, for example when redeveloping it'. The liability thus attaches to those knowingly permitting the continued presence of the contaminants.

5.4.3.5 It is also not in dispute that:

1) The relevant test is whether there is knowledge of the mere presence of the substance, rather than knowledge of the contaminating nature of the substance[310]. Messrs Morton and Witherington betrayed their ignorance of this vital point. The latter said that the correct test was that Jim 2 'must have known that the action it took could cause a problem in the future'[311]. There is no need to know that there might be a problem in the future. All that is needed is knowledge that the substance is present. The evidence on the extent of understanding of[312] the hazards of B(a)P and gasworks waste is irrelevant.
2) Jim 2 had actual knowledge that it was purchasing a gasworks site and that there was gasworks waste in the soil[313]. Mr Wielebski's evidence in cross-examination was that although developers weren't aware at the time of the dangers posed by gasworks waste in the ground, he 'couldn't deny that they had knowledge of the material' in the soil.

5.4.3.6 The dispute between the parties boils down to one question: was it necessary for Jim 2 to have known about the specific substance of B(a)P, rather than merely knowledge of gasworks waste more generally?

5.4.3.7 The Council submits that it is sufficient for Jim 2 to have known about the existence of gasworks waste, rather than B(a)P in particular. The reasoning for this is as follows:

[308] See ID3 para. 2.
[309] AAB6.
[310] Council's legal submissions, ID10 para. 46, Jim 2's legal submissions, ID3 para. 7.
[311] Mr Witherington, cross-examination, day 6.
[312] Day 3
[313] Cross-examination of Dr Wielebski on day 3.

1) 'Gasworks waste' is a convenient catch-all phrase for a series of individual constituent substances, including ash, tar, clinker etc associated with gasworks processes.[314]

2) It is agreed that B(a)P is a compound found in gasworks waste.

3) B(a)P is not just present in tar. It is present in other constituents of gasworks waste including ash[315].

4) It is also agreed that B(a)P, among the other substances in gasworks waste, is in the soil on this site.

5) B(a)P is commonly regarded as a marker for PAHs[316] because it is:

   a) the most dangerous of the carcinogenic PAHs;

   b) the constituent substance about which the most is known;

   c) the most accurately representative substance[317];

   d) a substance the remediation of which results in the remediation of all the other hazardous compounds in gasworks waste. As Dr Pease explains in the ENVIRON letter, 'one benefit of this approach is that a risk assessment using B(a)P measurements, as a surrogate marker of the genotoxic PAHs at any given site, gives assurance that the cancer risk from all PAHs present on the site, not just B(a)P, is covered off'.

6) It would have been open to the Council to have proposed 'organic material', rather than B(a)P, as the relevant 'substance', as was the case in *Circular Facilities*[318]. Alternatively, the Council could have specified 'gasworks waste' as the relevant substance. Had it done so, there would still be a focus in the investigation on B(a)P because it is a marker.

7) Jim 2's case is that the Council should be punished for being more specific and for using a marker for a wider collection of contaminating substances.

8) This is an area with limited case law. It is therefore imperative to have regard to what guidance can be found from those limited authorities. In *National Grid*, the significant pollutant linkage referred to 'polyaromatic hydrocarbons ('PAHs') including benzo(a)pyrene'[319], and the House of Lords[320] regarded a developer who purchased the site in 1966 as having arguably 'knowingly permitted' the contamination. What mattered was not

[314] The RSK Report CD7.3 calls them 'typical gasworks-derived contaminants' at para.1.1, p.110. For materials, see AECOM reports and Mr Smart's PoE, para. 97.
[315] Accepted by Dr Thomas in cross-examination, day 3. He noted that while on average B(a)P concentrations in ash were lower than for tar there could be higher levels in ash.
[316] ENVIRON letter CD16.1.13, 2014 Guidance, evidence of Dr Thomas in cross-examination, oral evidence of Dr Cole and his PoE para. 33, and p.238 of 16.1.3.
[317] Evidence in Chief of Cole – day 4.
[318] Ibid. para. 48.
[319] Council's Legal Submissions, tab 6, para. 36 (CAB6).
[320] CD2.4, para. 19.

the knowledge of PAHs including B(a)P, but instead knowledge of the existence of gasworks waste substances, i.e. coal tar residues, in general: see para. 12 of *National Grid* (CD2.4). The source of the knowledge in the *National Grid* case was the fact that 'the conveyance to the developer described the site as including 'the underground tanks installed on part thereof'[321]. The lack of specific knowledge of B(a)P in 1966 was not apparently regarded as at all relevant. This was also the position of the Environment Agency in the *National Grid* case. The Environment Agency held the developer to be liable 'for having knowingly permitted the continued presence of the contaminating substances on the land, on the basis that the company had knowledge that the land had been used as a gasworks, that it is improbable that it would have been unaware of the presence of the contaminating substances during the development of the site and because it had obtained planning permission and developed the site and thus had had an adequate opportunity to remediate the site.' Regardless of what the significant pollutant linkage specified, what was relevant was the knowledge that 'the site had been used as a gasworks', and awareness of the presence of 'the contaminating substances' in general[322].

Mr Tromans will say that the 'Knowingly permitted' issue was not the issue in that case, which is true. However, the view the Council relies on about how an almost identical situation amounted to knowingly permitted was the view of the Environment Agency, which was recorded in detail by the High Court Judge and not criticised. Furthermore, the House of Lords also recorded the position that 'knowingly permitted' was arguable.

9) It was known in 1972 that gasworks waste contained B(a)P. It is Jim 2's technical consultant RSK's case that B(a)P was determined in 1933 to be the compound in coal tar responsible for cancer[323].

10) Schedule 3 to the Remediation Notice sets out the 'particulars of significant harm and particulars of substances'[324]. The identified pollutant is indeed B(a)P, however it is clearly stated that the 'source location' is 'contaminated garden soils and gasworks waste'. This clearly indicates that it is the wider substance, namely gasworks waste, that is at issue in this case.

11) It is wrong to look at B(a)P as the only substance about which the determination and the Remediation Notice are concerned. It is not the only contaminating substance in the soil – it is merely focused on as a marker for other contaminants. Moreover, it would be physically impossible to remove only B(a)P

[321] CD2.4, para. 12.
[322] CAB6, para. 40-42.
[323] CD7.3, RSK Technical Report, p.114, section 2.1.
[324] CD6.8, p.257

in isolation. The Gasworks waste should instead be treated collectively as the hazardous substance, of which there was clearly knowledge.

12) At para. 6.2 of the second AECOM report[325], it was noted that 'the principal sources of contamination identified on the site are … contaminated ground associated with the presence of gasworks waste in the south eastern part of the site …'. It is therefore clear that the investigation was concerned with the general contamination in the ground due to presence of 'gasworks waste', rather than an exclusive focus on B(a)P.

13) To require specific knowledge of B(a)P would frustrate the purpose of the legislation, which is designed to be retrospective and not be hindered by the relative lack of scientific understanding in the past. That is why there need only be knowledge of the substance, rather than the contaminating potential.

5.4.3.8 Jim 2 has sought to explain, both in examination in chief of Dr Thomas and cross-examination of Mr Jarrett, that since any site investigation would have had a geo-technical purpose, rather than a search for contamination, the resultant discoveries of any investigation are irrelevant. This cannot be right. It conflicts with *Circular Facilities*. All that is required is knowledge of gasworks waste. It does not matter what the purpose of the investigation was. According to Dr Thomas[326], it 'cannot be denied' that gasworks waste was found on the site by AECOM.

5.4.3.9 Mr Wielebski confirmed in cross-examination what is said in his PoE – namely that Jim 2 would have dug trial pits, and undertaken chemical analysis of the soil[327]. He also noted that borehole information would have been obtained even on a greenfield site[328], and accepted that the need for borehole information and analysis would have been even greater for a former gasworks site. He accepted that normal ground investigations would have been extended given the known information about the historical use of the site.

5.4.3.10 Further, he confirmed in oral evidence and paras. 7.1 and 7.2 of his PoE that the level of scrutiny by Directors of the purchase of this site would have been high. He was clear that Directors would have been 'wary' of what was in the ground given the warning about suitability for building in the contract and particulars of sale[329]. In response to a question from the Inspector, Mr Wielebski said that the site could have been seen at the time as a 'major hazardous site' by the Health and Safety Executive, which had a growing concern with industrial land.

[325] CD16.1.2
[326] Day 3, cross-examination.
[327] Para. 5.1, 5.6 and 3.7 of Wielebski PoE.
[328] Para 5.8 of Wielebski PoE.
[329] Cross-examination of Mr Wielebski day 3.

5.4.3.11 Knowledge of gasworks waste and the previous use of the site is therefore agreed. For the reasons set out above, the Council's primary position is that the relevant substance for the purposes of applying the 'knowingly permitted' test is 'gasworks waste', rather than specifically B(a)P.

5.4.3.12 In the alternative, it would be open to the Inspector to modify the Remediation Notice to replace 'B(a)P' with gasworks waste.

5.4.3.13 In the further alternative, if it is considered that there must be specific knowledge of B(a)P itself, it is necessary to explore:

1) The constructive knowledge[330] of B(a)P of the Directors of Jim 2; and/or
2) The constructive knowledge of the specialist gasworks demolition contractors, in particular the occupational health and safety officers, which can be imputed to the Directors of Jim 2.

5.4.3.14 A number of documents[331] were put to Mr Witherington, who agreed[332] that it was known that coal tars caused cancer, and that the culprit was B(a)P, and that there was a knowledge of B(a)P within an occupational hazard context. This suggests that those working regularly with coal tars, who were presumably trained in occupational health and safety, would have been aware that the cancer risk was down to B(a)P.

5.4.3.15 Mr Wielebski's evidence in chief[333] was that Jim 2 would not have undertaken the Gasworks demolition themselves. Instead, they would have commissioned specialist gasworks demolition contractors. This is supported by RSK in their report[334]. These contractors, given that their daily activity brings them into contact with gasworks waste, ought to have been aware of the existence of B(a)P on account of their occupational health and safety training. This constructive knowledge can be imputed to Jim 2.

5.4.3.16 The question as to what knowledge possessed by an agent of a company can be attributed to that company is to be determined by ordinary principles of corporate law: see e.g. *Circular Facilities* at para. 35 CD2.3[335]. In this case, the 'controlling mind' of the company served with a

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[330] For the Council's legal submissions on 'constructive knowledge', see paras. 44-45. Jim 2's legal submissions, para. 11, do not disagree that constructive knowledge might be sufficient under Part IIA. See also Council's SoC, para. 147(c). Contrary to what is suggested at para. 14 of Jim 2's legal submissions, para. 7.48(d) of the 2012 Guidance was not intended to exhaustively cover the circumstances in which constructive knowledge would be sufficient. The circumstances of this case are exceptional: the awareness of the substances would have been blindingly apparent to Jim 2. This is different to other scenarios where, for example, less is known about the history of the site, there is nothing in the transfer documentation, there have been intervening 'non-contaminating' uses, or the warning signs of contamination have been removed or hidden (ID10).

[331] PoE of Mr Jarrett IJ10 p.11; RSK report, CD7.3, p. 114; CD16.2.9: p 3641, p 3645, p 3646 – 3647, p 3649

[332] Cross-examination of Mr Witherington, day 6.

[333] Day 3

[334] CD7.3, p.120.

[335] See also Tromans 5.36 and 5.38-AAB6.

remediation notice had not had personal knowledge of the presence of organic matter (the substance in that case) and other contaminants. However, an individual in an 'informal partnership' with the company was taken to be an 'agent' and may have had actual knowledge of the substances at the time. Newman J held that the evidential difficulties in that particular case (including that the agent was deceased) were too great to enable his knowledge to be imputed to the company on the basis of an agency relationship. Nonetheless, Newman J held that 'circumstances can arise in which a principal is fixed with the knowledge of an agent'.

5.4.3.17 The policy underlying the statute of seeking to impose retrospective liability despite a lack of certainty about the facts militates against an overly restrictive approach to any evidential difficulties. Parliament must have known that courts would be called on to determine whether persons, including companies, possessed knowledge of the presence of contaminants in, on or under land in the past. Given the historical uncertainties inevitably restricting the availability of evidence, the retrospective policy of the Act, the test of 'reasonableness', and the interpretation of 'knowingly permitted' in other contexts, Parliament must be taken to have intended 'knowingly permitted' to be construed broadly.

5.4.3.18 It is thus submitted that in this case a broad construction to 'knowingly permitted' should be applied. It is submitted that the evidential requirements should be relaxed when considering constructive knowledge of safety officers imputed from the contractors as agents to Jim 2 as principal. This would be consistent with the policy of the Act, the historical uncertainties and the reasonableness test.

5.4.3.19 On this basis, the Council submits that the above evidence of Mr Wielebski, the RSK report, Mr Witherington, and the documents relating to occupational health awareness of B(a)P should be regarded by the Secretary of State as sufficient to form the basis of a constructive knowledge of B(a)P imputed to Jim 2.

5.5 **Grounds (d) and (e): Other persons** ('subject to paragraph (2), 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') and ('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)')

5.5.1 As pleaded ground (d) sought to argue that there were a number of other appropriate persons that the Council had failed to identify:

1) the Council itself;
2) Fletcher – on the basis they could, and should be, restored;
3) The leaseholders identified in Annex A to the Grounds of Appeal

(CD7.2);

4) Triton Investments Ltd; and,
5) Shenstone Properties Ltd.

5.5.2 Jim 2 now pursues only (1). (2) – (5) were pursued right up to the eve of the start of the Inquiry. In relation to (3) – (5) the argument was that these persons rather than Jim 2 actually built the houses (see CD7.2, paras 4.39 – 4.42). The documentary evidence the Council produced some time ago showed that was not so (CD3.6 – 3.13). Moreover, the case advanced was contradicted in terms by the RSK report (CD7.3, p. 102, 3rd paragraph) and Mr Morton's PoE at para. 3.53. These arguments should have been abandoned long before they were. The argument about restoring Fletcher was again abandoned late in the day. It never had any merit and should have been given up long ago.

5.5.3 The case is now limited to (1), the position of the Council. Turning to consider that.

5.5.4 It is again relevant to note the treatment of this issue by Forbes J in the *National Grid* case (CAB6). He notes at para. 44 of his judgment that the residents of the properties on the old Gasworks site 'were 'receptors' introduced by [the developer] as developer of the site'. In other words, the receptors were the residents themselves, rather than the mere theoretical possibility of residential development pursuant to a planning permission being obtained.

5.5.5 Jim 2 has sought to argue that the Council cannot rely on Exclusion Test 6 from the 2012 Guidance because of the activities it allegedly performed on site prior to Jim 2's ownership: paras 2.23-2.24 of Jim 2's Reply to the Council's Statement of Case CD7.5, p. 427. The precise nature of these activities is a matter of dispute, but it is submitted that the resolution of this factual dispute is irrelevant as a matter of law for the purposes of Exclusion Test 6. The only relevant question is who completed the significant pollutant linkage. In this case, Jim 2 introduced the receptors to the site. Any such activity as there was by the Council prior to Jim 2's introduction to the site is irrelevant.

5.5.6 Jim 2's case on this aspect has also changed over time. The arguments in its grounds of appeal were to the effect that the mere obtaining of permission introduced the receptor (see e.g. para 33b, CD7.2, p 52). It was also argued in this regard and its Statement of Case that the permission itself brought about a change of use. The Council refers to its detailed legal submissions, to which there has never been any response at all. These points as pleaded were misconceived and have basically not been pursued. The constantly shifting nature of the case under this ground only further underlines its weakness.

5.5.7 To summarise what is said in the legal submissions[336], the Council was right to exclude itself by applying Exclusion Test 6 because it did not introduce the receptors, i.e. the residents, to the site and thereby complete the contamination linkage. Jim 2 has sought to argue in legal submissions[337] that the building of the houses was but one of many actions leading to the introduction of the receptors, and that the Council, being responsible for other relevant actions, is implicated in the introduction of the receptors.

5.5.8 It is accepted that the Council had an ancillary/preliminary role in leading to the eventual introduction of receptors[338]. However, it is clear on any common-sense view that Jim 2 were the main /primary agents behind the introduction of the receptors. Para. 7.57 of the 2012 Guidance indicates that the purpose of Exclusion Test 6 is to '*exclude from liability those who would otherwise be liable solely because of the subsequent introduction by others of the relevant pathways or receptors'*. Had Jim 2 not built the houses, there would be no receptors. But for the exclusion test, the Council would have been liable solely because of Jim 2's construction of the houses, which enabled the introduction of the receptors. The application of the test is as simple as that. Jim 2's attempts to complicate the test should be rejected.

5.5.9 Much was made by Jim 2 in legal submissions and in cross-examination of Mr Jarrett concerning the Housing Act 1957. It is not in dispute that the Council acquired the site pursuant to that Act, and that it was required to dispose of the land subject to a condition of residential development. However, there is no such condition in either the Particulars of Sale (CD3.4), the Contract of Sale (CD3.5), or most importantly recorded as a restrictive covenant in the Office Copy entry of the Land Registry (CD9.1)[339]. It is therefore not the case that the developer was subject to a land law requirement to build houses. This may have been grounds in 1972 for a judicial review of the Council for a disposal of land contrary to the Housing Act 1957, but such a challenge is now, obviously, over 40 years too late. Mr Tromans[340] sought to suggest there was an 'implied condition' that the land be used for residential purposes. That is a wholly misconceived submission. In land law there is no such thing. Absent a restrictive covenant being imposed through the sale, and registered, there can be no implied condition.

5.5.10 Mr Wielebski in his examination in chief on day 3 explained that the clear intention was for the site to be used for housing. However, he has confused intention with obligation. He was also asked to contemplate what would have happened if the developer had tried to do something else

[336] Ibid, paras. 63-71.
[337] Jim 2's legal submissions, ID3 paras. 32-39.
[338] However, it should be noted that (a) the Council only ever obtained outline planning permission, and (b) Jim 2, instead of obtaining detailed permission pursuant to the Council's outline grant, decided to obtain completely separate detailed planning permissions: see CD4.1-4.5.
[339] Mr Morton agreed in cross-examination, day 5.
[340] In the discussions on day 7.

with the land other than housing. He explained that there would be a provision in the contract of sale giving the Council the right to re-purchase the site. This may well have been what ought to have happened, but there is no evidence of any such provision in the contract of sale in this case.

5.5.11 Similarly, it has been suggested that it is of importance that when the land was sold there was in place an outline planning permission obtained by the Council in 1971 for housing. That is true but there was no obligation to implement the permission, full permission would have been required, and this permission was not in fact ever implemented.

5.5.12 It is therefore not correct to say that the Council had a role in introducing the receptor by imposing a condition of residential use on the developer.

5.5.13 Jim 2 has (rightly) not alleged that the Council undertook any physical operations on the land in order to facilitate redevelopment e.g. site preparation. The evidence shows its actions were limited to demolishing a single building for health and safety reasons.

5.5.14 In summary grounds (d) and (e) are totally without merit and should be dismissed.

5.6 **Ground (m) – Remediation powers** ('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 (n): Costs recovery ('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')

5.6.1 Section 78N(3)(e) deals with a situation 'where the enforcing authority considers that, were it to do some particular thing by way of remediation, it would decide, by virtue of subsection (2) of section 78P below or any guidance issued under that subsection', that it would not seek to recover any of the reasonable cost or only seek to recover a portion of that cost.

5.6.2 Section 78P deals with costs recovery, and provides that the authority must have regard to any hardship which the recovery may cause to the person from whom the cost is recoverable and to any guidance issued by the Secretary of State for the purposes of this subsection.

5.6.3 If the authority is satisfied that its own powers of remediation are exercisable under section 78N(3)(e), it shall not serve a remediation

notice: section 78H(5)(d).

5.6.4 Grounds (m) and (n) may be taken together, as they both relate to the alleged hardship and unreasonableness of a decision by the Council to recover full remediation costs from Jim 2.

5.6.5 The grounds are brought on the basis of (i) the allegedly poor financial position of Jim 2, and (ii) the fact that other causers/permitters cannot be found (thereby engaging paragraph 8.25 of the 2012 Guidance CD1.5: see below).

5.6.6 As is clear from the wording of sections 78P, 78H and 78N, grounds (m) and (n) and para. 8.25 of the 2012 Guidance, costs recovery is a matter of discretion for the authority: see also *Tromans* at para. 6.28 (CAB1). The appeal jurisdiction the Secretary of State has in this regard is a highly unusual one. It contemplates overturning on appeal the exercise of a discretion based on a wholly notional decision about what the local authority would do if it was seeking costs recovery. This is a bizarre position and jurisdiction.

5.6.7 Although no longer in force, it is useful to consider the limited guidance on 'hardship'[341] at paras. 10.8 to 10.9 of Annex 2 to the 2006 Guidance (CD1.3):

> '10.8 The term 'hardship' is not defined in Part 2A, and therefore carries its ordinary meaning – hardness of fate or circumstance, severe suffering or privation.
>
> 10.9 The term has been widely used in other legislation, and there is a substantial body of case law about its meaning under that other legislation. For example, it has been held appropriate to take account of injustice to the person claiming hardship, in addition to severe financial detriment. Although the case law may give a useful indication of the way in which the term has been interpreted by the courts, the meaning ascribed to the term in individual cases is specific to the particular facts of those cases and the legislation under which they were brought.'

5.6.8 Section 8 of the 2012 Guidance (CD1.5) 'sets out principles and approaches, rather than detailed rules. The enforcing authority should have regard to the circumstances of each individual case': para. 8.4.

5.6.9 Para. 8.5 provides as follows:

> 'In making any cost recovery decision, the enforcing authority should have regard to the following general principles:
>
> (a) The authority should aim for an overall result which is as fair and

[341] The test of hardship is objective, based on what the reasonable person would regard as hardship: Rukat v Rukat [1975] 1 All ER 343 at 351 (AB17).

equitable as possible to all who may have to meet the costs of remediation, including national and local taxpayers.

(b) The 'polluter pays' principle should be applied with a view that, where possible, the costs of remediating pollution should be borne by the polluter. The authority should therefore consider the degree and nature of responsibility of the relevant appropriate person(s) for the creation, or continued existence, of the circumstances which lead to the land in question being identified as contaminated land.'

5.6.10 The general starting point is that the authority should recover all the costs, which should only be departed from where hardship is demonstrated.

5.6.11 Para 8.8-9 provides:

'8.8 In general, the enforcing authority should expect anyone who is seeking a waiver or reduction in the recovery of remediation costs to present any information needed to support such a request.

8.9 In making any cost recovery decision, the enforcing authority should consider any relevant information provided by the appropriate person(s). The authority should also seek to obtain such information as is reasonable, having regard to: (i) accessibility of the information; (ii) the cost, for any of the parties involved, of obtaining the information; and (iii) the likely significance of the information for any decision.'

5.6.12 The burden is accordingly on Jim 2 to demonstrate that a waiver or reduction is justified. The authority is only required to obtain such information as is reasonable. Mere assertions of impecuniosity will not suffice: see the related planning context of compliance with an enforcement notice in *Kent CC v Brockman [1996] 1 P.L.R. 1, at p.4F-G* (CAB18).

5.6.13 *Tromans* at para. 6.33 (CAB1) provides:

'… where the remediation actions required involve very substantial cost, and the authority is met with a claim by a polluter who is a major company that they should pay only a small proportion of that cost, or indeed nothing at all, on hardship grounds, then the authority may well be justified in making its own enquiries into the matter, and taking professional advice as to the validity of the company's hardship case. If it did not, the authority could properly be criticized for failing to take proper steps to safeguard the public purse, which would otherwise have to bear the cost of remediation.'

5.6.14 Para. 8.24 of the 2012 Guidance provides:

'… the enforcing authority should consider whether or not the Class A person is likely to have profited financially from the activity which led to the land being determined to be contaminated land (e.g. as might

be the case if the contamination resulted from a business activity). If the person did profit, the authority should generally be less willing to waive or reduce costs recovery than if no such profits were made.'

5.6.15 The existence of another Class A person that cannot be 'found' (in this case because the company has been dissolved) only requires the Council to 'consider' waiving or reducing its costs recovery: see paragraph 8.25.

5.6.16 It is not suggested that Jim 2 is a 'small or medium-sized enterprise'. However, it is revealing that, under the 2012 Guidance at para. 8.16, costs recovery should not be waived or reduced by the enforcing authority where:

> '(a) it is satisfied that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation; (b) it appears that the enterprise would be likely to become insolvent whether or not recovery of the full cost takes place; or (c) it appears that the enterprise could be kept in, or returned to, business even if it does become insolvent under its current ownership.'

5.6.17 The position here is thus that:

1) The decision of the Council on these matters concerned the exercise of a discretion. The Secretary of State should accord the widest possible margin of appreciation to the Council in this regard. Jim 2 said that the exercise of arriving at a figure for reduction is essentially 'putting a finger in the air'. This serves to underline the width of the Council's discretion as the decision-maker.
2) The Council quite properly had in place a policy on contaminated land cost recovery and hardship: see CD6.2, this is something that the 2012 Guidance expressly allows for (see para. 8.11).
3) The Council, as required to, expressly gave consideration to whether it would in its discretion waive or reduce Jim 2's liability for remediation costs: see the memorandum at CD6.7 p 237 – 238 and in particular to the fact that Fletcher could not be 'found'. The Council concluded, in its discretion, that Jim 2's liability should not be waived or reduced for this reason. Hardship was also considered.

5.6.18 The Council's remediation requirements require Jim 2 to remove a layer of the contaminated soil and replace it with clean soil[342]. The Council has estimated the cost at £2-4 million[343]. Jim 2 is a subsidiary company of Taylor Wimpey plc, one of the largest and most successful currently active developers in the country[344]. Jim 2, although it is now dormant, has a

[342] This simplifies the remediation requirements set out Schedule 2 of the Remediation Notice, CD6.8. Schedule 4 sets out a summary of the reasoning behind the requirements.
[343] See the PoE of Mr Jarrett at para. 162; Jim 2 estimate the costs at £2 million.
[344] See CD15.1-15.5.

huge financial asset in the form of a £25.2m debt owed to it by another Taylor Wimpey subsidiary company[345]. It also has the financial support of its wealthy parent[346], who has doubtless funded this appeal. There is therefore no question whatever of any hardship on its part justifying a reduction or waiver of cost recovery. The notion that Taylor Wimpey Plc might suffer 'hardship' in this context is risible.

5.6.19 The Council reviewed the financial information of Jim 2, from which it did not unreasonably conclude that Jim 2 would not suffer hardship. It is telling that no evidence whatsoever, oral or written, has been adduced by Jim 2 on these matters. Such financial information as the Council has obtained was obtained by it. The absence of provision of any financial information or evidence from Jim 2 about its own position is something that can (see what is said in *Tromans* above) and should be held against it. The Council has gone out of its way to ensure it can properly consider these matters despite an absence of any information being forthcoming from Jim 2.

5.6.20 In addition, given the Council's position that Jim 2 caused or knowingly permitted all of the land to be contaminated, including the land developed by Fletcher, it was not considered appropriate to limit costs recovery to reflect the fact that Fletcher could not be 'found'[347]. The Council's discretionary decision in this regard should not be interfered with unless shown to be unreasonable or not in accordance with the statutory guidance.

5.6.21 There is one additional matter. Jim 2 argues that under para 8.25 of the 2012 Guidance that there is another group of appropriate persons who cannot now be 'found' and who if they could be found would affect the proportion of costs Jim 2 would have to bear. This focuses on the gas companies who operated the Willenhall Gasworks. The Council says that even if these companies could be found their liabilities would be excluded by the application of Exclusion Test 6. The Gas companies did not introduce the receptor. Therefore there is no proper basis for any waiver/reduction on this basis.

5.7 ***Conclusion***

5.7.1 The Council therefore submits that it has acted reasonably and in accordance with statutory guidance. The Inspector is accordingly invited to recommend to the Secretary of State that Jim 2's appeal be dismissed on all grounds.

[345] CD15.1, p.27
[346] CD15.1, p.25
[347] CD10.9, p.59 and 60.

6 THE CASE FOR JIM 2 LIMITED (Jim 2/the appellant)

The gist of the material points made by the appellant in its written (including footnotes) and oral submissions were:

6.1 Preamble

6.1.1 The appellant's evidence in relation to these questions has been provided through the oral and written evidence of five witnesses: Mr Witherington, Mr Morton, Dr Thomas, Mr Wielebski and Mr Pole.[348] Necessarily, these closing submissions cannot address all of that evidence in its entirety, therefore the Inspector in making his recommendation and Secretary of State in making her decision are requested to have regard to their full proofs and notes of their oral evidence when considering this appeal. These closing submissions should be read together with the appellant's legal submissions (dated 2 December 2015)[349] and their response to the legal submissions of the Council (dated 14 December 2015)[350]. These submissions will not repeat unnecessarily what is contained therein.

6.1.2 There can be few more important decisions that a local authority is called upon to make in its environmental functions than the identification of land as contaminated under Part IIA of the Environmental Protection Act 1990. It is dealing with the safety of the public who may be exposed to risks from contamination.

6.1.3 Equally however identification of a site such as the Stonegate Estate will be a life-changing experience for those who are unfortunate enough to live there. Their homes will be very significantly reduced in value, if they are indeed saleable at all. They will no longer be accepted as good security for a loan. If the owner wishes to move in order to downsize, or upsize, or for work reasons, they will not be able to do so. As Mrs Fullwood[351] put it in her statement to the Inquiry, they will become 'prisoners in their own homes'. That is to say nothing of the anxiety, stress and worry which will follow. They will worry about their children or grandchildren who play, or have played in the garden. They will have no real incentive to improve or maintain a home and garden which is worthless. If they are unlucky enough to get ill they will worry as to whether it is due to their garden. Their main asset will literally become a millstone round their necks. The Council has suggested that this nightmare has been caused by the former gasworks status of the land. With respect, that is different to the Council determining the land as SPOSH. In re-examination on 16 December 2015 Mr Witherington distinguished between the former

[348] Mr Pole's evidence was uncontroversial and by agreement he was not required to give oral evidence.
[349] ID3.
[350] ID24.
[351] It is asked that the Inspector should record for the Secretary of State's benefit that Mrs Fullwood was clearly a sensible, down to earth and articulate lady, and certainly did not appear to be someone who would exaggerate or over-dramatise the problems she described.

gasworks site and land determined to be contaminated. He said there is no comparison between the two. It amounts to a catastrophic change for residents.

6.1.4 Even worse, if the land has been identified as contaminated and it turns out that no 'appropriate person' can be found who caused or knowingly permitted the presence of the contaminant, they themselves will be liable for the costs of cleaning-up their gardens, subject to the possibility of costs against them being waived wholly or in part.

6.1.5 It is genuinely difficult to imagine a much worse thing that could happen to a person or family, short of major illness or bereavement.

6.1.6 Local authorities such as Walsall therefore need to exercise enormous care before they take the step of identifying as 'contaminated land' a swathe of residential homes and gardens. The residents are entitled to expect that the process will be rigorous, fully supported by sufficient data, and by a proper risk assessment.

6.1.7 Unfortunately for the residents of what the Council has (entirely arbitrarily) drawn as 'Zones 4 and 7' on the Stonegate Estate, the Council has conspicuously failed to meet that standard of care.

6.1.8 It has identified those areas as 'contaminated' on the basis of an inadequate site investigation process, without any risk assessment worthy of the name, and without taking properly into account (if at all) what the massive impact on the residents would be.

6.1.9 It has entirely failed over the 6 days of evidence at this Inquiry to justify its identification of the land as presenting a significant possibility of significant harm (SPOSH).

6.1.10 Its case has crumbled before our eyes. Its star witness, Dr Cole, has reversed his evidence, accepting that on the numerical data there is no 'strong case' for identification of Zones 4 and 7. He has accepted that it would, for Zone 7, have been possible to obtain further data to better characterise the few relatively high samples of B(a)P found on investigation. Plainly this is what the Council should have done. It may well have found that these were explicable by sources related to the historic operation of the gasworks. There might have been localised 'hotspots' of B(a)P which might have justified identification, and which could probably have been cleaned up by now. We shall however never know, because it simply did not do that work.

6.1.11 A genuinely disturbing feature of this Inquiry has been the way in which the Council's stubborn insistence in refusing to admit the shortcomings of its past work has led it to seek to defend this appeal by reinventing its case, and by relying upon completely unmeritorious arguments as to the margin of discretion which it says it enjoys in making the decision. This is

a deeply unattractive position. In refusing to do the right thing and reconsider the identification, it has wasted huge amounts of public money and exposed its council tax payers to potentially massive costs. Worse still, it has condemned the residents to an extension of their misery, as they now wait to hear their fate, potentially, though it is sincerely hoped not, for another 2 years or more.

6.1.12 All that is bad enough, and will be examined more closely in the remainder of this Closing. However, there is a further disturbing feature, which is the timing of the identification. It should concern anyone with any sense of good public administration. The identification took place on 27 March 2012 under the Secretary of State's 2006 Statutory Guidance,[352] then in force. About 2 weeks later there came into force the revised Statutory Guidance dealing with identification, on 10 April 2012.[353]

6.1.13 That revised Guidance, it is clear, was the product of long and careful deliberation and consultation. Its main purpose was to ensure that local councils considered in a rigorous way the strength of the case for finding a SPOSH, specifically to avoid inflicting the sort of collateral damage described above.

6.1.14 For reasons which have not been explained in any convincing way, the Council (having had the site under consideration since the first Desk Study in April 2007,[354] having had a report in May 2009 which recommended that zone 7 be identified,[355] and having had a consolidated report in July 2011 which recommended identification of zone 4[356]) suddenly galvanised itself into action to identify the land as contaminated just before the new, much clearer and more demanding, Guidance came in.

6.1.15 We know that Mr Jarrett, the key relevant officer at the Council, knew that the new Guidance was in the offing and knew its terms. The Council seeks to say that it did not know precisely when it would come into force. This is simply not credible. We know that in February/March 2012, the Council instructed to advise it Mr Andrew Wiseman, a solicitor whose website says that he is '…without question a leader on Contaminated Land', 'admired for his ability to explain issues …. in a calm and clear fashion' and having 'won praise from clients for his impressive knowledge … and ability to understand the technical issues involved as well as political pressures'.[357]

6.1.16 It is entirely implausible that Mr Wiseman would have been unaware of the imminence of the 2012 Guidance and of its implications. We shall never know what passed between Mr Wiseman and the Council as it is legally privileged. However, if it was the case that the Council hoped to obtain

[352] CD 1.3
[353] CD 1.5
[354] CD 16.1.1
[355] CD 16.1.3
[356] CD 16.1.7
[357] http://www.hglaw.co.uk/about-us/andrew-wiseman/

some advantage by getting the identification through ahead of the 2012 Guidance, it has done the Council, and certainly the affected residents, no favours at all. If it was the case that the Council hoped to save money by not having to do the further work required under the 2012 Guidance by producing a risk summary, that was both extremely misguided and has certainly not achieved that effect. A lot was made by the Council in closing that no risk assessment was required by the 2006 Guidance. However, the summary is not a hypothetical exercise, it is a non-technical summary to assist residents in understanding the assessment. They are entitled to know the basis upon which potential impacts have been assessed.

6.1.17 Altogether, this is a troubling feature of an already troubling case. This introduction has not so far mentioned the Council's allocation of 100% liability to the appellant, another important basis of appeal. Whilst important, and it will be discussed at length later in these submissions, it pales somewhat into insignificance beside the deeply flawed identification of the land as contaminated, and the impacts, past, present and future, on the residents, with whom it is impossible to have anything other than the strongest sympathy.

6.2 Brief site history and background to the appeal

6.2.1 The subject of this appeal concerns two zones within a residential development in Willenhall. The development is bounded by Newent Close to the east, a dismantled railway to the south, Clarkes Lane to the west and further residential development to the north ('the site'). It comprises roughly 4.8 hectares.

6.2.2 The remediation notice served on the appellant[358] applies to zones 4 and 7. Zone 4 comprises 26 properties located to the north of Brookthorpe Drive. Zone 7 comprises 43 properties, to the south, along Brookthorpe Drive and Kemble Close[359].

6.2.3 Prior to there being residential development on the site, the site hosted a gasworks which was operated initially by the Willenhall Gas Company and later by the West Midlands Gas Board. The manufacture of gas on site ceased on 18 June 1957 and the site was then used as a holder station for some years.[360] The evidence of Tony Morton details how the nature of the gasworks changed over its lifetime. The operations and changes which took place on site during the lifetime of the gasworks are highly material to this appeal and will be discussed further below.

6.2.4 A number of structures found on the site during the lifetime of the gasworks were sited within zone 7, these include; purifiers, benzole

[358] CD 6.8
[359] ID2.
[360] CD 7.3 Appendix H and para 3.29 Morton Proof of Evidence

storage tanks, tar extractor, static washer, benzole rotary washer, station meter, purifier heater, electric detarrer, zinc acetate washer, old water pump house and sludge separating pit.[361] Both zone 4 and 7 were used for dumping of waste from the gasworks during its operation. Again, this will be discussed in further detail below.

6.2.5 In 1965 the Site was acquired by the Urban District Council of Willenhall (the predecessor of Walsall Metropolitan Borough Council) under Part V of the Housing Act 1957, for the purposes of redeveloping the site for housing. The Council owned the site for seven years, from 1965 until 1972.

6.2.6 The Council has provided a note, dated 4 May 1971, which indicates that a dangerous building was demolished by them and a tank infilled.[362] It is unclear which building and tank this note relates to. The Council does not accept that it demolished any other buildings during the period of its ownership and there is no evidence one way or the other on that matter.

6.2.7 On 24 May 1971, the Council submitted an outline planning application (application no P34619) for residential development of the Site.

6.2.8 The Council sold the Site to Mclean Homes (Midlands) Limited ('McLeans'), with the benefit of an outline planning permission for residential development granted pursuant to application no P34619 by a transfer dated 29 February 1972 and registered under freehold title number SF82384.

6.2.9 McLeans submitted an application for detailed planning permission, which was granted on 2 February 1972.

6.2.10 Having acquired the Site by a transfer dated 29 February 1972, McLeans subsequently transferred part of the Site to E Fletcher Builders Limited (Fletcher) under a transfer dated 6 June 1972 (subsequently registered under title number SF86128).

6.2.11 Fletcher obtained detailed planning permission for the erection of 59 houses (plots 50-108) on the part of the Site owned by it. These plots include the properties on Kemble Close (nos. 1-27), which are the subject of the Notice. Planning permission was granted on 28 June 1972 (application no. P36210).

6.2.12 A further detailed planning permission (application no. P36898) was granted to McLeans on 8 November 1972 in respect of plots 90-118.

6.2.13 McLeans changed its name to Jim 2 Limited in 1993. Where the appellant

[361] Para 3.38 Morton Proof of Evidence and CD7.3 Appendix H
[362] CD 3.2

is referred to in these closing submissions it denotes both McLeans and Jim 2.

6.2.14 As a result of a series of mergers, Fletcher became a part of the Aggregate Industries Group.

6.2.15 On 27 March 2012, the Council purported to determine that the Site was contaminated land for the purposes of section 78A(2) of the Act. The Notice of Identification of Contaminated Land served by the Council in August 2012 identified Fletcher as a potential Class A person. Fletcher was subsequently dissolved on 21 October 2014.

6.2.16 The Remediation Notice was served on the appellant on 17 March 2015.[363]

6.2.17 The appellant submitted its appeal against the Remediation Notice on 7 April 2015.[364]

6.2.18 The appeal is brought on the following grounds (as set out in regulation 7 of the 2006 Regulations):

1) **Ground (a)(i) and (ii):** In determining whether the land to which the Notice relates appears to be contaminated land, the Council (i) failed to act in accordance with the statutory guidance; and (ii) unreasonably identified the site, or any part of it, as contaminated land.

2) **Ground (b)(i) and (ii):** In determining the remediation requirements as set out in the remediation notice, the Council failed to have regard to the 2012 Guidance, as required by section 78E(5). Furthermore, the steps which the appellant is required to undertake by way of remediation are unreasonable.

3) **Ground (c):** The Council has unreasonably determined that the appellant is the appropriate person to bear responsibility for the matters required in the Notice to be done by way of remediation.

4) **Ground (d):** Without prejudice to the appellant's contention that it is not an appropriate person, the Council has unreasonably failed to determine that other persons are appropriate persons, in relation to the matters required by the Notice to be done by way of remediation.

5) **Ground (e):** The Council failed to act in accordance with the statutory guidance issued under section 78F(6) and contained in

[363] CD 6.8
[364] CD 7.1

section 7 of the 2012 Guidance, which explains how liability should be attributed and/or apportioned in circumstances where two or more persons are liable to bear responsibility for anything required to be done by way of remediation.

6) **Ground (m):** The Council has the power to do anything which may be appropriate by way of remediation to the Site by virtue of section 78N(3)(e), having regard to (i) the hardship which would be caused to the appellant as a result of the Notice and (ii) section 8 of the 2012 Guidance.

7) **Ground (n):** Insofar as the Council turned its mind to the question of whether it would seek to recover all or a portion of the cost incurred by it in exercising its power under section 78N(3)e, the Council: (i) failed to have regard to any hardship which the recovery would cause to the appellant and/or to section 8 of the 2012 Guidance issued under section 78P(2) and; (ii) unreasonably determined that it would seek to recover all of the cost from the appellant.

6.2.19 The appellant's case under each of these grounds is dealt with below.

6.3 Legal and policy framework

6.3.1 The appellant has set out its case on the law in its legal submissions dated 2 December 2015[365] and also its Reply to the Council's legal submissions, dated 14 December 2015[366]. We will not repeat what is included therein, but will instead provide an overview of the legislative and policy framework within which the decision on this appeal should be taken.

6.3.2 The legislative framework is set out in Part IIA Environmental Protection Act 1990 (the Act) and the Contaminated Land (England) Regulations 2006 ('the 2006 Regulations'). The relevant provisions are summarised below.

6.3.3 'Contaminated land' is defined in section 78A(2) of the Act as any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that— (a) significant harm is being caused or there is a significant possibility of such harm being caused; or (b) significant pollution of controlled waters is being caused or there is a significant possibility of such pollution being caused.

6.3.4 In determining whether land satisfies this definition, the Council is required to act in accordance with guidance issued by the Secretary of

[365] ID3.
[366] ID24.

State under section 78YA.

6.3.5 Where the Council has identified any contaminated land in its area, it is required to serve on each person who is an appropriate person a notice, specifying what that person is to do by way of remediation and the periods within which he is required to do each of the things so specified: see section 78E(1).

6.3.6 An 'appropriate person' is defined in section 78F as 'any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land.'

6.3.7 A person will only be deemed to have caused or knowingly permitted the substances to be in, on or under the land for the purposes of section 78E, where that person has actual (i.e. not implied or constructive) knowledge of the presence of the contaminating substance on the land: see *Circular Facilities (London) Ltd v Sevenoaks DC* [2005] EWHC 65.

6.3.8 Where two or more persons would be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority is required to determine, in accordance with guidance issued for the purpose by the Secretary of State, whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing: see section 78F(6) of the Act.

6.3.9 The Council is also required to have regard to this guidance in determining what proportion of the cost of any remediation works is to be borne by each appropriate person: see section 78F(7).

6.3.10 By virtue of section 78E(4) of the Act, the only things by way of remediation which the enforcing authority may do, or require to be done, under or by virtue of Part IIA of the Act are things which it considers reasonable, having regard to: (a) the cost which is likely to be involved; and (b) the seriousness of the harm in question. The Council is required to have regard to statutory guidance issued by the Secretary of State when determining the remediation requirements as set out in the Notice: see section 78E(5).

6.3.11 In deciding whether to recover the reasonable cost of remediation works from an appropriate person and, if so, how much of that cost, section 78P(2) provides that the Council is required to have regard to (a) any hardship which the recovery may cause to the person from whom the cost is recoverable; and (b) any guidance issued by the Secretary of State. Where, by virtue of section 78P(2), the Council considers that it would decide not to seek to recover any of the reasonable cost incurred by it in doing that thing; or to seek to recover only a portion of that cost, the enforcing authority itself has power to do what is appropriate by way of remediation: see section 78N.

6.3.12 Where the Council is satisfied that the powers under section 78N to do what is appropriate by way of remediation are exercisable, it is prohibited from serving a remediation notice by virtue of section 78H(5)(d).

6.3.13 Section 78L makes provision for an appeal to be made against a remediation notice within 21 days of service of the notice. The grounds on which an appeal may be made are set out in Regulation 7 of the 2006 Regulations.

6.3.14 At the time when the Council purported to determine that the land was 'contaminated land' for the purposes of section 78A(2), the statutory guidance was contained in Annex 3 of Defra's *Circular 01/2006* ('the 2006 Guidance).

6.3.15 In April 2012, Defra published the Environmental Protection Act 1990 Part 2A Contaminated Land Statutory Guidance ('the 2012 Guidance') under section 78YA of the Act. This guidance replaced Circular 01/2006 with immediate effect, rendering the 2006 Guidance obsolete.

6.4 **Was it reasonable for the Council to determine zone 4 and/or zone 7 as contaminated and/or did it fail to act in accordance with the 2006 and 2012 Guidance?**

6.4.1 This section of our closing submissions addresses appeal grounds (a)(i) and (ii) – In determining the land the Council failed to act in accordance with guidance issued by the Secretary of State under section 78A and also unreasonably identified all or any of the land to which the notice relates as contaminated land.

6.4.2 As was set out in the appellant's Statement of Case, in order to determine whether the land was 'contaminated land' in accordance with the 2006 Guidance, the Council was required to satisfy itself that:

1) A 'contaminant', a 'pathway' and a 'receptor' have been identified in respect of the land; and

2) A 'pollutant linkage' between those elements exist; and

3) The 'pollutant linkage is resulting in significant harm being caused to the receptor in the pollutant linkage; or presents a significant possibility of significant harm ('SPOSH') being caused to that receptor. A significant possibility is one which meets the conditions set out in Table B of the 2006 Guidance and would represent *'an unacceptable intake or direct bodily contact, assessed on the basis of relevant information on the toxicological properties of the pollutant.'*

6.4.3 In order to determine whether the pollutant linkage presented a SPOSH,

as alleged, the Council was required to undertake a scientific and technical assessment of the risks arising from the pollutant linkage, to be undertaken according to relevant, appropriate, authoritative and scientifically based guidance on undertaking risk assessments. Paragraph B.45 of the 2006 Guidance states:

> *'The local authority should determine that land is contaminated land on the basis that there is a significant possibility of significant harm being caused (as defined in Chapter A), where:*
>
> *a) it has carried 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;*
> *b) that assessment shows that there is a significant possibility of significant harm being caused; and*
> *c) there are no suitable and sufficient risk management arrangements in place to prevent such harm.'*

6.4.4 It is accepted that at the time the determination was made, the Guidance in force was the 2006 Guidance. Even judged on that Guidance, and leaving out of account the 2012 Guidance entirely, the Council plainly failed to act in accordance with the 2006 version. The failures of the Council to follow the 2006 Guidance and in unreasonably identifying any or all of the land are the:

1) unreasonable failure to demonstrate that B(a)P present in the soil poses an unacceptable risk to health;
2) unreasonable failure to undertake a toxicological risk assessment in order to examine potential toxicological effects of the concentrations and exposure routes identified on the site;
3) unreasonable failure to zone the site appropriately;
4) unreasonable failure to treat topsoil as a separate soil population in their assessment;
5) unreasonable failure to carry out adequate shallow soil sampling; and,
6) unreasonable reliance on extrapolated and incomplete data and failure to either discount outliers or to undertake further testing to establish whether they ought to be included within the dataset.

6.4.5 Further, the Council unreasonably failed to take the draft 2012 Guidance into account when making its determination and failed to undertake any, or any adequate, assessment of the impact of the new technical guidance on soil contamination ('SP1010') which advised that a value of 5 mg/kg of B(a)P does not represent an unacceptable risk to human health.
As discussed in the introduction, it knew full well that the 2012 Guidance

was imminent, what it contained and its implications. It must surely, as Mr Witherington pointed out,[367] have turned its mind to whether the identification of the land would satisfy the requirements of that Guidance. If it did not, it should have done. The Secretary of State should not be seen to endorse the playing of clever games by local authorities with something as important as this. As a matter of law, the Council should have regarded the 2012 Guidance as a material consideration (see legal submissions). The wish to evade the requirements of the new guidance (if that is found to be the inference to be drawn) or the misguided desire to save money on further assessment (if that is the explanation) are not proper material considerations: indeed taking account of such considerations could properly be said to be Wednesbury unreasonable[368] in the overall context, as could its refusal even to reconsider its decision in the light of that new Guidance. It is in the circumstances perfectly reasonable for the conduct of the Council to be judged against the 2012 Guidance. Had it acted properly and reasonably that is the Guidance which would have been in force.

6.4.6 Each of the matters listed above is dealt with in the following paragraphs. However, as a preliminary matter it is necessary to examine the extent of the Council's reasoning at the time it took the decision to determine zones 4 and 7 as contaminated and also how much weight, if any, can be given to the *ex post facto* reasoning of the Council (which extends to a huge proportion of their evidence), particularly the evidence of Dr Cole.

Council's Contemporaneous Reasoning in relation to Determination

6.4.7 The notice of identification of contaminated land (June 2011)[369] included the RoD at Appendix 1 which, as the notice states (at para 3), sets out the basis upon which the determination was made. The reasoning for the determination was as follows:

> *'Walsall Metropolitan Borough Council has identified the presence of a contamination source, pathway and receptor (the significant pollutant linkage) relative to the current use of the land. The Council is satisfied that a significant possibility of significant harm exists as a result of the identified pollutant linkage and that there are insufficient suitable mitigation measures in place to prevent such harm occurring.'*[370]

[367] 16 December 2015 Witherington cross-examination.
[368] That is, so unreasonable that no reasonable authority could possibly have acted in that way: see *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 K.B. 223, Court of Appeal. At p. 229 Lord Greene MR said one aspect of this test is that: 'It is so unreasonable that it might almost be described as being done in bad faith'. For the avoidance of doubt, the appellant is not accusing the Council or Mr Wiseman of bad faith (ID48).
[369] CD 6.3
[370] CD 6.3 p109

6.4.8 Schedule 2 to the document contained the reasoning for the determination and stated *inter alia:*

> *4.3 The determination has been made using information from five rounds of intrusive site investigations designed and carried out by Faber Maunsell (now AECOM) on behalf of Walsall Metropolitan Borough Council and the recommendations made within reports on the findings. Faber Maunsell have carried out a review of the results of the investigations, identified plausible pollutant linkages and undertaken a site specific risk assessment to inform the decision on whether all or part of the investigation areas should be determined as contaminated land….*
>
> *4.4 The last report in the series* **'***Consolidated Contaminated Land Risk Assessment – Former Willenhall Gasworks, Oakridge Drive, Walsall' (July 2011) has regard to the previous reports and it is upon the findings and recommendations of this report and 'Phase II Contaminated Land Risk Assessment Former Willenhall Gasworks' (May 2009 for Zone 7) that Walsall MBC has made the decision to determine the specified land as contaminated land.'* (this is contrary to the Council's closing submissions).
>
> *'4.5 The reports identify that concentrations of benzo(a)pyrene in 51% of samples recovered from the determination areas were found to exceed the Health Criteria Value (HCV) of 1.02 milligrams per kilogram (mg/kg) derived by Faber Maunsell using the Contaminated Land Exposure Assessment (CLEA) v1.04 model.*
>
> *4.6 Walsall MBC recognises that exceedance of a HCV or screening value does not equate to an unacceptable level of risk as defined by the Environmental Protection Act 1990 Part IIA. In concluding that significant possibility of significant harm is being caused consideration has been given to the extent of exceedance of the HCV, the depth below the surface from which the sample was obtained and the likelihood of occupiers or users of the land being exposed to that contamination…*
>
> *4.8 Statistical analysis of the benzo(a)pyrene concentrations in the samples using the techniques provided in the Chartered Institute of Environmental Health Guidance on Comparing Soil Contamination Data with Critical Concentration (May 2008) shows that the true mean concentration of benzo(a)pyrene in the soils is significantly above the screening value of 1.02 mg/kg that has been used as the critical concentration and consequently there is a significant possibility of significant harm to the receptors…*
>
> *4.9 Walsall MBC has also considered the extent of surface cover and treatment of soft landscaped areas together with the potential for soils disturbance leading to the potential for inhalation, ingestion of*

or dermal contact with contamination from soils and concluded that the prevailing conditions do not constitute acceptable control measures or allow management of situations to control or prevent exposure and associated risks to human health.

4.10 Having regard to the above factors Walsall MBC has concluded that the extent and concentrations of benzo(a)pyrene in near surface soils and the presence of credible exposure pathways indicates that significant possibility of significant harm exists in relation to human health and therefore the areas of land specified should be determined as contaminated land.' (original emphasis)

6.4.9 It is worth setting out the Council's reasoning at length. This is the only contemporaneous document which records the Council's thinking behind the determination. Dr Cole attempted to rely on unrecorded and unspecified discussions on their reasoning which he had held with unspecified officers to elaborate their reasoning. This is (a) very naïve of Dr Cole to believe such 'evidence' could possibly be relevant; and (b) utterly unsatisfactory and unacceptable as a way of justifying a decision making process which should be transparent.

6.4.10 Indeed, much of the Council's evidence before this Inquiry has sought to justify or shore up its decision *ex post facto*, and in this regard the sound of the bottoms of barrels being scraped was audible. That evidence cannot be relied upon in reaching a decision on whether the Council's determination of the land was reasonable as at March 2012. The Inspector and Secretary of State are particularly asked to note the following with regard to the Council's contemporaneous reasoning:

1) The Council relies heavily upon the margin of exceedance of 1.02 mg/kg which it incorrectly stated was an HCV;
2) Although the Council states it took into account the extent of surface cover, it does not give any indication of what the surface cover is and whether it has been subject to any mixing;
3) The Council states in the summary of the evidence upon which the determination is based (not set out above) that the data used was that from 37 locations (in February and March 2008), that from 40 locations (in November 2008) and data from a further 44 locations (in February 2009)[371]. As will be explored below, these do not relate to shallow soils, contrary to the claims of Mr Jarrett in evidence that the determination was based on the high concentrations in shallow soils[372]; and,
4) There is no mention of the precautionary principle or ALARP (as low as reasonably practicable).
5) In its closing statement the Council indicates that B(a)P is a marker for PAHs. That is obvious and is not in dispute.

[371] CD6.3 paras 2.2 and 2.5
[372] 9 December 2011 Inspector's question to Mr Jarrett.

> However, the problem is that Mr Smart and Mr Jarrett have done something different, they say gasworks waste is a marker for B(a)P.

Each of the above matters will be explored further in these submissions.

The Ex-Post Facto Reasoning of Dr Cole

6.4.11 As a preliminary matter, it is also worth considering the *ex post facto* reasoning of Dr Cole. It is absolutely clear that no weight can be given to his evidence to the Inquiry for four reasons: (1) Dr Cole is a member of the same company as carried out the initial work for the Council, he cannot therefore be impartial; (2) his evidence blatantly is no more than an ex-post facto attempt to shore up an unreasonable decision; (3) his evidence has been replete with errors; and (4) Dr Cole ought not to have given evidence due to a clear conflict of interest arising out of his membership of the CL:AIRE Conland expert panel which was considering a similar case at the time this appeal has been running, a fact which he failed to disclose. Each of these matters is dealt with in the following paragraphs.

6.4.12 At paragraph 2 of his Proof of Evidence Dr Cole states:

> *'I have been asked to provide my opinion on whether the decision of WMBC* (the Council) *that the land posed a significant possibility of significant harm was reasonable.'*

6.4.13 At paragraph 7 of his proof Dr Cole states that he is a Technical Director within AECOM. To the extent that the Council attempts to rely upon Dr Cole's evidence as an impartial and independent review of the Council's conduct, that submission must be tempered by the fact that their witness is not at all independent, being part of the same company which has been advising the Council in relation to this site since 2008. It is notable that the only truly independent expert which the Council has consulted in relation to their work/conclusions with regard to the site was Dr Pease of ENVIRON and the Council chose not to follow her advice (more on this below).[373] The lack of independence must therefore temper the weight to be given to Dr Cole's evidence. Dr Cole asserted on cross examination that he did feel able to take an impartial view of the work of his colleagues at AECOM and to be critical of it. Indeed to some extent in cross examination he was critical, though the defects were so glaring that he frankly had little choice. It was however plain from his answers that he was torn, and could not at times bring himself to agree with reasonable critical descriptors of their work.

6.4.14 For example, Dr Cole accepted that the AECOM reports were 'short on detail'. The exchange in relation to this went as follows:

> Mr Tromans Q.C.: 'Wholly unsatisfactory?'

[373] CD16.1.13

> Dr Cole: 'Not ideal'
>
> Mr Tromans Q.C.: 'Completely unacceptable?'
>
> Dr Cole: 'It is not clearly stated what a council should or shouldn't' report. Yes, unacceptable.'
>
> Mr Tromans Q.C.: 'Unreasonable?'
>
> Dr Cole: 'Not unreasonable, the 2012 Guidance states more clearly a requirement for how councils should set out what they have looked at.'[374]

6.4.15 Dr Cole was therefore prepared to accept that the Council's behaviour had been 'unacceptable'. However, knowing that the issue in the appeal is reasonableness would not let himself state that the behaviour was unreasonable. There can be no doubt that behaviour which has been described as 'unacceptable' must also be unreasonable.

6.4.16 Second, Dr Cole agreed in evidence in chief and cross examination that the question is whether the Council was right to do what it did at the time of the determination and service of the remediation notice.[375] Hindsight was not relevant as he put it, though the implications of this for his evidence only seemed to dawn on him under cross-examination. Therefore, the statistical gymnastics which Dr Cole performs in order to make the Council's decision appear 'reasonable' are entirely irrelevant. Dr Cole accepted in cross examination that if the Council failed to carry out some obvious reasonable step (such as a detailed quantitative risk assessment ('DQRA')) and someone later does one, that would not be relevant to the test of reasonableness.[376] He further accepted that the Council did not undertake a statistical risk assessment for zone 7 and that the statistical analysis which he has carried out at paragraphs 66 to 75 of his proof of evidence doesn't go to the reasonableness of their decision.[377]

6.4.17 The same must go for Dr Cole's work on unacceptable intake at paragraphs 80-88 of his proof. It was put to him that the Council did not do this work. Dr Cole answered that it was 'certainly unreported' but that 'it was clear to me that the Council and AECOM were discussing these issues.'[378] This is an unacceptable and unreasonable state of affairs. In order to shore up its decision the Council appears to be relying upon conversations long after the event which are undocumented. There would have been a huge temptation to whoever had those conversations with Dr Cole to conscious or unconscious self-justification. As a general matter of administrative law, the courts are rightly highly sceptical of such post-hoc justification, and there is no reason why the Secretary of State should accept it. There has been no evidence put forward of what work was done by the Council and therefore the Inspector can have no degree

[374] 15 December 2015 cross-examination Cole
[375] 11 December 2015 evidence in chief Cole; 5 December 2015 cross-examination Cole
[376] 15 December 2015 cross-examination Cole
[377] *Ibid.*
[378] *Ibid.*

of assurance that the Council adopted a reasonable approach as to what would represent an unacceptable intake.

6.4.18 Further, any attempt by Dr Cole to rely upon principles which are not recorded in the determination or the remediation notice (or indeed in any decision making document) is also irrelevant. This applies to his reliance upon the Precautionary Principle and ALARP.[379] Neither of these are referenced in any document seen by the appellant which explains why the Council took the decisions that they did. Submissions on their substantive relevance are made elsewhere in these submissions however it is worth highlighting here that they cannot be applied after the event in an attempt to shore up an unreasonable decision.

6.4.19 Third, the errors and inaccuracies in Dr Cole's evidence further reduces the weight which can be given to it. Dr Cole's evidence is replete with illogicalities and mistakes. Some were indeed self-cancelling, such as his calculation of a mean concentration of 22 mg/kg, which he then failed to use in his further workings, but then turned out to be a mistake anyway. This gives little confidence in the analytical rigour of Dr Cole or the care taken in preparing his evidence. We will return in due course to contrast the evidence of Dr Cole with that of Mr Witherington and Mr Morton. In this regard the Inspector and Secretary of State are requested to have regard to the 'track changes' version of Dr Cole's proof submitted to the Inquiry on 16 December 2015. This reveals the scale of amends which Dr Cole has had to make during the course of the Inquiry.

6.4.20 Further, and strikingly, Dr Cole appeared to undergo in the course of the Inquiry a road to Damascus experience in two respects. First his evidence on the 'strong case' on the numerical data which he had opined existed for Zone 7 evaporated, and he revealed that there was no such case. Instead his case then rested on a cost-benefit analysis of qualitative environmental, social and economic criteria. However it was only under cross examination that the further light appeared to dawn on him that perhaps those social and economic criteria might include what he agreed were the 'life-changing' impacts of having one's home declared to be contaminated land. That is a quite extraordinary failure to see the wood for the trees. It makes anyone question what weight at all should be given to his views.

6.4.21 On Day 3 of the Inquiry the Council introduced a document to the Inquiry of whose publication or impending publication the appellant had no knowledge. That document was the first and only case study published by the CL:AIRE Conland panel. The Council has suggested that the appellant's approach to the case study has been inconsistent, characterised by objecting to its introduction and then relying on it. The appellant's approach to this matter is easily explained. The appellant was astounded by the manner in which the case study was introduced.

[379] Cole proof paras 89-91

No advance warning was given to the appellant, as a matter of courtesy. Furthermore, Dr Cole is a member of the CL:AIRE Conland panel and under cross examination it transpired that the Council team obtained it when Dr Cole emailed them to say that it had been published.[380] These circumstances concern the appellant and it is its view that Dr Cole's evidence to the Inquiry was tainted by an undisclosed potential conflict of interest. However, once the case study had been put in evidence, the appellant had to give a view upon it.

6.4.22 At this point it is necessary also to mention that the chair of the Panel is Andrew Wiseman, mentioned previously, who advised the Council until May 2015. The appellant having raised its concerns over this matter on Day 4 of the Inquiry, the Council provided an explanatory note[381]. From this it appears that there were communications between the Council's internal solicitor, Ms Bennett-Matthews and Mr Wiseman on two occasions, in June 2015 and 'late October/November 2015'. We are told that the second of these was a simple request for information about the date of publication of the case study. However, the Council maintains that the communications were and remain legally privileged.

6.4.23 The fact that the Council is obviously so reluctant to disclose a communication which it says was entirely innocent itself only excites further suspicion. Further, its stance of relying on legal privilege in the context of what should be a transparent public Inquiry process is, to say the least, unattractive. Under these circumstances there would have been no point in the appellant asking that Council witnesses be called to answer questions on the matter, as they would have said nothing. Whilst the appellant does not make allegations of impropriety and cannot in this forum pursue its concerns further, it is however at least correct that the appellant's concerns be recorded, even if they are addressed through other avenues. To that end, the appellant is writing through its solicitors to the Secretary of State to ask that this matter be looked into by her in terms of the integrity of the appeal process and the Panel process generally.

6.4.24 Having noted that concern, the more pressing issue in terms of this Inquiry is Dr Cole's involvement with the panel. Under cross examination Dr Cole stated that he was appointed to the panel sometime in 2012 and that the case study came before the panel in 2012/13. He explained that not all cases which are heard by the panel (there have been four in total) are published as case studies, in fact this is the only one which has been published. When asked who makes the decision as to which cases get published, Dr Cole stated that he didn't recall a formal process but it would have been Mr Wiseman and/or the secretary of the panel. Dr Cole further stated that the drafting of the case study began in May last year (2014) but that the process 'fizzled out' at around that date. He stated that it re-ignited around June 2015 but could not recall why. However, he

[380] 11 December 2015 cross-examination Cole
[381] ID29.

confirmed that he wasn't the reason it 're-ignited'. He does not know that reason. E-mails from the panel secretary with a revised version began to recirculate. He said that the secretary's action in circulating them would have been at the instigation of the chair.

6.4.25 The subject matter of the case-study is very similar to the instant appeal, it involves B(a)P and levels which amount to SPOSH. As stated in the FAQ section of CL:AIRE's Conland expert panel website:

> '*The establishment of an Expert Panel was proposed during the Statutory Guidance review as a way to help the contaminated land sector use the revised guidance in the way it is intended. Defra has given the Panel the authority to act in order to help promote consistency in Part 2A decision making through the development of case studies from the Panel's outputs. These will be made available to the wider sector as evidence of best practice.*'[382]

6.4.26 Dr Cole was first asked to be a witness for the Council in late September 2015. This was during the time which the case-study was being prepared for publication. It is clear then that, as a member of the panel, Dr Cole has been sitting in a potentially influential public advisory position on a case which was very similar to the instant appeal, whilst also seeking to prepare and present 'impartial' expert evidence to this Inquiry. Further, he confirmed that at around the time of his instruction he told the Council that a case study would be due to be published, which would have relevance to this appeal. Importantly, that fact appeared nowhere in his proof and the appellant was not notified of Dr Cole's possible conflict. There is a potential conflict of interest here between Dr Cole's role as a panel member and his roles as the Council's expert, and a failure to disclose relevant information which would have led to the appellant's objection to his being tendered as a witness by the Council. It is no use the Council arguing that Dr Cole could not do so because the content of panel references was confidential: if he could disclose the fact of his involvement on a closely analogous case to his client, the Council, then he could also disclose it in his proof.

6.4.27 That conflict does not appear to be the result of any misconduct or wrongful intention on the part of Dr Cole, but instead a failure to understand his duties as an expert witness. It transpired during cross examination that he had no letter of instruction and appeared to be unaware of what one was.[383] When asked whether he had a clear understanding in his mind of his duties as an expert witness, Dr Cole answered 'No'. He further stated that the possibility of there being a conflict of interest in relation to his role on the panel didn't enter his head at all. Finally when asked the question: 'Standing back and looking at it

[382] Document 2 of the Panel documents submitted by the appellant on 11 December 2015 during cross-examination Cole
[383] 11 December 2015 cross-examination Cole

you can see the problem, that we are faced with a document which Mr Maurici is going to heavily rely on, and we find now that it has been contributed to – and we don't know how and to what extent – by the key witness for the Council?' Dr Cole answered: 'In hindsight, yes.'

6.4.28 In light of this conflict it is absolutely clear that, quite apart from the fact that his evidence was replete with errors, Dr Cole's evidence can be given no weight. He plainly has not the first clue of what is expected of an expert witness. It was for this reason that cross-examination of this witness was conducted in a manner described by the Council as 'rather gentle', an appropriate approach under the circumstances.

6.4.29 With those preliminary submissions in mind, we go on to make our substantive submissions on ground (a)(i) and (ii).

6.4.30 First, it is worth highlighting the reliance which the Council placed upon its consultants AECOM. Under cross examination Mr Jarrett made clear that he himself did not have detailed scientific training or scientific education in site investigation or statistical analysis. He stated that he had some basic foundation which leads him to know when to take advice from experts.[384] It is clear then that the Council relied heavily on the advice that they received from Faber Maunsell/AECOM and that any failings by FM/AECOM were subsequently adopted by the Council.

6.4.31 Second, it should be noted that Dr Cole accepted in cross examination that as the thrust of the evidence is stronger for zone 7 than for zone 4, if the Council cannot establish that the determination decision is reasonable for zone 7 then it will be unlikely to establish that the decision on zone 4 was reasonable.[385] Therefore, where our submissions relate to zone 7 in particular, there are clearly implications for the determinations of each of the zones.

Unreasonable failure to demonstrate that B(a)P poses an unacceptable risk to health

6.4.32 The unreasonable failure of the Council to demonstrate that B(a)P poses an unacceptable risk to health has been manifested in the incorrect application of generic assessment criteria ('GAC') and C4SLs and therefore the failure to derive a value that represents SPOSH.

6.4.33 The Council's determination was based upon a GAC figure of 1.02 mg/kg.

6.4.34 Mr Jarrett accepted under cross examination that the figure of 1.02 mg/kg was part of the reasoning of AECOM in that they looked at that figure and found levels which were a multiple of that. He confirmed that the use of

[384] 9 December 2015 cross-examination Jarrett
[385] 15 December 2015 cross-examination Cole

1.02 mg/kg was 'the starting point' and part of the considerations which were made.[386]

6.4.35 Indeed, this much is clear from the record of determination, the text of which has been set out above.

Shaky foundations: the AECOM Phase II report of May 2009

6.4.36 The determination of zone 7 was based upon data gathered up to 2009 and the recommendations in the AECOM Phase II report of May 2009.[387] No further data was gathered for that zone after that date. From then on the die was cast for zone 7. It is therefore worth taking some time to consider the robustness of that report and whether it was reasonable for the Council to rely upon it. The conclusions section of the report under the heading 'Initial Screening' stated:

> *'The findings of the screening are provided at Appendix E. On the basis of these findings, TPH, PAH and cyanide are considered to be the most significant contaminants recorded in samples recovered from soils underlying much of the site. Across most of the site, elevated contamination levels are present in the shallow soils at less than 1m below the ground surface.'*[388]

6.4.37 Dr Cole accepted that the contour plan at Appendix E is 'entirely and utterly misleading'. In answer to the question: 'Whenever whoever wrote this report said that it showed the extent of contamination across the site – that's complete rubbish isn't it?' Dr Cole answered 'yes'.[389]

6.4.38 Dr Cole further accepted that the use of the term HCVs is wrong in the report.[390] Dr Cole stated (unprompted) that it was a 'schoolboy error'. When asked whether the reader might wonder whether the author of the report knew what they were doing, Dr Cole responded: 'you might draw that conclusion'.[391]

6.4.39 Further, the 2009 report goes on to state that:

> *'However an examination of the total distribution of the B(a)P concentrations indicates that the highest concentrations of B(a)P are generally centred in zone 7. This corresponds to historical data which reports this area to have been used extensively for storage of gasworks waste. Generally B(a)P concentrations are lower in*

[386] 9 December 2015 cross-examination Jarrett
[387] CD 16.1.3
[388] CD16.1.3 p.237
[389] 15 December 2015 cross-examination Cole
[390] See CD16.1.3 p241
[391] 15 December 2015 cross-examination Cole.

samples recovered from locations further away from zone 7, suggesting waste stocked (sic) piled in the zone 7 area was spread across the site during redevelopment works.'

6.4.40 It is completely unclear what historical data this statement is referring to. Although historical data was referred to in previous plans, there was no evidence of a particular stockpile in zone 7. Further, the Council clearly no longer rely upon the presence of a stockpile which was spread by the appellant. In cross examination Mr Smart when asked by reference to aerial photographs: 'Where is the stockpile of gasworks waste on the 1971 photo which you say McLean or Jim 2 spread around' replied, 'I don't say there were stockpiles'.[392] Later in the exchange Mr Smart said: 'I would be surprised if there were stockpiles. I would imagine that all residual stockpiles had been blended out long before Jim 2 owned the site.'[393] Clearly, the author of the Phase II report has jumped to unsupported conclusions which were relied upon by the Council, seemingly without question or checking against available photographic records. They are no longer supported by that same author.

6.4.41 The *dénouement* of the 2009 report in relation to zone 7 is in the final paragraph of p241. It states:

'The highest proportion of samples which exceeded the HCV for B(a)P was in zone 7 (Kemble Close and Brookthorpe Drive) and the results show that for samples taken at 25m intervals, most of the zone is contaminated and could be defined as contaminated land….as all the sample locations in zone 7 usually reported B(a)P concentrations significantly above the HCV of 1.02 mg/kg, it is considered unlikely that additional samples within this zone will show the absence of contamination.'

6.4.42 Therefore, AECOM's conclusion that zone 7 was contaminated land was based upon the simple exceedance of a figure of 1.02. As Dr Cole confirmed, that is not the test and that if one is drawing conclusions from exceedance of 1.02 mg/kg then one would have to take into account the fact that it is 'minimal risk' and in 'category terms' at the bottom of category 4 referred to in the 2012 Guidance.[394] The report simply hasn't done this. Dr Cole also agreed that the statement that '*all sample locations usually reported B(a)P concentrations significantly above the HCV*' was factually incorrect and that it was a non-sequitur to conclude that additional samples would show an absence of contamination.[395] Dr Cole further agreed that where the report referred to '*elevated concentrations*' that is not the test for contaminated land and means

[392] 8 December 2015 cross-examination Smart.
[393] 8 December 2015 cross-examination Smart.
[394] 15 December 2015 cross-examination Cole
[395] *Ibid.*

nothing.[396]

6.4.43 The Council's only real technical assessment providing support for Zone 7 is that report. It is a rotten report. It is replete with schoolboy errors. It contains a plan purporting to show the extent of contamination across the site which is agreed to be rubbish. It rests in truth on no more than a 'screening exercise' involving highlighting B(a)P data-points above the inaccurately termed 'HCV' (sic) with a yellow highlighter, a task which frankly the most junior office worker could have done. It contains, despite avowing it does so, no laboratory certificates allowing the integrity of the data (such as it is) to be verified. It most certainly has nothing resembling a risk assessment. To call it amateurish would be a charitable description. Yet on the strength of this frankly shoddy piece of work, the Council saw fit to consign the residents of zone 7 to the loss of all or most of the value of their homes and to years of anxiety and misery.

6.4.44 When Dr Cole was taken to the RoD he agreed that where the determination concluded that most samples reported elevated B(a)P[397] that statement appeared to follow precisely what AECOM had said in their 2009 Report. It was therefore based on a report whose conclusions were both 'misleading' and 'factually incorrect' as has been stated by Dr Cole, himself a technical director at AECOM. The reliance upon this flawed report by the Council was clearly unreasonable.

6.4.45 The Council seeks to rely heavily on its assertion that the decision to determine the land as contaminated was not solely based upon the exceedance of 1.02 mg/kg of B(a)P in zone 7. The Record of Determination states:

> *4.6 Walsall MBC recognises that exceedance of a HCV or screening value does not equate to an unacceptable level of risk as defined by the Environmental Protection Act 1990 Part IIA. In concluding that significant possibility of significant harm is being caused consideration has been given to the extent of exceedance of the HCV, the depth below the surface from which the sample was obtained and the likelihood of occupiers or users of the land being exposed to that contamination…*

Much was made by the Council about Mr Witherington urging caution concerning the excavation of soil. However, the Council's closing does not accurately reflect the context in which he was asked about extensions and foundations.

> *4.8 Statistical analysis of the benzo(a)pyrene concentrations in the samples using the techniques provided in the Chartered Institute of Environmental Health Guidance on Comparing Soil Contamination*

[396] *Ibid.*
[397] CD6.3 p111 para 2.4

Data with Critical Concentration (May 2008) shows that the true mean concentration of benzo(a)pyrene in the soils is significantly above the screening value of 1.02 mg/kg that has been used as the critical concentration and consequently there is a significant possibility of significant harm to the receptors…

4.9 Walsall MBC has also considered the extent of surface cover and treatment of soft landscaped areas together with the potential for soils disturbance leading to the potential for inhalation, ingestion of or dermal contact with contamination from soils and concluded that the prevailing conditions do not constitute acceptable control measures or allow management of situations to control or prevent exposure and associated risks to human health.

6.4.46 The Inspector and Secretary of State are requested to note that paragraphs 4.6 and 4.9 are the sum total of the Council's consideration of factors other than exceedance of B(a)P. Further, when they are critically analysed the Council's case that they have behaved reasonably does not stack up.

6.4.47 The Council allege that they considered the depth of the concentrations. Its approach to taking into account samples at greater depth than 1 metre has fluctuated. It has been noted above that the mean concentrations relied upon by the Council were arrived at taking into account the depth of samples at all levels. Further, at paragraph 284 of his Proof of Evidence Mr Jarrett appears to be justifying the reliance upon results found at over 1m depth. However, the Council now appears to accept that it is the top 1 metre which is relevant, but the paucity of samples at the more critical shallower depths is striking.

6.4.48 The Council also allege that they gave consideration to the likelihood of occupiers being exposed to contamination, including the extent of surface cover. They have however fallen down in failure to provide anything approaching an adequate characterisation of the presence of topsoil. The matter of topsoil is dealt with below. Dr Cole agreed that there had been no rigorous analysis of topsoil by the Council.[398]

6.4.49 The Council subsequently purported to review its determination in light of the publication of Category 4 screening criteria. It commissioned a noted expert Dr Pease of ENVIRON, to undertake a review.[399] Having obtained in her letter of 20 June 2014 what was obviously sensible advice that Zone 4 would benefit from detailed DQRA and Zone 7 from further intrusive investigation (see further below) it then proceeded to ignore it, and ploughed on regardless, no doubt because the advice did not suit its predetermined view of the merits of its own decision.

[398] 15 December 2015 cross-examination Cole
[399] CD 16.1.13

6.4.50 It is clear then that the Council has categorically failed to undertake a suitably scientific and technical assessment of the possible risks posed by B(a)P, taking into consideration the amount of B(a)P which would represent an unacceptable intake or direct bodily contact in respect of site-specific exposure. As Mr Witherington states:

> *'Reliance on the exceedance of soil concentrations above published, or derived, minimal or tolerable risk GAC for a specific land use does not constitute a scientific and technical assessment of the unacceptable risks arising from the identified pollutant linkage(s).'*[400]

6.4.51 The appellant's case on this matter is also supported by the independent review which was commissioned by the Council from Dr Camilla Pease of ENVIRON. She was asked by the Council to review its position in light of the publication of the CS4Ls and based her comments on the figures given to her by the Council (i.e. the figure of 9.19mg/kg for zone 4 and 38mg/kg for zone 7).[401] Of the use of the figure of 1.02 mg/kg, she stated:

> *'The GAC used by AECOM can be considered as a 'minimal risk' GAC, and is a strongly precautionary figure in terms of protecting residents from the risks of suffering cancer as a result of exposure to B(a)P from soil. The risk could be considered negligible from a policy point of view. In the context of the 4 category model as published by Defra in 2012, this minimal risk GAC can be considered towards the bottom of Category 4.'*[402]

6.4.52 Of the C4SL figure of 5 mg/kg Dr Pease stated:

> *'The C4SL represents a 'low risk' scenario: above 'minimal risk' but still precautionary and well away from a level that could be considered as 'significant possibility of significant harm'…*
>
> *Hence, even the C4SL of 5 mg/kg for the residential setting with home grown produce is still not near the point at which 'significant harm' is (sic) anticipated to be defined for determining land as 'contaminated' according to the Defra four category approach. The derivation of the C4SL helps to define where the top of Category 4 in the four category system should be defined, but the question still remains a matter of judgement by local authorities in relation to specific sites as to where the Category 2/3 boundary occurs for B[a]P.'*

[400] Witherington PoE para 7.29.
[401] CD16.1.13 p. 1915.
[402] CD16.1.13 p. 1914.

6.4.53 The complete failure to heed this advice or even discuss it with AECOM was clearly unreasonable.

6.4.54 Further support for the appellant's case that the Council have acted unreasonably and have failed to demonstrate that B(a)P represents an unacceptable risk to health came from their own witness Dr Cole. Following the agreement of the data which the Council had used to derive its average concentrations of B(a)P in each zone (something which RSK had been seeking since at least May 2013[403]) Dr Cole confirmed, following his Road to Damascus experience, that he was no longer of the view that a 'strong case' existed in relation to zone 7.[404] He amended his proof at para 114 to state 'it is now not clear a strong case exists'.
This extraordinary reversal of views by a purported expert risk assessor is extremely significant and, as Dr Cole confirmed, it means that paragraph 4.27 rather than 4.26 of the 2012 Guidance applies. The relevant paragraphs state:

> *4.26 In making its decision on whether land falls into Category 2 or Category 3, the local authority should first consider its assessment of the possibility of significant harm to human health, including the estimated likelihood of such harm, the estimated impact if it did occur, the timescale over which it might occur, and the levels of certainty attached to these estimates. If the authority considers, on the basis of this consideration alone, that the strong case described in paragraph 4.25(a) does or does not exist, the authority should make its decision on whether the land falls into Category 2 or Category 3 on this basis regardless of the other factors discussed in paragraph 4.27.*
>
> *4.27 If the authority considers that it cannot make a decision in line with paragraph 4.26, it should consider other factors which it considers are relevant to achieving the objectives set out in Section 1. This should include consideration of:*
>
> *(a) The likely direct and indirect health benefits and impacts of regulatory intervention. This would include benefits of reducing or removing the risk posed by contamination. It would also include any risks from contaminants being mobilised during remediation (which would in any case have to be considered under other relevant legislation); and any indirect impacts such as stress-related health effects that may be experienced by affected people, particularly local residents. If it is not clear to the authority that the health benefits of remediation would outweigh the health impacts, the authority should presume the land falls into Category 3 unless there is strong reason to consider otherwise.*

[403] CD7.3 part 5.3 pp140-1
[404] 11 December 2015 evidence in cheif Cole and 15 December 2015 cross-examination Cole

(b) The authority's initial estimate of what remediation would involve; how long it would take; what benefit it would be likely to bring; whether the benefits would outweigh the financial and economic costs; and any impacts on local society or the environment from taking action that the authority considers to be relevant.

6.4.55 On page 55 of his proof Dr Cole set out a table which purports to include an *ex post facto* analysis of how the factors in paragraph 4.27 would have applied to the decision, had they been considered by the Council. However, Dr Cole has left out of account two hugely important negative factors; the financial impact on residents of the land being identified as contaminated and also the stress it would inevitably and certainly has caused. Mrs Fullwood gave very clear and eloquent evidence to the Inquiry on what the impact has been on residents. She stated that the residents were prisoners in their own homes, they could not sell them or get money lent on them. It was also evident that there was a very real emotional impact which included considerable stress and anxiety.

6.4.56 This seemed to come as a surprise to Dr Cole (or at least a revelation that it might be relevant in considering whether, in the absence of a strong case, to determine land as contaminated). However he then admitted that these were entirely foreseeable impacts from determination. He agreed that the significant social and economic detriment should weigh in an authority's mind when deciding to determine land.[405]

6.4.57 In this case the land was determined in 2012, we are now at the end of 2015 and the appeal process rumbles on. In the St Leonard's Court case[406] the Inquiry opened on 16 April 2007 and sat for 13 days. The Inspector then took around 6 months to write his report and the Secretary of State took a further 20 months to reach a decision. On that basis, it could be another two years until the residents get a decision, though we sincerely hope not, and will return to that in closing.

6.4.58 It is worth recording in full one exchange between counsel for the appellant and Dr Cole:

Stephen Tromans Q.C.: *'All I am putting to you is this, your revised case is no strong case on the numbers for determining the site. So, when the Council are looking at determining they should have looked at socio economic factors. These are absolutely massive factors they should have looked at?*

Dr Cole: *Yes*

6.4.59 The abject failure on behalf of the Council to take into account these sorts

[405] 15 December 2015 cross-examination Cole
[406] See CD 2.6

of social and economic factors is patently unreasonable and the appeal ought to be allowed even on this basis alone. Mr Jarrett in his evidence (para. 96) refers to a single 'drop in' session for residents and to two documents, CD 13.1.1 and 13.1.2. The second of these is simply a requisition for information from residents as to mortgagees (followed by a second letter explaining what a mortgagee was) and is irrelevant. The first is a note in Q&A form following the 'drop in' session. It begins 'Dear Occupier' and deals with a range of questions. These include the question of whether properties will be worthless and that legal procedures might take a considerable time, possibly years, and that it might adversely affect mortgages being offered. However, if the Council should seek to suggest that this constitutes an adequate process of consultation and information on something as important as this, it is, frankly, a laughable suggestion.

6.4.60 Just as worrying is the lack of democratic input. The decision was taken under a scheme of delegation (provided at the appellant's request during the Inquiry). On consideration it can be agreed that the decision was taken lawfully within that scheme, the prime mover behind it appearing to be Mr Jarrett. However, it seems extraordinary that a matter as significant as this: for residents, which renders their homes worthless and causes stress and anxiety; and, in terms of costs for the Council, was not apparently reported to committee.

6.4.61 All in all the identification was a shoddy, opaque process, not underpinned by the sound science and proper risk assessment required whichever version of the Guidance one consults. The residents deserved better.

Unreasonable failure to undertake a toxicological risk assessment in order to examine potential toxicological effects of the concentrations and exposure routes identified on site.

6.4.62 Whilst Dr Cole did undertake a risk assessment, it was done 2 years too late. Furthermore, on considering it, Dr Cole said that there was no strong case on the basis of the numbers. Therefore, the risk assessment did not justify determination of zones 4 or 7 as contaminated.

6.4.63 Whichever version of the Guidance one takes, the need for a proper risk assessment is inescapable, however much the Council may wriggle. Under Table B to Annex 3 of the 2006 Guidance there must be an assessment of whether the amount of the pollutant in question to which a human might be exposed would represent an unacceptable intake. That cannot be established without risk assessment. Dr Cole accepted in cross examination that the word 'any' at para A.30 (despite his reliance on it in his proof) could not be read literally to include any risk however slight (e.g. 1:10,000,000).

6.4.64 The 2012 Guidance[407] is more explicit on the subject and in particular the boundary between Categories 2 and 3. There must be an estimation of the likelihood of harm and the strength of the evidence underlying the estimate (para. 4.12). The possibility must be sufficiently high that regulatory action should be taken to reduce it 'with all that would entail.' (para. 4.16), that is collateral damage to the interests of residents. There must be a strong case made out on the risk assessment (para. 4.25 and 4.26). True that under para. 4.27, it is then possible to go on to consider wider factors, but as Mr Witherington pointed out in cross, risk assessment is an essential pre-requisite. After all, how could you otherwise possibly consider what were the benefits of reducing or removing the risk (para. 4.27(a)).

6.4.65 The Council seems to pin its hopes on Defra's non-statutory 2008 Guidance on the Legal Definition of Contaminated Land,[408] cherry picking out references to the discretionary aspects of the determination process, as if this removed the need for a rigorous risk assessment process. It does no such thing. Plainly it is possible, legitimately, to form different views on risk, and there is an important policy element in play. However, that is predicated on actually having performed a risk assessment. This is clear from the following paragraphs:

> *'23. In the absence of a practicable number-based threshold option (and in recognition of the site-specific nature of risks), Part 2A takes an approach where decisions on whether risks constitute SPOSH must be taken on a case-by-case basis by local authorities. In essence, a local authority must do this:*
>
> 1) *By conducting a science-based risk assessment which takes account of toxicological information, and site-specific local circumstances.*
>
> 2) *By making a judgement on whether in the view of the local authority there is a SPOSH. The judgement should be firmly based on the science-based risk assessment. It should also take due account of the purpose of Part 2A.'*

6.4.66 Footnote 10 which is attached to para 23(ii) states:

> *The statutory guidance requires that local authorities' decisions on what is an 'unacceptable intake' (i.e. SPOSH) must be assessed on the basis of toxicological risk assessments. Decisions cannot be based solely on such risk assessments because, whilst they can inform an authority about the* possibility of significant harm *at a site, risk assessments cannot answer the policy question about what is acceptable or unacceptable. Thus, in Defra's view, decisions should*

[407] CD1.5.
[408] CD 1.10

be firmly based on scientific risk assessment, but they should also take account of the purpose of Part 2A and the local context in which the decision is being made.'[409]

Unreasonable failure to zone the site appropriately

6.4.67 When deciding how to zone the area, consideration of the current use of the land, referred to by the Council, is a relevant factor. However, it would be wrong to ignore past uses. The importance of correctly zoning a site was summed up simply and cogently by Mr Witherington in his proof:

'…if incorrectly zoned, the sampling and statistical analysis will not reliably define the concentrations of contamination that the residents will be exposed to. This can be explained by way of simple example. Take a site containing predominantly one soil type that is clean but it contains a small pocket of contaminated material. If this were zoned as one area, data from the pocket of contaminated soil would have a significant (and incorrect) effect on the mean concentration determined for the whole zone that is predominantly clean.'[410]

6.4.68 Under cross examination Mr Smart accepted that an effective investigation of a gasworks site requires knowledge of the layout of the works, its processes and of the waste and other substances it produces.[411] Mr Smart further accepted that the carrying out of an initial assessment to ascertain the likelihood of finding contamination and for assisting the design of any subsequent sampling programme was 'reasonable good practice.'[412] Mr Smart also stated that one needs to know 'what the site comprises' and one should gather 'as much information as you can'.[413]

6.4.69 The Council approached the site as follows. It first considered that the site should be split into four zones, based on the visual characteristics of the made ground.[414] It was then further divided into nine zones to allow assessment of the extent of B(a)P contamination.[415] Zone 5 was further subdivided into zones 5 and 5b.[416]

6.4.70 There was no attempt by the Council to zone the site according to the layout of the gasworks or to identify materials of a similar chemical characteristic. As Mr Witherington states: *'this makes statistical analysis*

[409] CD1.10 pages 496-7.
[410] Witherington PoE para.7.2.
[411] 8 December 2015 cross-examination Smart.
[412] 8 December 2015 cross-examination Smart.
[413] *Ibid.*
[414] CD16.1.3 section 4.1.
[415] CD16.1.3 section 4.7.
[416] CD16.1.7 section 3.6.

of the data almost impossible.'[417]

6.4.71 In his evidence Dr Cole stated that he introduced the Conland case study for two reasons. One of these was 'zoning'. The case study document states:

> *'The site was split into three distinct areas which were selected predominantly based on the historical land use, contamination distribution and current site layout.'*

6.4.72 Dr Cole stated that the approach to zoning in the case study supports the reasonableness of the Council's approach. It does no such thing. The Council has singularly failed to take into account contamination distribution and historical land use when zoning the site.

6.4.73 During cross examination of Mr Witherington, it appeared as if counsel for the Council was attempting to make a case that AECOM and the Council had taken into account historical uses of the site when zoning it. This is a completely contrary position to the Council's own evidence. Mr Smart's proof of evidence clearly states:

> *'The zoning was determined for practical purposes on the current site conditions and did not reflect the historical footprint of the gasworks operation.'*[418]

6.4.74 The Council's unthinking and unreasonable approach is further evidenced by the proposal of the Council to combine zones 4 and 7 as one averaging area.[419] There has been no clear justification for this. As Mr Witherington states, this demonstrates the fact that the site has been incorrectly zoned as by 'simply changing the zones, the Council is obtaining different mean concentrations whereas clearly nothing has changed in the ground.'[420] The way the Council has approached the matter is entirely arbitrary and haphazard, based on nothing more than the current estate layout.[421]

6.4.75 The issue of zoning takes on particular importance on this site due to its historic use as a gasworks. The gasworks was host to a number of different processes producing different by products and waste streams. These included coal tar, liquor and spent oxide. Dr Thomas' evidence to the Inquiry has demonstrated this and is further supported by a number of technical publications. These include the DETR guidance document[422] and

[417] Witherington PoE para 7.8.
[418] Smart PoE para.93.
[419] CD11.22.
[420] Witherington PoE para.7.9.
[421] Smart PoE para. 93.
[422] CD16.2.9 see p. 3558.

the CL:AIRE document appended to Dr Thomas' proof.[423] Page 7 of the CL:AIRE document has a diagram/flowchart which shows various activities and streams of waste.

6.4.76 The contaminant which is the subject of the remediation notice[424] is B(a)P. This is, as Mr Smart stated, a combustion product.[425] It is associated with the presence of coal tar. Mr Smart stated in evidence that there were areas where elevated PAH levels were found but without significant areas of coal tar. However, he later stated that he had no reason to disagree with the evidence of Dr Thomas that ash would tend to have a low PAH concentration.[426] Any ash from coal or wood burning will contain B(a)P. The ash on the site would have come from the coal or coke used to provide heat to the retorts for gasification, or the boilers. Whilst it is fuel used in a gasworks, it is not different to ash from coal used for other heating purposes, which is found very widely.[427]

6.4.77 The key issue therefore, was whether there were particular pockets of tar on site as a result of individual gasworks processes. The failure to consider this has led to an unreasonable approach to the site investigation and interpretation of the data. This is clear from the correlation of some of the highest sample concentrations with areas of the site where tar would be likely to have leaked. For example HP24, to the south west of zone 7 (320mg/kg at 0.5 and 250mg/kg at 2.5m depth[428]). It was accepted by Mr Smart in cross examination that this is close to the underground tar and liquor pit. It was further accepted by Mr Smart that the location of the sample would be quite likely to account for the elevated readings at those depths.[429] Further, WS48 which also demonstrated elevated B(a)P readings was also in close proximity to the tar and liquor well. It was accepted by Mr Smart that the location close to the well could account for the elevated concentration level. Finally, WS55A gave a concentration of 290mg/kg at 2m depth. This was located close to where the purifiers would have been. Mr Smart accepted that the purifiers were situated at this location and what came out of them would be a potentially contaminating substance. He further accepted that as the purifiers were built on areas previously used for tipping, the elevated levels could be explained by either the purifiers or the tipping.[430]

6.4.78 These few examples demonstrate that it was imperative that AECOM/the Council had a proper and robust understanding of where particular activities were located on site in order to focus their investigations and to interpret their investigations.[431] The failure of the Council in this regard is

[423] Thomas PoE Appendix 5.
[424] CD6.8
[425] 8 December 2015 cross-examination Smart.
[426] 8 December 2015 cross-examination Smart.
[427] 16 December 2015 Witherington cross-examination.
[428] CD16.1.7 p. 1553.
[429] 8 December 2015 cross-examination Smart.
[430] 8 December 2015 cross-examination Smart.
[431] Accepted by Smart in cross-examination 8 December 2015.

perhaps most evident in their approach to Zone 7. In cross examination Mr Smart sought to explain why additional data was not gathered for that zone. He stated that a judgement was made that if one property had elevated B(a)P so could another. However, that assumption simply cannot be made where one point source is next to an historic tar and liquor pit and another garden isn't.[432] That much is common sense. Further it is common ground that the sub-surface made ground is variable or heterogeneous. It does not follow that all gardens will have levels of B(a)P of concern as a SPOSH (indeed the Council never made any attempt to give thought to what figure or range of figures might represent a SPOSH, but that is yet another problem). It has simply been assumed by the Council that all gardens will have SPOSH levels without any evidential basis. Had a proper site investigation exercise been undertaken, perhaps some might have, but we simply don't know.

6.4.79 Part of the problem, perhaps, is that AECOM did not have any gasworks specialists on their team when carrying out their studies of the site. Mr Smart accepted that he only has knowledge of working on 3 gasworks investigations and that he didn't have anything approaching the experience of Dr Thomas or Mr Morton who has investigated 70 gasworks.[433] This is important as gasworks are a special type of contaminated land in terms of their history and complexity.[434]

6.4.80 Therefore, from the start, there was a failure by AECOM/the Council to understand the processes on the Willenhall site and to ensure that their approach took these into account. The first report, which set the strategy for the future reports, did not have regard to aerial photographs or research from the gas archive.[435] Further, the conceptual model for that report looked at gasworks waste as a 'single source'. It was explained by Mr Smart as the 'residue of material that was surplus to requirements and deposited on site'.[436] This is an unduly simplistic approach.

6.4.81 The failure to understand the history of the site and to zone it appropriately does not only undermine the Council's sampling strategy (if it can indeed be called that). It also undermines their argument that Jim 2 spread contaminated waste around the site. This is dealt with in our submissions on ground (c) below.

Unreasonable failure to treat topsoil as a separate soil population in their assessment

6.4.82 The evidence before the Inquiry has demonstrated that the presence of topsoil is crucial as to whether the conditions on site, and indeed in each

[432] See for example log for HP24 – log at CD16.1.7 p.1521, WS48 p.1578 of CD16.1.7 or WS55A on p.1584 of CD 16.1.7 (Close to purifiers)
[433] 8 December 2015 cross-examination Smart.
[434] Accepted by Smart in cross-examination 8 December 2015.
[435] 8 December 2015 cross-examination Smart.
[436] *Ibid.*

individual garden represent a SPOSH. Mr Jarrett accepted that the photograph at appendix IJ 11 of his PoE shows that there is a clear distinction between the made ground and turf on site and that there was no mixing.[437] This was confirmed by Mr Witherington.[438]

6.4.83 The failure to take into account the topsoil in the determination forms part of the Council's failure to carry out a detailed quantitative risk assessment. This was advised by Dr Pease in relation to zone 4. She stated:

> '*This site may benefit from a more Detailed Quantitative Risk Assessment (DQRA)'* (original emphasis)

6.4.84 When asked what this would have involved, Mr Jarrett stated that this would have involved looking at garden situations, taking into account current levels of turf, hardstanding, soil profiles, age profiles and the nature of activity. He further stated that the Council decided not to do that.[439] It is notable that the Council has produced no minute, or documentary evidence of how the Council considered Dr Pease's advice and it has therefore been necessary to rely upon an ex post facto explanation from Mr Jarrett, to the extent one can or should. Indeed, the lack of documentary evidence for the Council's thought process has been surprising given the gravity of the decisions with which they were dealing, as has already been noted.

6.4.85 The failure to recognise the presence of topsoil on site is further compounded by the Council/AECOM's insufficient sampling and testing of shallow soils. We go on to discuss this below.

Unreasonable failure to carry out adequate shallow soil sampling

6.4.86 It is clear that the shallow soil is the material which will generate most of the exposure to the residents. However, only a minority of the sampling has been done in those soils. Table 1 of Mr Smart's rebuttal proof makes clear that only 3 samples at 0-0.5 metres were taken in zone 4. He agreed that this was a very low proportion of samples for that depth. He also agreed that in terms of exposure, 0-0.5 metres is the critical depth.[440]

6.4.87 The weight of industry guidance and research documents indicate that it is the top 0.3 metres which is the actual soil to which human receptors are most likely to be exposed to B(a)P, and concentrations in the upper 0.1 metres are the most appropriate for considering risks to a child

[437] 9 December 2015 evidence in chief Jarrett.
[438] 16 December 2015 Witherington.
[439] *Ibid.*
[440] 8 December 2015 cross-examination Smart.

receptor.[441]

6.4.88 It is important to note that the samples for the Conland case study[442] were taken from between 0-0.2 metres below ground. Further, there were around 90 samples covering an area of 22 gardens. A brief comparison of the work undertaken in that case reveals just how poor and unreasonable the Council's (and AECOM's) approach has been to this site.

6.4.89 Here, the Council has relied upon a number of scenarios where it states that soil might be brought to the surface during normal residential activities. However, they have failed to take into account the likelihood of these taking place and weighted them accordingly. As Mr Witherington states:

> *'The Council identifies a number of scenarios within its risk assessment whereby soil may be brought to the surface during normal residential activities. While excavation for foundations may bring soil to the surface from 1m depth, the frequency of this happening will be considerably lower than, say, an activity such as domestic gardening where soil may be brought to the surface from a maximum 0.3m depth. Soil sampling should reflect those scenarios and, consequently, should have been weighted towards shallow soils.'*[443]

6.4.90 The inadequate sampling of shallow soils, taken with the chemical and physical variability of the soil gives rise to significant uncertainty over precisely what levels of contaminant are present in near-surface soils in any individual garden. This was uncertainty which plainly it was within the Council's power to resolve or reduce. It chose, on AECOM's flawed advice, not to do so.

Unreasonable reliance on incomplete data and failure to either discount outliers or to undertake further testing to establish whether they ought to be included within the dataset

6.4.91 A key part of data analysis and risk assessment is understanding whether the data gathered is representative of the wider site or whether some results can be treated as outliers. This is explained by CIEH 2008[444] which states:

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[441] Society of Brownfield Risk Assessment (SoBRA) (2011) 'Human Health Risk Assessment and Polycyclic Aromatic Hydrocarbons' CD16.2.21 at section 4.26; Environment Agency (2009b) 'Updated technical background to the CLEA model' Science Report , Appendix PW8 section 2.2.1; Building Research Establishment (2004) 'Cover Systems for Land' BR465 Appendix PW10 at section 5.4.
[442] ID17.
[443] Witherington Proof of Evidence para.7.18
[444] CD16.2.4 section 5.3.2

'..site investigation data can comprise contaminant concentrations spanning several orders of magnitude. This, amongst other things, reflects heterogeneity in soil conditions, the variability of contaminant distributions at large and small scales, differing sources of contamination, and uncertainty associated with laboratory analysis. Extreme values can also result from inaccuracy in sampling, chain of custody and laboratory analysis processes, measurement system problems, transcription or data entry errors and the use of incorrect units in reporting and recording analytical results. The failure to remove outliers from a dataset or, conversely, the removal of values which are not in fact outliers, obviously has consequences for the outcome of statistical testing.'

6.4.92 The CIEH document goes on to state:

'in general, however, outliers should be excluded from a dataset only where they:

- *are obviously and demonstrably the result of an error that can be identified and explained – in which case the correct value should be identified and the dataset amended, where possible, or the erroneous value excluded with justification, or*
- *clearly indicate that more than one soil population exists within the dataset and this can be justified by (or informs the further development of) the conceptual model – in which case the different population expressed by the outlier(s) should be explored in more detail, either by reviewing and refining zoning decisions and treating outlier values as a separate population or even individually or, if necessary, by undertaking further site sampling to verify conditions in the vicinity of outlier values.*

In all other cases, outlying data should be assumed to be genuine and reflective of the full range of soil concentrations to which receptors may be exposed.'

6.4.93 The problem of outliers was identified by Dr Pease in relation to zone 7. She stated:

'However, it is the two high values (180-220mg/kg) that drive the higher statistical mean of this dataset. It is not likely that DQRA can refine these two high measures in this zone. Further analytical investigations could be focussed at this location in zone 7…'[445]

The Council makes a lot of the word 'could'.

6.4.94 However, the Council completely ignored the advice of ENVIRON and has dismissed the criticisms of RSK. Notably, Mr Jarrett confirmed that he did

[445] CD 16.1.13 pp1921-2

not discuss the recommendations of Dr Pease for DQRA in zone 4 or more sampling in zone 7 with AECOM who had been advising the Council. This is clearly unreasonable behaviour on the Council's part. Mr Jarrett had admitted that he himself (and the Council) did not have the technical expertise to fully understand/interpret the data, he and the Council were faced with a review which advised further work be carried out. Not only did he fail to heed this advice, he failed to discuss it with his external technical advisors. Furthermore, there is no documentary evidence to show that the Council sought to persuade Defra to fund more tests or that it asked AECOM to consider that issue. It would be surprising if AECOM supported seeking funding, as that would have been a reversal of the advice in its report. However, the Council could have asked Dr Pease for a letter of support for more funding, with which it could have gone back to Defra, who in the appellant's view would be likely to have supported such a request. All we have is Mr Jarrett's statement that the Council asked Defra for additional funding.

6.4.95 Mr Smart accepted in cross examination that the Council and AECOM simply don't know whether the high values in zone 7 represent a genuine risk across the zone or whether they are merely hotspots.[446]. This is a damning admission and represents the Council's unreasonable failure to carry out a robust assessment of the site which assesses whether there truly is a SPOSH.

6.4.96 The paucity of data gathered by the Council and AECOM is evident from a comparison with the CL:AIRE panel case study where, as stated above, there were 90 samples (from between 0 and 0.2m depth) spanning an area which included only 22 gardens.

6.4.97 In the professional opinion of Mr Morton, the data from SMW2[447] and WS13 should be treated as outliers. This has significant consequences for the mean and median concentrations on the site. This is clear from the 'Statement of Agreement and Clarification on Data Used in the Assessments for Willenhall Gasworks'[448]. Page 12 of that document sets out the difference in mean concentrations. The mean of 28.78mg/kg for samples equal to or less than 1m becomes 20.81mg/kg if WS13 is removed and 13.41mg/kg if all outliers are removed.

6.4.98 Even if these figures aren't to be discounted as outliers, it was imperative on the Council to undertake further testing to establish their representativeness of the wider site. The failure to do so was patently unreasonable.

[446] 8 December 2015 cross-examination Smart.
[447] SMW2 also referred to as SWM2 in a number of Inquiry documents.
[448] ID15.

Unreasonable failure to take the draft 2012 Guidance into account when making its determination and failure to undertake any, or any adequate, assessment of the impact of the new technical guidance on soil contamination ('SP1010') which advised that a value of 5 mg/kg of B(a)P does not represent an unacceptable risk to human health.

6.4.99 In examination in chief Mr Jarrett stated that it wouldn't have been appropriate for the Council to wait for the 2012 Guidance to come into force, as the Council had a duty to carry out its statutory function.[449] This was an extraordinary response in light of the timeline leading to determination.

6.4.100 The Council purports to be most concerned about zone 7. Indeed, so concerned that it ceased any investigation of that zone by AECOM's third report dated May 2009. That report stated:

> *'Based on the results of the B(a)P analyses, it is concluded that the ground conditions in zone 7 are such that this part of the site could be designated formally as contaminated.'*[450]

6.4.101 The Council was therefore in possession of that report nearly three years before the 2012 Guidance came into force. When this fact was put to Mr Jarrett in cross examination he stated that he received advice that because of the interrelationship between zone 7 and other zones it would be better procedurally to deal with the site as a whole.[451] That is extraordinary. It beggars belief that he would wait, following its experts opinion that there was a SPOSH.

6.4.102 This answer, whether correct or not, does not accord with the Council's assertion that they were compelled to act shortly before the 2012 Guidance came into force. Further, it does not accord with the timeline of when the Council had sufficient information (on their case) to determine both zone 4 and 7. AECOM's consolidated report is dated July 2011. Mr Jarrett confirmed in cross examination that no further technical work was done between then and the determination on 27 March 2012. There was therefore 9 months during which Mr Jarrett states that the Council was taking time to digest, seek advice, put together relevant documents etc. He stated that it was a co-incidence that they were ready to physically serve at the time.[452]

6.4.103 It is absolutely clear that the Council would have known that the 2012 Guidance was imminently coming into force. Under section 78YA of the Act a draft of the statutory guidance must be laid before each House of

[449] 9 December 2015 evidence in chief Jarrett.
[450] CD16.1.3 p. 248.
[451] 9 December 2015 cross-examination Jarrett.
[452] 9 December 2015 cross-examination Jarrett.

Parliament for forty days before it is issued. Therefore, at the time that the determination notice was served, the Guidance would have been before parliament for around 30 days.

6.4.104 In his proof of evidence Mr Jarrett states:

> *'The 2012 Contaminated Land Statutory Guidance had been in draft form for some time, however the issue date had been uncertain and publication had been postponed several times.'*[453]

6.4.105 This is clearly misleading, the fact that the 2012 Guidance was to come into force shortly after the determination notice was issued was certain and the Council's explanation as to why they failed to have regard to it leaves a lot to be desired. As has been pointed out above, they were advised by one of the UK's leading contaminated land experts. However, one thing is clear, that the Council did not take the Guidance into account as a material consideration at the time of their decision whether to determine the land as contaminated.

6.4.106 As has been set out in the appellant's legal submissions, the failure to have regard to the 2012 Guidance as a material consideration in making its decision to determine the land as contaminated was unlawful (see paragraphs 43-44). In our submission in acting unlawfully in this regard the Council has most certainly acted 'unreasonably'.

6.4.107 The Council states that in any event the Council did have regard to the 2012 Guidance (para 119 Jarrett Proof of Evidence), and has at this Inquiry sought to justify its decision on the basis of that Guidance.[454] Our comments with regard to *ex post facto* reasoning above apply to this later work from the Council. It is of course completely ironic that the Council's star witness, having performed a U-turn of epic proportions, now pins his hopes on para. 4.27 of the 2012 Guidance, which the Council disavows as relevant and which he was, he says, considering only on a 'what if' basis.[455] One wonders if a more incoherent case could possibly be devised.

Conclusion

6.4.108 We will address later the question of what is meant by 'reasonably' or 'unreasonably' in the 2006 Regulations, a straw at which the Council clutches. However, it is clear that, whichever version of the Guidance applies or is relevant, the Council did not comply with it. It never undertook the essential risk assessment, based on sound science, which would allow it to conclude that the entirety of zones 4 and 7 represented a

[453] Jarrett Proof of Evidence para. 114.
[454] See for example paras 159, 160-162 Jarrett Proof of Evidence.
[455] 15 December 2015 cross-examination Cole.

SPOSH. Instead, despite anything it says to the contrary, for zone 7 it simply looked at exceedance by some samples of an SGV which represented, on its own expert's admission and as confirmed by Dr Pease, a concentration representing a level of risk at the bottom of Category 4, which was negligible. A multiple of a negligible risk plainly is not a legitimate way of deriving a SPOSH level. Further, the decision woefully failed to take proper account of the massive socio-economic effects on residents affected. As well as being not in accordance with the guidance, the decision was unreasonable. It was based on scientifically rotten foundations in the AECOM reports. It was taken unreasonably in ignoring new and highly relevant statutory guidance which was imminent.

6.4.109 These defects mean the notice cannot be regarded as sound. It cannot be saved by the later work of Dr Cole (itself an entirely unreliable basis anyway). It should be quashed and the appellant respectfully so requests.

6.4.110 The Council appears belatedly, no doubt recognising the way in which this aspect of its case was heading, to seize on the word 'may' in section 78L(2)(b) that in cases other than a material defect in the notice, the Secretary of State has a discretion whether to quash, modify or confirm the notice.[456] It draws attention to authorities in the field of judicial review, where the courts may decline to quash a decision which has been found unlawful, for example where there has been delay in bringing a claim, or quashing would cause relevant detriment (a limited jurisdiction) or where the flaw has been minor and technical. It may be noted however that the text relied on by the Council states: 'The Court will need to identify a good and principled reason to exercise its discretion by declining a practical and effective remedy to a claimant who has succeeded in showing a public law wrong.'[457] This point is addressed more generally below, but we wish to deal here with its application in respect of ground (a).

6.4.111 It would be entirely unjust in a situation where a council has unreasonably determined land as contaminated, forcing the recipient to fight an appeal, then to deny the successful appellant the remedy of quashing. It would send out the most awful message that the Secretary of State is willing to support authorities which determine land as contaminated on an inadequate basis and then seek to justify it later on appeal. If this ground is successful, the reality is that there can be no proper or acceptable remedy other than quashing. It may be noted that the discretion in section 78L(2)(b) is a general one, applying to all grounds of appeal: there may be grounds where it would be justifiable to exercise it, but not, it is submitted, this one.

[456] CD 1.1
[457] Fordham, Judicial Review Handbook, Sixth edition, by Michael Fordham QC, Hart Publishing, 2012 (ID43).

6.5 Was it reasonable for the Council to conclude that the appellant caused and/or knowingly permitted the contamination?

6.5.1 This section of our closing submissions addresses appeal ground (c): that the enforcing authority unreasonably determined the appellant to be the Appropriate Person who is to bear responsibility for anything required by the notice to be done by way of remediation.

6.5.2 The appellant's submissions on 'causing' and 'knowingly permitting' are set out in our legal submissions dated 2 December 2015[458] and also in our response to the Council's legal submissions (14 December 2015)[459]. A brief summary of the legal position is as follows:

1) Any person who caused or knowingly permitted the substance, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person;[460]
2) To have caused a contaminant to be present there must be some positive action or activity by the appellant;[461]
3) Simply leaving a contaminant in place is not causing its presence;[462]
4) In the case of a person redeveloping land on which contaminants are present there must have been some positive action which caused the contaminant to be more extensively present;[463]
5) With regards to 'knowingly permitting' there must be knowledge of the presence of the substance involved, there does not need to have been knowledge of its polluting characteristics or potential harmfulness. That is not controversial and so it is not clear why the Council pursued the matter with the appellant's witness;[464]
6) Knowledge of a broader generic category of substances of which the substance in question may form part (e.g. gasworks waste) or of a broad family of substances of which the substance in question is one (e.g. PAH) is not sufficient;[465] and
7) Knowledge must be of the actual presence of the substance, not its likely or potential presence[466].

[458] ID3.
[459] ID24.
[460] s78F(2) EPA 1990 (CD1.1)
[461] Para 2 appellant's legal submissions 2 December 2015 (ID24).
[462] *Ibid* para.3
[463] *Ibid.* para.4
[464] *Ibid.* para.7
[465] *Ibid.*
[466] *Ibid.* para.14

6.5.3 With those principles in mind it is necessary to examine the contemporaneous reasoning of the Council when they served a remediation notice on Jim 2.[467] The only reasoning for considering the appellant to be an Appropriate Person appears to be that contained in a letter dated 7 August 2012 and included at Appendix 1 of the remediation notice[468] and a section of Schedule 2 to the remediation notice entitled 'Apportionment of Liability between Identified Class A Appropriate Persons'. The 2012 letter stated:

> *'Walsall Metropolitan Borough Council considers you to be a potential Appropriate Person because you purchased the site of the former gasworks in January 1972. Included in the Contract for Sale agreed with you at the time of the conveyance was information to confirm the former use of the site and that because of this use some or all of the land may not be suitable for residential use.*
>
> *Walsall Council is of the opinion that you are a potential Appropriate Person as detailed in the Environmental Protection Act 1990, part 2A, Section 78F(2) in that you knowingly permitted the substance causing the contamination to be in, or under the land that has been determined as contaminated land.*[469]

The suggestion by the Council that the reference in the contract to the former use of the site supports a finding of 'knowingly permitted' contamination amounts to post rationalisation and goes nowhere.

6.5.4 With regard to the appellant, the Remediation Notice stated:

> ***'Involvement**: Purchased, demolished, cleared and prepared the site of the former gasworks for residential development. Introduced pathways and receptors and sold on part of the site to others for development. Considered to be a causer and knowing permitter.*
>
> ***History**: Purchased the site from the Council in January 1972 as part of a larger parcel of land. Implemented demolition and site clearance operations to prepare the site for housing and public open space redevelopment. Obtained full planning approval for housing development of parts of the site in phases in April, June and November 1972. In June 1972 a portion of the larger land parcel that included a part of the former gasworks was sold on to E Fletcher Builders Ltd who were dissolved on the 21st October 2014 and therefore no longer exist. In clearing the gasworks and levelling the site in preparation for development demolition materials and waste from gasworks operation was spread over the site.*

[467] At CD6.8
[468] *Ibid.* p272
[469] *Ibid p273*

***Status**: Considered that Jim 2 Limited would be aware of the potential for gasworks operations to cause land contamination and for waste materials to be potentially harmful. By building dwellings introduced pathway and receptors thus completing the significant pollutant linkage. Class A liability exclusion tests have been considered and deemed not to apply.*[470]

6.5.5 There was no evidence to back up these assertions served with the remediation notice. Notably the Council did not consider what was known about B(a)P at the time when the houses were built on site, how a builder would have approached the site as it was in 1972, and (by marked contrast with the appellant) has not sought to provide any evidence to the appeal on these matters. The failure to consider these basic matters and instead to jump to the conclusion that the appellant was an Appropriate Person was unreasonable and the matter ought to end there. However, we will go on to discuss the nature of the evidence before the Inquiry and whether the appellant can reasonably have been considered to be an Appropriate Person by the Council either by causing the contaminant to be present or knowingly permitting its presence.

6.5.6 In a nutshell the Council has tried to cobble together a case from various fragments of evidence, creating suppositions which are non-sequiturs, or which lead precisely nowhere.

The evidence for Jim 2 causing contamination

6.5.7 The Council asserts that the appellant spread gasworks waste around the site and is therefore a causer of the contamination. The first point to note is that the Council accepts that zones 4 and 7 are sited on an area used for waste disposal by the gasworks during their operation.[471] Zone 7 was also host to a number of gasworks buildings, including the purifiers, which we know from the historical records were built on land which had been infilled. There were some metres thickness of what the Council terms 'gasworks waste' (in fact principally ash) across that area. This is clear from plans and aerial photographs and the careful reconstruction of the history of infilling undertaken by Mr Morton in his evidence. By the time that Jim 2 acquired the site, the photographs show that there had been demolition of a significant number of buildings which appears to have resulted in demolition material being deposited on the surface.
Further, the Council has not sought to allege that the appellant caused greater concentrations of B(a)P in these zones. The argument must therefore end there for causation. If indeed the appellant did mix and spread the waste around the wider site the effect must have been the removal and reduction of the amount of waste in the zones which are subject to the notice and therefore levels of B(a)P on zones 4 and 7 would have been reduced, not increased. That simply cannot, as a matter of

[470] CD6.8 p252-3
[471] See Jarrett Proof of Evidence para 157

basic common sense, amount to causation under section 78F(2) of the Act. The Council has devoted significant forensic effort at the Inquiry to establishing that gasworks waste has been found in zone 8 and to the north of the gas holders, outside the operational footprint of what was the gasworks. This was utterly futile. The answer, even if the material was moved is: so what? We are not concerned with causing or permitting material to be present in those areas.

6.5.8 In any event we move on to examine the thin evidential basis for the Council's 'spreading' theory. The theory appeared to rest upon only two matters (1) the discovery of gasworks waste to the east of the Tar Brook, in Zone 8 and (2) the fact that gasworks waste was found under the gasworks buildings. The Council did, in the course of the Inquiry, add the argument that gasworks waste had been found in the area to the north of the gas holders. Each of these pieces of 'evidence' is discussed below. However, it should be noted that these appear, again, to be part of the *ex post facto* reasoning of the Council. The notice of identification does not make any mention of the significance of zone 8 or of the alleged finding of waste under gasworks buildings.

6.5.9 It is also worth mentioning here that latterly, the Council has sought to draw conclusions from land to the north of the gasworks. Up until day 1 of this Inquiry this had not been mentioned by the Council and appears nowhere in the Council's witnesses' proofs of evidence. One can only surmise that it is another example of the Council latching on to any theory which will shore up its original decision and it certainly wasn't in the mind of the Council when the Remediation Notice was served on the appellant. With those points in mind, we consider the Council's case as it has now been put before this Inquiry.

6.5.10 The Council states that the finding of gasworks waste to the east of the Tar Brook indicates that Jim 2 spread the gasworks waste around the whole site. Indeed, under cross examination Mr Smart stated that the conclusions relating to the Tar Brook are a very important part of the Council's evidential basis and therefore it is necessary to examine the evidence closely.

6.5.11 First, it must be recognised that the Council has concluded that there is no basis upon which to determine zone 8 as contaminated land. Indeed, the evidence suggests that there is a very different composition between the ground in zone 8 and that in zones 4 and 7.[472] It was put to Mr Smart that the different compositions 'tends to suggest that it wasn't as simple as a developer pushing a whole load of material across the brook, otherwise you would expect the same proportions'. Mr Smart agreed with that proposition.[473] He further agreed that it is unknown where the material which was used to fill zone 8 came from.

[472] See AECOM Consolidated Report CD16.1.7 p1483 section 4.5
[473] 8 December 2015 cross-examination Smart.

6.5.12 The Council asserts that the waste was pushed over the Tar Brook by the appellant. The Council produced a helpful plan at CD5.3 which shows the location and dates of the permissions granted to build housing on the Willenhall Site. The key dates are as follows:

14 January 1972 – Contract of Sale between the Council and McLean[474] ;

29 February 1972 – Transfer of land to McLean from the Council effected;

6 June 1972 – McLean transfers part of the Site to Fletcher[475];

14 June 1972 – Council grants McLean further detailed planning permission for plots 52-89[476];

28 June 1972 – Council grants Fletcher detailed planning permission for the erection of 59 houses including nos. 1-27 Kemble Close[477];

4 August 1972 – Agreement between McLean and the Midlands Electricity Board[478];

8 November 1972 – Council grants further permission to McLean in respect of plots 90-118[479].

6.5.13 There were only just over three months between the date on which McLean became owner of the site (29 February 1972) and when it transferred part of the site to Fletcher (6 June 1972). On the Council's case, the appellant completed the works which were necessary for them to have spread ground across the Tar Brook onto zone 8. This included preparing the ground for development and culverting the Tar Brook.

6.5.14 The only evidence which Mr Jarrett could point to for the fact that Fletcher did not move contaminated material is the submissions of Aggregate Industries.[480] He termed these submissions 'direct evidence'. They are anything but. Aggregate Industries has chosen not to present any evidence to this Inquiry, whether in the form of documentary evidence or witness evidence. It merely relies upon a letter from its solicitors. Further, clearly, Aggregate Industries is not an impartial witness. For the Council to rely blindly, or place weight upon their unsupported assertions is clearly unreasonable. Bizarrely, Mr Jarrett in cross examination asserted that the only 'direct evidence' was that submitted by Aggregate Industries, 'That indicates to us that Fletcher did not take part in the preparation of the site for development' (i.e. movement material). He then had to accept that they were not an uninterested party and he

[474] CD3.5
[475] CD3.5A
[476] CD4.5
[477] CD4.3
[478] CD3.6
[479] CD4.4
[480] CD10.14

could not take their word for it.[481]

6.5.15 The Council also appears to rely upon the fact that the transfer document of part of the land from McLean to Fletcher[482] does not refer to the previous use of the site as a gasworks. The Council make an evidential leap to state that this suggests that Fletcher was buying land ready for development. This is an extraordinary submission on their part. The mention, or otherwise, of the site being a gasworks does not assist. First, it is highly likely that a representative from Fletcher would have visited the site and seen the gasworks structures at the time which negotiations began. The evidence of the site having been a gasworks was so clear that there would have been no need to mention it in the conveyance.

6.5.16 Indeed, counsel for the Council stated to Mr Wielebski in cross examination that the appellant would have known at the outset the previous use of the site. The fact was that when the site was bought there were 'two socking great gas storage cylinders' on site and that one would therefore know on visiting the site that it was a gasworks. Mr Wielebski agreed with this proposition.[483] The same must also be true for Fletcher, it is inconceivable that during negotiations for the sale a representative would not have visited the site and seen the structures which were on it at the time. The fact that there is no mention that the site was previously a gasworks in the transfer document is completely immaterial and serves only to illustrate the true thinness of the Council's case. As such it falls into the (very large) category of scrapings from the bottom of the barrel, which seem to be a large ingredient of the Council's case.

6.5.17 Further, although planning permission wasn't required for demolition in 1972, it certainly would have been for the types of engineering works which the Council is alleging were undertaken by McLean. Notably, this includes the culverting of the Tar Brook.[484] This is highly significant as detailed permissions covering part of the land either side of the Tar Brook was not granted until 28 June 1972 (the Fletcher permission).[485] It is therefore unlikely that this work was done until after that date. Mr Wielebski confirmed to the Inspector that the culverting would not have been done without having a planning permission beforehand.[486] This, together with the fact that the Tar Brook runs through the Fletcher land, raises the possibility that the culverting may well have been done by Fletcher rather than McLean. Mr Wielebski stated that this was a possibility given the timescales involved.[487]

[481] 9 December 2015, Jarrett cross-examination.
[482] CD9.2.
[483] 10 December 2015.
[484] As was stated by Mr Wielebski in evidence 10 December 2015.
[485] See helpful plan prepared by Mr Jarrett at CD5.3.
[486] 10 December 2015 Inspector's question to Wielebski.
[487] 10 December 2015 response to Inspector's question.

6.5.18 In cross examination of Mr Wielebski, the Council sought to suggest that the purchase prices of the land supported the case that the culverting work was carried out by McLean. This novel argument appears nowhere in their evidence and there is certainly no evidence of it entering the minds of the Council at the time the Remediation Notice was served. In any event, it is not a point which supports the Council's case. Counsel for the Council put to Mr Wielebski that the purchase price of the site from the Council was £266,500[488] and that this was paid for around 21.6 acres. The sale to Fletcher by McLean was 9.6 acres (44% of the land) for £129,680[489]. As 44% of the purchase price is £117,000 that represented a £12,000 uplift in value. It was put to Mr Wielebski that if the site had been cleared for development that would increase the price of the land to Fletcher, Mr Wielebski stated 'not necessarily'.[490]

6.5.19 Indeed, this line of questioning is paradigmatic of the Council's failure to consider any explanation for facts which does not fit with their own decision which they are now seeking to shore up. The 6 June 1972 transfer between McLean and Fletcher reveals that it included the right to pass over roads.[491] The plan at page 22 demonstrates the roads which were to be constructed by McLean but which would serve the Fletcher part of the land. There was also a right to connect with gas and water cables on the McLean Land.[492] It is therefore clear that this may have accounted for any uplift of £12,000. The Council will apparently latch onto any argument, however speculative or unsound, if it thinks it may lend support. More of that anon.

6.5.20 Alongside the culverting of the Tar Brook the Council's case also rests on the fact that McLean raised the ground to the east of the Tar Brook using 'gasworks waste' from the west of the site. Mr Wielebski was clear that ground raising would have required planning permission and that it is unlikely that a developer would embark on a raising operation without detailed planning permission.[493] The plan attached to the detailed planning permission granted to Fletcher Builders on 28 June 1972 indicates the floor levels. It is therefore likely that it was only once this permission was granted that works were undertaken to the east of the Tar Brook.
It follows that it is more likely than not, given that the permission was granted to Fletcher, and Fletcher was developing land either side of the Tar Brook, that the raising of the levels was done by Fletcher.
Notably, this scenario has not been considered by the Council. Given the weight of evidence in its favour, the failure even to consider it is undoubtedly unreasonable.

6.5.21 Finally with regard to the significance of zone 8, even if contaminated material was moved from zones 4 and 7 across the Tar Brook and into

[488] CD3.5 p10
[489] CD3.5A p17
[490] 10 December 2015 cross-examination Wielebski
[491] CD3.5A p.18
[492] *Ibid.*
[493] 10 December 2015 cross-examination Wielebski and Re-Ex

zone 8 that would necessarily have reduced, not increased, the contamination found in zones 4 and 7. The presence of contamination on zone 8 does not assist the Council's case.

6.5.22 We now turn to the relevance of gasworks waste being found under buildings. In his proof of evidence, Mr Smart stated that gasworks waste could not have been deposited under buildings during the lifetime of the gasworks. However, he admitted under cross examination that it was perfectly possible that gasworks waste was deposited under buildings and structures as the works developed. He further recognised that it is known that waste was deposited under the purifiers. He agreed that one cannot seek to draw 'conclusive assumptions' from the presence of waste under buildings. This is a considerable climb down by the Council and again, demonstrates the unreasonable nature of their decision to identify the appellant as an Appropriate Person.

6.5.23 Aside from the discovery of 'gasworks waste' in zone 8 and under buildings, it is necessary to address the Council's nebulous assertion that in levelling the site McLean/Jim 2 would have spread material around and thereby caused contamination. It is agreed between the parties that *'gas making operations ceased in 1957 and that any filling of the site with gasworks waste was completed prior to ownership by Jim 2 Limited.'* (para.4.8 Statement of Common Ground)[494].

6.5.24 Therefore, the Council is not alleging that McLean/Jim 2 brought any gasworks waste or any other material containing B(a)P onto the site. The contaminants were in situ long before Jim 2/McLean bought the site or built houses.

6.5.25 Prior to the opening of the Inquiry, it appeared to the appellant that the Council were arguing that there was a 'stockpile' of waste which was spread around by the appellant. That stockpile is labelled on a plan which is part of the AECOM phase 2 report.[495] However, Mr Smart confirmed under cross examination that there were no stockpiles of gasworks waste when the site was closed down.[496]

6.5.26 It is also agreed between the parties that zones 4 and 7 are situated upon areas where gasworks waste was dumped during the lifetime of the gasworks. It is clear then that any gasworks waste containing B(a)P was present within the zones with which this appeal is concerned well before McLean/Jim 2 purchased the site or built any houses.

6.5.27 Nowhere in its evidence has the Council alleged that McLean/Jim 2 imported material into zones 4 and 7 from elsewhere on site in order to prepare the site for development or to construct the houses. Therefore, it

[494] ID11.
[495] CD16.1.3 p229 and fig.3 p257
[496] 8 December 2015 cross-examination Smart.

appears to base its case upon two assumptions: (1) that McLean/Jim 2 spread the contaminants within zones 4 and 7 and thereby somehow increased the concentration of the B(a)P within those zones, and (2) McLean/Jim 2 filled in the voids left by gasworks structures on site with gasworks waste containing B(a)P and which resulted in there being a higher concentration of that contaminant in those areas.

6.5.28 The parties have agreed that the nature of the soil in zones 4 and 7 is heterogeneous. The relevant section of the Statement of Common Ground states:

> *'4.16 It was agreed that the logs showed vertical and lateral variability (heterogeneity) in material type (clay, sand, gravel), that distinct site wide layers of made ground of the same material type were not present but that material may form distinct lenses.*
>
> *4.17 There is agreement that some logs suggest vertical stratification of the made ground, but that this layering is not consistent across logs and does not provide a basis for zoning data based on material type. It was agreed that made ground material of this type is typically chemically heterogenic at different scales.'*

6.5.29 The heterogenic nature of the soil and lack of stratification clearly indicates that there was not a 'mixing' of the made ground on site by McLean or Fletcher.

6.5.30 The Council has sought to support its theory by stating that the site needed to be 'levelled' before houses were built upon it. In cross examination it was put to Mr Wielebski that the following statement in the sale particulars indicates that levelling would be required. It states:

> *'The developer will be required to lay out the public open space, in accordance with the Borough Engineer, Surveyor and Planning Officer's wishes. It is not thought that extensive landscaping etc. is required. Levelling, grassing and perhaps some tree planting may suffice.'*[497]

6.5.31 Mr Wielebski highlighted that there is a distinction between levelling and regrading. He stated that the term levelling indicated minor regularisation to provide open space of useful amenity.[498]

6.5.32 Indeed, the 1968 photographs[499], as Mr Wielebski highlighted, show a site which was relatively level and therefore these works would have been

[497] CD3.4 p10
[498] 10 December 2015 Wielebski cross-examination
[499] Introduced into evidence by the Council on day 2 of the Inquiry.

minimal. Further, a significant part of the Council's case is that by virtue of the historic filling of the site during the operation of the gasworks, the land to the west of the Tar Brook was higher than land to the east. As such, as a matter of common sense, any levelling which took place on the west side is extremely unlikely to have involved the raising of ground and the importing of material from elsewhere on site. Indeed, Mr Wielebski highlighted that there was no evidence that floor levels had been raised on site to facilitate the spreading and levelling of surplus excavated material.[500]

6.5.33 The 1968 photographs also revealed the presence of significant vegetation on site during the period of the Council's ownership and before the site was bought by the appellant. On being asked the implications of this for a developer Mr Wielebski answered that it would have ramifications for how the site was prepared. He stated that one can't take a site like that shown in the 1968 photographs and simply 'blade across it'. He noted that developers were not permitted to spread vegetative material under structures pursuant to the *Building Regulations*, and section 18 of the *Public Health Act 1968*.[501] It is therefore likely that this material (together with its roots) would have to have been removed by the developer. This further undermines the Council's case on 'spreading'.

6.5.34 The Inspector and Secretary of State are requested to note that the conclusion which Mr Jarrett, for the Council, reached from the presence of vegetation on site was that it was consistent with the site being contaminated land. This was an extraordinary statement and under cross examination, on the same day, Mr Jarrett rowed back from the statement and agreed that he wasn't seriously suggesting that the presence of vegetation provided any real support that the land was contaminated with a SPOSH. The fact that Mr Jarrett sought to draw such a conclusion in the first place indicates that many of the Council's conclusions and assumptions are plainly uninformed, unsafe and cannot be relied upon and that Mr Jarrett in particular is an untrustworthy and unreliable witness. More anon.

6.5.35 In his oral evidence Mr Wielebski confirmed that around the 1970s there were some developers who would use ash to assist with drainage under the front gardens of properties.[502] However, if this were the case on the Willenhall site one would expect to see a defined layer of ash underneath the topsoil within the gardens of zones 4 and 7. That has not been found by AECOM. In any event, even if this had taken place, as was noted by Dr Thomas, ash contains low levels of B(a)P, on average 5 mg/kg.[503] The Council has not sought to introduce evidence to the Inquiry which counters that of Dr Thomas.

[500] Wielebski PoE para 7.14.
[501] 10 December 2015 evidence in chief Wielebski.
[502] 10 December 2015 evidence in chief Wielebski and cross-examination.
[503] 10 December 2015 evidence in chief and cross-examination Thomas.

6.5.36 Although the Council has still not sought to justify a figure for SPOSH it is clear that a figure around 5 mg/kg would not represent a SPOSH. This is dealt with above. Therefore, even if ash was used to underlay the gardens on site, for which there is no evidence, the appellant cannot be said to have caused a contaminant to be present at levels which constitute SPOSH.

6.5.37 The Council also relies upon the demolition of buildings on site as being part of the cause for the contamination. The Council has provided no scientific evidence to support their case that demolition rubble would have contaminated the site. In his evidence in chief Dr Thomas made clear that demolition rubble on site would be no different from any other type of demolition rubble.[504] The Council places some reliance on CD16.2.9 and in particular paragraphs 2.7-*Materials in process when the works closed* and 2.9-*Contamination resulting from demolition and clearing*. The appellant considers, with reference to paragraph 2.6-*Contamination arising from normal site operations*, that the actual use of the gasworks is likely to have been a more significant cause of contamination.

6.5.38 Mr Wielebski provided valuable evidence to the Inquiry on this point. Mr Wielebski, a Civil Engineer, a Chartered Environmentalist, a Chartered Building Engineer, a Professional Engineer and a Fellow of both the Chartered Institute of Building and the Chartered Association of Building Engineers, has been involved in the investigation of new land and development opportunities since he entered the construction industry in 1968.[505] He was asked in oral evidence how a developer would approach any remaining structures on a site such as the Willenhalll site. He stated that there would be attempts to investigate and that buildings would not be left in situ unless the foundation solutions allowed for that to happen. He stated that they would have been removed together with associated material. Removal of complex structures like the gas holders would have been outside of the expertise of any developer and therefore it was likely they would have relied upon a subcontractor to effect the demolition. Mr Wielebski further stated that the materials from the structures would be sold for their scrap value by the contractor and that value would be reflected in the price which the developer would pay them to clear the site.

6.5.39 Indeed, the fact that some of the structures were to be sold for scrap was likely to have been reflected in the purchase price for the sale of the site by the Council. The Particulars of Sale corroborate Mr Wielebski's evidence, they stated:

> *'The purchaser of lot 1 will be required to demolish the Gasworks and the cost thereof and the value of scrap materials will no doubt be taken into account when offers are being formalised.'*[506]

[504] 10 December 2015 evidence in chief Thomas.
[505] Wielebski PoE paras 1.1-1.2.
[506] Particulars of Sale CD3.4 p.10.

6.5.40 In his oral evidence Mr Wielebski highlighted that at the time of the development sophisticated crushing plants did not exist. As such, a developer was limited in terms of what he could or could not use on site.[507] In his Proof of Evidence Mr Wielebski stated that excavation arisings from on-site construction, namely roads, sewers, foundations and external works would be likely to have been removed from the site to landfill as this was a cheap and easy solution.[508] Mr Wielebski further stated:

> *'Based on my experience of new residential development at the time, off-site disposal to landfill was nearly always the chosen option. I can see no reason why this approach would have been any different at the Willenhall site.'*[509]

Importantly, the Council has not produced any evidence which counters the evidence of Mr Wielebski.

6.5.41 It is relevant to note that in evidence in chief Mr Jarrett, again, climbed down from his earlier stated position that the vast majority of buildings remained in place at the time when Jim 2 took ownership of the site.[510] He acknowledged that RSK's photographs demonstrated that a number of buildings had been demolished or removed before 1971. Mr Jarrett accepted that it would be likely that, in accordance with common practice, the operators of the gasworks following its decommissioning would have removed more difficult pieces of equipment. He stated that these would be those containing asbestos, tar pits and tar storage.[511]

6.5.42 Under cross examination Mr Jarrett was unable to explain why he had made the mistake that Jim 2 had done all of the demolition. He further confirmed that demolition is considered part of the preparation of the site and that this formed part of the Council's thought process when serving the Remediation Notice and in allocating liability.[512]

6.5.43 With regard to the filling of voids Mr Wielebski's evidence is that they would not necessarily have been filled with materials from the excavation of the site. He explained to the Inquiry that subsequent construction on an area filled in this manner can be more expensive and it is not an easy solution.[513] He further explained that different materials found on site will

[507] 10 December 2015 Wielebski evidence in chief.
[508] Wielebski PoE para 7.13.
[509] Wielebski PoE para 7.14.
[510] 9 December 2015 evidence in chief Jarrett.
[511] *Ibid.*
[512] 9 December 2015 cross-examination Jarrett.
[513] 10 December 2015 cross-examination Wielebski.

have different geotechnical properties. He stated that the material used needs to be of a grain which you can compact. Any loose back filling could result in settlement and it is not good engineering practice to build houses on top of it.[514] Again, the Council has not produced any evidence to counter this.

6.5.44 It is clear then that the Council's case on 'causing' is based upon no more than speculation which runs contrary to the available evidence. It is actually worse than speculation in fact. Prompted by AECOM, without the benefit of any real evidence, or anyone with any genuine experience of gasworks sites, it formed its theory that there were 'stockpiles' of gasworks waste which Jim 2/McLean spread. Having formed that theory it (a) wilfully blinded itself to any facts which contradicted it and (b) latched onto any evidence however tenuous, to concoct arguments to support its theory.

6.5.45 It is notable that, in deciding that the appellant was an Appropriate Person, the Council did not seek the advice of anyone with knowledge of how a site such as the Willenhall one would have been approached by a house builder in the 1970s. Similarly, it failed to consider the timeline of events and the role which Fletcher is likely to have played in the development. Further, it has failed to demonstrate how, even if it was correct that the appellant 'spread' gasworks waste on site, that would have led to causing a SPOSH in zones 4 and 7, i.e. increasing the concentration of B(a)P already present. The failure to consider this basic information was clearly unreasonable. The weight of evidence in fact suggests, contrary to the Council's supposition, that the appellant did not cause contamination by B(a)P or indeed by gasworks waste on the areas determined to be contaminated land.

Knowingly Permitting

6.5.46 As stated above, for a party to have knowingly permitted a contaminative substance there must be knowledge of that substance, in this instance B(a)P. Lately, i.e. at the Inquiry, the Council has sought to rely upon knowledge of there being gasworks waste as being sufficient to meet the knowingly permitting test. That is patently wrong in law as has been set out in our response to the Council's legal submissions (14 December 2015)[515].

6.5.47 Further, and in any event, it is notable that neither the determination[516] nor the remediation notice[517] refer to a knowledge of 'gasworks waste' as opposed to B(a)P. The reliance upon knowledge of gasworks waste is nothing but an *ex post facto* and misguided lawyerly attempt to salvage the Council's case. It is unsupported by both statute and case law, wasn't

[514] *Ibid.*
[515] ID24.
[516] CD6.3
[517] CD6.8

taken into account by the Council at the time of the decision and therefore simply cannot assist the Council in the context of this appeal. It has been made even worse by the frankly ridiculous attempt to draw analogies with the use of the terms 'organic material' in the *Circular Facilities* case, which was plainly a fair way of describing indeterminate organic material which might generate gas. In this case the substance of concern is B(a)P. Whether that is intended to be a pollutant in its own right or a marker for wider PAHs, B(a)P is the substance for Part IIA purposes.

6.5.48 It is therefore highly relevant to consider what was known about B(a)P at the time when the appellant built some of the houses on the site. The Inquiry has had the benefit of the expert evidence of Dr Thomas in this regard. He is recognised as one of the world's leading specialists in the investigation, understanding and remediation of gasworks.[518] His expertise was not challenged by the Council.

6.5.49 Dr Thomas' evidence detailed how the major publications relating to contaminated land post-dated the 1970s.[519] A growing concern about the redevelopment of potentially contaminated sites led to the formation of the Inter-Departmental Committee on the Redevelopment of Contaminated Land (ICRCL) in 1976. However, it was not until May 1983 that the ICRCL published '*Guidance on the Redevelopment of Contaminated Land' 1st Edition May 1983'*.[520] The formation of the Committee and the publication of the guidance was therefore after the appellant's construction of the houses on site.

6.5.50 Dr Thomas' evidence is corroborated and confirmed by that of Mr Wiebliski and Mr Witherington. All of the following post-dated 1972: (1) awareness of the risks of contaminated land generally; (2) awareness of the risks of gasworks sites in particular; (3) awareness of the toxicity of B(a)P in the contaminated land context, as opposed to the completely different context of occupational exposure at extreme levels, for example chimney sweeps.

6.5.51 Mr Witherington was cross examined on this subject. The Council appears to be relying on the fact that by 1933 it was known that, in relation to occupational exposures, there was knowledge of the link between coal tar and harm to human health. Indeed this was highlighted in RSK's report. It was also known that B(a)P was the likely culprit.[521] However, this is extremely different to the question of contaminated land. As Mr Witherington pointed out, those studies were dealing with puddles of neat tar.[522]

6.5.52 When asked to what extent these historic studies are helpful in informing us as to the knowledge of risk. Mr Witherington stated that all studies

[518] Thomas PoE para.1.
[519] *Ibid* para. 32.
[520] *Ibid* para. 33.
[521] CD7.3 p. 114.
[522] 16 December 2015 cross-examination Witherington.

were relating to visual evidence of tar. He stated that any developer who found a great pocket of tar would question what they were going to do about it, however that is not the case in relation to Willenhall and has never been the Council's case.[523] Mr Smart in re-examination said the made ground was 'fairly nondescript stuff'.[524] Mr Jarrett confirmed this, that there would have been nothing obvious to indicate contamination.[525]

6.5.53 The Council's case relies heavily on the followings statement found in the 1971 Particulars of Sale. Indeed it is perhaps the high point of their submissions:

> *'In preparing a layout developers will bear in mind that some part of the land comprising the parts of the former Gasworks may be unsuitable for building'*[526]

6.5.54 In his proof Mr Jarrett stated the following:

> *'I also interpreted this information to mean that McLean Homes (Midland) Limited knew that they were purchasing a gasworks and that parts of the land may be unsuitable for building, thereby clearly suggesting contamination of the land.'* (our emphasis)

6.5.55 However, under cross examination he admitted that it was 'quite possible' that those words relate to the fact that there were physical structures such as pits and gas holders which in engineering terms would not be suitable for building houses on.[527] He further stated that there might be many 'other reasons' for that clause in the particulars of sale. It is clear that none of the sale documents refer to contamination or to the requirement for it to be 'cleared up'.[528] Mr Jarrett's climb down from the bald assertion that the clause 'clearly' suggested that the land was contaminated is again worrying and, in the appellant's view, is again paradigmatic of how the Council has assessed, or failed to assess, the site and the appellant's activities on it. The Council has jumped to a number of conclusions which, although they suit its preferred case, are unsupported by the evidence. This is just one of a number of examples which are highlighted throughout these submissions.

6.5.56 Indeed, Mr Jarrett's apparent *volte face* is unsurprising. The evidence before this Inquiry points to the fact that land contamination, and particularly by B(a)P, simply wasn't on the radar at the time of the development. The Council has not produced any evidence to the contrary.

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[523] 16 December 2015 Re-exam Witherington.
[524] 8 December 2015, Re-exam Smart.
[525] 9 December 2015, cross-examination Jarrett.
[526] CD3.4 p. 10.
[527] 9 December 2015 cross-examination Jarrett.
[528] Accepted by Jarrett in cross-examination 9 December 2015.

They therefore appear to be putting forward a case that the Council had a prescient knowledge of what was to come back in 1971 in inserting the clause for that purpose. That simply isn't supported by the evidence. As Dr Cole admitted under cross examination, it was not until the 1980s that people were looking at coal tar in the context of anything other than occupational exposure[529], not even the Council.

6.5.57 It is also evident that neither the particulars of sale nor the sale agreement nor any of the planning permissions refer to contamination. If the clause in the particulars of sale had been referring to the potential for/or presence of contamination on site then one would expect this to have been stated explicitly. Further, one would also have expected relevant conditions dealing with contamination to be attached to the permissions. This isn't the case and this undermines the Council's argument.

6.5.58 Further evidence from the particulars of sale is that the developer would be required to lay out the public open space in accordance with the Borough Engineer, Surveyor and Planning Officer's wishes.[530] Mr Jarrett sought to explain this as the Council being desirous of controlling what type of open space there should be on site. However, one has to question why the Borough Engineer would be involved in that decision. He went on to accept however that it was likely that the determination of location of the public space was influenced by economic reasons and it could well have included structural considerations.

6.5.59 Indeed, the final layout of the public open space was over where the gasholders and other structures to the south used to be. As Mr Wielebski stated in his oral evidence, when one looks at the layout of the site it demonstrates that the developer made a conscious decision to exclude complex areas from the development footprint, i.e. the public open space.[531] The final layout of the site therefore indicates that what was meant by the warning that some parts of the site 'may be unsuitable for building' in the particulars of sale was that there were geotechnical issues on site which would mean development on parts of the site would need to be avoided.

6.5.60 Much time was taken up in the Council's cross examination of Mr Wielebski in highlighting the processes which were undertaken by a developer in the early 1970s. This information came from the evidence of Mr Wielebski himself and he confirmed that trial pits would have been dug on site before development was undertaken.[532] Mr Wielebski's evidence was that the focus of these pits would be geotechnical in order to determine the prevailing soil conditions and their bearing capacity.[533] He further

[529] 15 December 2015 cross-examination Cole.
[530] CD 3.4 p. 10.
[531] 10 December 2015 Wielebski evidence in chief.
[532] 10 December 2015 cross-examination Wielebski and para 5.1 proof.
[533] 10 December 2015 cross-examination Wielebski.

confirmed that there would have been some chemical analysis to determine sulphate and pH concentrations.[534] He confirmed that these tests had a geotechnical purpose and 'the only things we were interested in was the durability of subsurface concrete which was dictated by sulphates and pH'.[535]

6.5.61 That evidence, from Mr Wielebski's experience, is corroborated by the DETR paper 'Problems Arising from the Redevelopment of Gasworks and Similar Sites'[536] (1987) Page F12 states: *'until fairly recently little heed was taken of the previous activities carried out on any site prior to redevelopment. Any site investigations were generally directed towards engineering considerations for foundation design purposes. Chemical considerations were usually limited to soil pH, sulphate and sometimes chloride concentrations'.*

6.5.62 Importantly, the Council has provided no evidence to counter Mr Wielebski's evidence that there would not have been chemical testing for the toxicity of soils during the early 1970s. Mr Wielebski has provided evidence that around the time of the development there were four documents containing guidance on site investigations. These were:

1) British Standards Institution CP 2001 (1957)[537]
2) British Standards Institution CP 2003 (1959)[538]
3) TRRL Report LR 625 (1974)[539]
4) TRRL Report 403 (1976)[540]

6.5.63 None of these documents refer to contaminated land or to the potential presence of hydrocarbons on site. They are also silent on the need for toxicological testing. As Mr Wielebski states:

> *'In the 1970s the existence of B(a)P was not something that was referred to in any guidance and/or recommendations specific to site investigation. Had this been the case there is no doubt that it would have been considered at the site investigation stage and more importantly, included in a suite of chemical evaluation tests.'*[541]

6.5.64 Mr Wielebski further confirmed at para 7.7 of his Proof of Evidence that the same applied to Polycyclic Aromatic Hydrocarbons (PAHs).

[534] Wielebski PoE para 5.6.
[535] 10 December 2015 Re-exam Wielebski.
[536] CD 7.3, Appendix J.
[537] Wielebski PoE Appendix 1.
[538] Wielebski PoE Appendix 2.
[539] Wielebski PoE Appendix 3.
[540] Wielebski PoE Appendix 4.
[541] Wielebski PoE para.7.6.

6.5.65 Mr Jarrett and Mr Smart both accepted that there was no sign of gross contamination, for example tar deposits in the made ground.[542] Mr Jarrett agreed that there was nothing obvious to indicate contamination.[543] Mr Jarrett further accepted that it is unlikely that Jim 2 would have emptied the tar wells because that would have been done at decommissioning and that knowledge of gasworks infrastructure would not indicate contamination.[544]

6.5.66 This is a crucial contradistinction from the *National Grid* case.[545] In their legal submissions the Council has sought to draw a number of parallels between the instant case and that decision. In that case the factual scenario which brought the contamination to the Environment Agency's attention was the discovery of a pit filled with a tar-like substance in the back garden of one of the affected properties (para 33 first instance decision, CAB6 to Council's legal submissions). Nothing of the sort has been found on this site. As the Council's witnesses agreed, there was no sign of tar deposits in the made ground.[546]

6.5.67 It is worth briefly addressing Mr Jarrett's reliance on the fact that the appellants would have been aware of gasworks 'structural material'.[547] In cross examination he accepted that in themselves the presence of structural material/infrastructure was not the same as putting the appellant on notice of contamination. That must be correct. It is also necessary to address Mr Jarrett's assertion that the 1968 photographs revealed a pile of 'coke' on the site.

6.5.68 The first point to note is that it is a photo taken three years before the appellant acquired the site from the Council and therefore they are of limited value in showing what was on site when the appellant took possession of it. The second point is that to conclude that a pile of granular material is coke from the poor quality photograph is an unreasonable evidential leap which the Council has sought to make entirely 'on the hoof'. Under cross-examination Mr Jarrett accepted that the material 'could be road planings' used by the company (Stourbridge Paving) who occupied the site during the Council's ownership. On re-examination, responding in a Pavlovian manner to his counsel's prompting, he was of the view it was more likely now to be coke. Whatever that material is, it simply cannot be relied upon by the Council as putting the appellant on notice of the presence of contaminants, and specifically B(a)P. What it does show is that Mr Jarrett will, frankly, say anything at the witness stand if he thinks it will assist his Council's case.

6.5.69 At this appeal, the Council has sought to re-cast its case and rely upon

[542] 8 December 2015 cross-examination Smart, 9 December 2015 cross-examination Jarrett.
[543] 9 December 2015 cross-examination Jarrett.
[544] 9 December 2015 cross-examination Jarrett.
[545] CD2.4
[546] 8 December 2015 cross-examination Smart, 9 December 2015 cross-examination Jarrett.
[547] Jarrett Proof of Evidence para. 45.

knowledge of gasworks waste rather than B(a)P. It is clear that the Remediation Notice and the notice of determination both refer to B(a)P rather than gasworks waste, there can be no doubt that the determination relates to this substance in particular. It may be that the Council seeks to build its case on the basis that B(a)P can be considered to be a marker for gasworks waste. That is clearly not the case. Elsewhere in these submissions we have dealt with the evidence of Dr Thomas which demonstrates that gasworks waste should not be seen as an homogenous substance but is the result of various waste streams on site.

6.5.70 It is therefore clear that the Council's conclusion that the appellant 'knowingly permitted' the presence of B(a)P on site was unreasonable. It did not properly analyse the factual situation on the site history, nor did it obtain help from an expert on development in the early 1970s, or on the operation and decommissioning of gasworks. It did not research the history of guidance and the development of knowledge of contaminated land or gasworks in particular. It has presented no evidence to the Inquiry to support its case, or to rebut the evidence of the appellant. It has conspicuously failed to challenge that evidence at this Inquiry.

6.5.71 If, contrary to our submission on ground (a) the notice is not quashed on that ground (i.e. there was a reasonable determination that there was a SPOSH) but we succeed on ground (c), the residents and Council will be left in a most unfortunate position, which perhaps the Council has never fully thought through. The notice will have to be quashed as against Jim 2. Unless the Council accepts liability itself as an appropriate person, liability will fall to individual owners and occupiers, as no appropriate person can be found. The SPOSH will however plainly have to be addressed, and the Council will presumably ultimately have to use its powers of entry and cost recovery to do so, considering properly under the Guidance whether and to what extent to waive cost recovery for some or all residents. That, sadly, will be the Council's problem, and the residents' plight.

6.6 **Was it reasonable for the Council to conclude that the appellant should take 100% liability for 'causing' or 'knowingly permitting' contamination on site and was it reasonable for the Council to exclude itself from any liability?**

6.6.1 It is striking that Jim 2 is in the Council's view the only Appropriate Person, liable for 100% of the remediation. The gas companies, original polluters of the site, have long gone. Fletcher has recently gone, conveniently dissolved by its parent. The Council and Jim 2 remain. The Council instigated the acquisition and development of this site for housing, putting in place the statutory framework and outline planning permission necessary for housing, indeed necessitating housing. Jim 2 built some of the houses. It is quite extraordinary, and actually rather disreputable, that the Council seeks to absolve itself from responsibility, and is willing to concoct highly spurious arguments to do so. Disappointing, but sadly typical of the Council's approach to this case.

6.6.2 Fletcher took the easy way out and the appellant could have done the same. The appellant is not suggesting that Jim 2 Limited be rewarded for not winding up the company. However, it considers that proper consideration should be given to the Guidance in relation to that situation.

Exclusion of the Council from Liability

6.6.3 This section of our closing submissions relates to ground (d) of the appeal. Without prejudice to the appellant's contention that it is not an Appropriate Person, the Council has unreasonably failed to determine that other persons are Appropriate Persons, in relation to the matters required by the Notice to be done by way of remediation. Specifically, the Council's decision to exclude itself from being an Appropriate Person was manifestly unreasonable.

6.6.4 Under cross examination, Mr Jarrett accepted that in terms of liability under part 2A of the Act, there should be no differentiation between the Urban District Council of Willenhall and Walsall Metropolitan Borough Council.[548]

6.6.5 The Council excluded itself from liability under exclusion test 6 of the 2012 Guidance. The Guidance states:

> *'7.57 The purpose of this test is to exclude from liability those who would otherwise be liable solely because of the subsequent introduction by others of the relevant pathways or receptors (as defined in Section 3) in the significant contaminant linkage.*
>
> *7.58 In applying this test, the enforcing authority should consider whether all the following circumstances exist:*
>
> *(a) One or more members of the liability group have carried out a relevant action, and/or made a relevant omission ('the later actions'), either: (i) as part of the series of actions and/or omissions which amount to their having caused or knowingly permitted the presence of the contaminant in a significant contaminant linkage; or (ii) in addition to that series of actions and/or omissions.*
>
> *(b) The effect of the later actions has been to introduce the pathway or the receptor which form part of the significant contaminant linkage in question.*
>
> *(c) If those later actions had not been carried out or made, the significant contaminant linkage would either not have existed, or would not have been a significant contaminant linkage, because of the absence of a pathway or of a receptor.*

[548] 9 December 2015 cross-examination Jarrett.

(d) A person is a member of the liability group in question solely by reason of having carried out other actions or making other omissions ('the earlier actions') which were completed before any of the later actions were carried out or made.

7.59 For the purpose of this test:

(a) A 'relevant action' means: (i) the carrying out at any time of building, engineering, mining or other operations in, on, over or under the land in question; and/or (ii) the making of any material change in the use of the land in question for which a specific application for planning permission was required to be made (as opposed to permission being granted, or deemed to be granted, by general legislation or by virtue of a development order, the adoption of a simplified planning zone or the designation of an enterprise zone) at the time when the change in use was made.

(b) A 'relevant omission' means: (i) in the course of a relevant action, failing to take a step which would have ensured that a significant contaminant linkage was not brought into existence as a result of that action, and/or (ii) unreasonably failing to maintain or operate a system installed for the purpose of reducing or managing the risk associated with the presence on the land in question of the significant contaminant in the significant contaminant linkage in question.

……..

7.61 If all of the circumstances in paragraph 7.58 above apply, the enforcing authority should exclude any person meeting the description at paragraph 7.58(d) above.'[549]

6.6.6 In the 'Apportionment of Liability between Identified Class A Appropriate Persons' document (schedule 2 to the Remediation Notice)[550] the Council stated:

'The Council clearly intended the land to be used for residential development and obtained outline approval to establish the principle. Records indicate that the Council never had any intent to undertake such development itself and it was always its aim to sell on the land.

Applying the Exclusion Tests applicable to the Class A Liability Group it is possible that the Council may be excluded under the terms of Test 3 on the basis that information about the previous use of the

[549] CD1.5.
[550] CD6.8 p. 252.

site was contained in both the particulars of sale and the contract of sale indicating that the land was sold with knowledge. This view is reinforced by the fact that the purchaser of the land was required to demolish and clear the old gasworks following purchase. There is some uncertainty about the extent of detail provided in the sale accordingly the Council has not been excluded from the liability group under this test. Considering later exclusion tests it is considered that Test 6 is relevant. While the Council may have known about the previous use of the land and the potential contamination it did not undertake any direct significant actions that resulted in the introduction of pathways or receptors in the significant pollutant linkage. These actions were carried out by others who cleared the land, prepared it for development and built dwellings.

Excluded from liability pool under test 6

6.6.7 The appellant's primary case is that para. 7.58(a) is not met. The appellant has not caused or knowingly permitted the presence of B(a)P on site and therefore the Council cannot benefit from exclusion Test 6. Our submissions on this are set out above.

6.6.8 However, it is also clear that the Council's role in the development of the site means it cannot meet subsections (c) and (d) of para.7.58. The Council acquired the site under part V of the Housing Act 1957.[551] Under section 91 of that Act there is a duty on local authorities to consider the housing conditions and needs of their districts. Under section 92 local authorities have the power to provide accommodation through the erection of houses. Under section 96 the local authority has power to acquire land as a site for the erection of houses. However, under section 105 of that Act a local authority may sell land to any person for the purpose and under the condition that person will erect and maintain houses.

6.6.9 The purchase of the site by the Council under Part V of the Housing Act 1957 meant that it was inevitable that the site would be developed for housing. It appears as though the Council is now relying upon the absence of an explicit condition in the conveyance to McLean which required the building of houses. However, this does little to support their case. The fact is that the site was bought under Part V of the Housing Act 1957. It was unlawful for the Council to sell the site on without there being a requirement for housing to be built; that would be ultra vires. The Council granted itself outline permission on the site[552] and then sold it to McLean Homes Ltd (a house builder). Further, the particulars of sale as contained at Appendix IJ5 of Mr Jarrett's PoE make clear that the site was to be developed for housing. Under the heading 'Town planning and type of development' the particulars state:

[551] CD1.7
[552] CD4.1

'Outline planning permission has been obtained for residential development, in accordance with the enclosed plans.'

6.6.10 A fair reading of the situation makes it absolutely clear that the Council intended there to be housing on site and ensured that it was delivered by selling the site to McLean Homes.

6.6.11 Indeed, under cross examination Mr Jarrett agreed that under section 105 of the Housing Act 1957 the authority is selling land exclusively on the basis that it ends up as housing and it could not end up as anything else. He further accepted that the consequence of the Council acquiring the gasworks under Part V of the Housing Act 1957 was that housing was going to end up on it.

6.6.12 This was corroborated by the evidence of Mr Wielebski, he was asked that in a situation where a local authority acquired a site under statutory powers, granted itself outline permission for residential development and then sells it to McLean to what extent would there be the prospect of anything other than housing being built on site. Mr Wielebski replied that it would be very remote. He stated that McLean was a speculative house builder who would not have invested if there was an alternative use.

6.6.13 Scrutiny must also be given to the way in which the Council treated the site during their ownership. As has been set out above, the Council's case against the appellant rests, at least in part, on the alleged demolition of buildings and filling of 'voids' by them. It is clear from the evidence that the Council demolished at least one building and filled in at least one tank in 1971. [553] It is also clear, and only now accepted by the Council, that a number of buildings were demolished in between the cessation of gasworks operation and the appellant's ownership.[554] However, the Council does not accept that it is responsible for any more demolition than is referred to in the 4 May 1971 document. This approach to the evidence is again, unreasonable. The Council always assumes the worst in respect of McLean, and the best in respect of itself.

6.6.14 Prior to the opening of the Inquiry the stance of the Council was that the majority of buildings on site were demolished by the appellant. This was in the absence of any photographic or documentary evidence to support their assertion. This evidential leap is in marked contrast to the conclusions which the Council draws on its own role. In their case they will not draw any conclusion which is unsupported by definitive proof. This approach is unreasonable.

6.6.15 The Council therefore took a relevant action which ensured that the contaminant linkage came into force and/or made a relevant omission which, if not omitted, would have ensured that the contaminant linkage

[553] CD3.2
[554] 9 December 2015 accepted by Jarrett evidence in chief.

did come into existence, namely: (i) bringing about a material change of use of the site to residential use and (ii) failing to carry out any investigations or remediation or to undertake or ensure a clean up of the site which would have ensured that a significant contaminant linkage was not brought into existence.

6.6.16 Further, by securing the change of use of the site to a residential use, the Council introduced the receptor onto the site, namely residential housing. The appellant merely continued the process which had already been commenced by the Council. Had the appellant not constructed the houses, the site would still have been developed for housing and the contamination linkage would still have existed. The Council was a party to the making of the material change of use and has unreasonably excluded itself by confining consideration to what it terms 'direct significant actions', a term which does not appear in either the 2006 Guidance or the 2012 Guidance.

Apportionment

6.6.17 This section of our closing submissions relates to ground (e) of the appeal in that the Council failed to act in accordance with section 78F(6) and contained in section 7 of the 2012 Guidance, which explains how liability should be attributed and/or apportioned in circumstances where two or more persons are liable to bear responsibility for anything required to be done by way of remediation.

6.6.18 Section 78F(6) and (7) of the Act state:

> *'(6) Where two or more persons would, apart from this subsection, be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued for the purpose by the Secretary of State whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing.*
>
> *(7) Where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, they shall be liable to bear the cost of doing that thing in proportions determined by the enforcing authority in accordance with guidance issued for the purpose by the Secretary of State.'*

6.6.19 As has been stated above, the Council ought to be considered as an Appropriate Person under the Act. Therefore, in circumstances where the appellant is also found to be an Appropriate Person then the Council must bear the majority of the costs of remediation. It is the appellant's view that this should be 75% of the costs.

6.6.20 As has been set out above, the Council initiated the development of the site for housing by acquiring it under Part V of the Housing Act 1957 and

selling it on with planning permission for housing. Further, it owned the site for a significant period of time, whereas the appellant only owned the Fletcher land for a few months. The 2012 Guidance states:

> *'7.72 In cases where the circumstances in neither paragraph 7.69 nor 7.70 above apply, the enforcing authority should consider the nature of the activities carried out by the appropriate persons concerned from which the significant contaminant arose. Where these activities were broadly equivalent, the enforcing authority should apportion responsibility in proportion to the periods of time over which the different persons were in control of those activities. It would be appropriate to adjust this apportionment to reflect circumstances where the persons concerned carried out activities which were not broadly equivalent, for example where they were on a different scale.'*[555]
>
> *'7.73 Where the enforcing authority is determining the relative responsibilities of members of the liability group who have knowingly permitted the continued presence, over a period of time, of a significant contaminant in, on or under land, it should apportion that responsibility in proportion to: (a) the length of time during which each person controlled the land; (b) the area of land which each person controlled; (c) the extent to which each person had the means and a reasonable opportunity to deal with the presence of the contaminant in question or to reduce the seriousness of the implications of that presence; or (d) a combination of the foregoing factors.'*[556]

6.6.21 Corresponding Guidance in the 2006 document can be found at paragraphs D.83 and D.84 of that document.[557]

6.6.22 It is clear then that the majority of the burden of remediation ought to fall upon the Council.

6.6.23 It is also clear that there are two Appropriate Persons who cannot be 'found' in relation to the site[558]. These are Fletcher and the Gas Companies. Their role must also be taken into account in apportioning any liability to the appellant.

6.6.24 If the Secretary of State finds that gasworks waste was 'spread' around the site thereby causing contamination then she is asked to pay particularly close attention to the role of Fletcher. As has been set out above, the evidence suggests that it was in fact Fletcher who is likely to have played a more significant role in the movement of waste on site, in particular with regard to land to the east of the Tar Brook. This must be

[555] CD1.5 p. 444
[556] *Ibid.*
[557] CD1.3 p. 339
[558] P10.

taken into account when apportioning any liability of the appellant for remediation.

6.6.25 Further, and in any event, Fletcher developed 40% of the land subject to the notice. Paragraph 8.25 of the 2012 Guidance states:

> *'8.25 In some cases where a Class A person has been found, it may be possible to identify another person who caused or knowingly permitted the presence of the significant contaminant in question, but who cannot now be found for the purposes of treating that person as an appropriate person (as might be the case if a company has been dissolved). In such cases, the enforcing authority should consider waiving or reducing its costs recovery from a Class A person if that person demonstrates that:*
>
> *(a) another identified person, who cannot now be found, also caused or knowingly permitted the significant contaminant to be in, on or under the land; and*
> *(b) if that other person could be found, the Class A person seeking the waiver or reduction of the authority's costs recovery would either: (i) be excluded from liability by virtue of one or more of the exclusion tests set out in the Section 7 of this Guidance; or (ii) the proportion of the cost of remediation which the appropriate person has to bear would have been significantly less, by virtue of the guidance on apportionment set out in Section 7.'*[559]

6.6.26 Paragraph 7.71 of the 2012 Guidance states that:

> *'If it is deciding the relative quantities of contaminant which are referable to different persons, the enforcing authority should consider first whether there is direct evidence of the relative quantities referable to each person. If there is such evidence, it should be used. In the absence of direct evidence, the enforcing authority should see whether an appropriate surrogate measure is available. Such surrogate measures can include:… (b) the area of land which each person controlled; (c) the relative areas of land on which different persons carried out their operations; or (d) a combination of the foregoing factors.'*[560]

6.6.27 In respect of the land developed by Fletcher, the Council originally decided that the appellant should be liable for 60% of the remediation and Fletcher for 40%. In circumstances where both are appropriate persons (albeit Fletcher cannot be found) this apportionment should stand and the appellant held liable for only 60% of the remediation costs.

[559] CD1.5 p. 453
[560] CD1.5 p. 444

6.6.28 In circumstances where the Council, Fletcher and the appellant are found to be appropriate persons then the appellant should be liable for only 15% of the remediation. As has been set out above, where the Council and the appellant are both appropriate persons then the appellant should be liable for only 25% of the remediation. Where Fletcher is also an Appropriate Person then they should take on 40% of the appellant's 25%. The effect of this would be to leave the appellant with 15% liability.

6.6.29 The final Appropriate Persons to consider are the Gas Companies. It is clear from the evidence before the Inquiry that the Gas Companies caused B(a)P to be present in zones 4 and 7. They may not have known what it was, but that doesn't matter. They clearly had the opportunity to remove it after decommissioning. Relevant paragraphs of the 2012 Guidance state:

> *'7.67 In assessing the relative responsibility of a person who has caused or knowingly permitted the entry of a significant contaminant into, onto or under land (the 'first person') and another person who has knowingly permitted the continued presence of that same contaminant in, on or under that land (the 'second person'), the enforcing authority should consider the extent to which the second person had the means and a reasonable opportunity to deal with the presence of the contaminant in question or to reduce the seriousness of the implications of that presence. The authority should then assess the relative responsibilities on the following basis: (a) if the second person had the necessary means and opportunity, they should bear the same responsibility as the first person; (b) if the second person did not have the means and opportunity, their responsibility relative to that of the first person should be substantially reduced; and (c) if the second person had some, but insufficient, means or opportunity, their responsibility relative to that of the first person should be reduced to an appropriate extent.'*
>
> *'8.25 In some cases where a Class A person has been found, it may be possible to identify another person who caused or knowingly permitted the presence of the significant contaminant in question, but who cannot now be found for the purposes of treating that person as an appropriate person (as might be the case if a company has been dissolved). In such cases, the enforcing authority should consider waiving or reducing its costs recovery from a Class A person if that person demonstrates that:*
>
> *(a) another identified person, who cannot now be found, also caused or knowingly permitted the significant contaminant to be in, on or under the land; and*
>
> *(b) if that other person could be found, the Class A person seeking the waiver or reduction of the authority's costs recovery would either: (i) be excluded from liability by virtue of one or more of the exclusion tests set out in the Section 7 of this Guidance; or (ii) the*

proportion of the cost of remediation which the appropriate person has to bear would have been significantly less, by virtue of the guidance on apportionment set out in Section 7.'

6.6.30 Although the appellant had some opportunity to remove the B(a)P during its ownership of the site, this was limited. Particularly this is the case with regard to the land which was sold to Fletcher. Further, the extent of the appellant's knowledge of B(a)P and/or contamination on site is relevant here. Both parties agree that there is no evidence of 'gross contamination' on site. Therefore, a house builder in 1972 simply would not have known that the offending substance was present on site. This is contrary to the gas companies who operated the gasworks and clearly knew the nature of the waste which they were dumping on site or which may have leaked into the ground from tanks or pipes. It is therefore appropriate to reduce the appellant's liability on that basis.

6.6.31 This is a matter not susceptible to being dealt with in evidence and neither party sought seriously to do so. Each produced a table setting out its suggested allocation under various scenarios which was presented at the conditions session. It is not a matter on which detailed analysis particularly helps, as it is an exercise of judgement in the light of the very broad principles in the Guidance. The Inspector and Secretary of State are asked to note the general points made above, and the content of the table produced.

Grounds (m) and (n)

6.6.32 Grounds (m) and (n) of Regulation 7 state:

'(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;

(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.

6.6.33 Relevant parts of section 78N of the Act state:

> 1) *Where this section applies, the enforcing authority shall itself have power, in a case falling within paragraph (a) or (b) of section 78E(1) above, to do what is appropriate by way of remediation to the relevant land or waters.*
>
> 2) *Subsection (1) above shall not confer power on the enforcing authority to do anything by way of remediation if the authority would, in the particular case, be precluded by section 78YB below from serving a remediation notice requiring that thing to be done.*
>
> 3) *This section applies in each of the following cases, that is to say-*
>
> *……*
>
> *(e) where the enforcing authority considers that, were it to do some particular thing by way of remediation, it would decide, by virtue of subsection (2) of section 78P below or any guidance issued under that subsection, -*
>
> I. *not to seek to recover under subsection (1) of that section any of the reasonable cost incurred by it in doing that thing; or*
>
> II. *to seek to recover only a portion of that cost…'*

6.6.34 Subsections (1) and (2) of section 78P states:

> *'(1) Where, by virtue of section 78N(3)(a), (c), (e) or (f) above, the enforcing authority does any particular thing by way of remediation, it shall be entitled, subject to sections 78J(7) and 78K(6) above, to recover the reasonable cost incurred in doing it from the appropriate person or, if there are two or more appropriate persons in relation to the thing in question, from those persons in proportions determined pursuant to section 78F(7) above.*
>
> *(2) In deciding whether to recover the cost, and, if so, how much of the cost, which it is entitled to recover under subsection (1) above, the enforcing authority shall have regard—*
>
> *(a) to any hardship which the recovery may cause to the person from whom the cost is recoverable; and*
>
> *(b) to any guidance issued by the Secretary of State for the purposes of this subsection.'*

6.6.35 These grounds can be dealt with together and briefly as they are largely parasitic on other grounds raised by the appellant. Ground (n) is based on

the Council's determination that the appellant should bear 100% of liability, including for an area which the appellant did not develop, and notwithstanding the fact that there are other causers/knowing permitters which cannot be found.[561] Our submissions in this regard are set out above and will not be repeated here. In holding the appellant 100% liable the Council has acted unreasonably and contrary to the 2012 Guidance (in particular: paras. 8.5, 8.6 and 8.25-8.26). It is not a fair and equitable outcome.

6.6.36 Further, the consequence of reducing the liability of the appellant in accordance with the Guidance is that the Council then has power to undertake the remediation itself under section 78N(3), which engages Ground (m).

6.7 Are the remediation requirements proposed by the Council reasonable?

6.7.1 In summary the remediation strategy proposed by the Council, in the Remediation Notice, raises the following concerns[562].

1) An options appraisal to evaluate the most sustainable remediation solution has not been undertaken, including separate remediation of the land developed by the appellant and Fletcher;
2) There is some confusion over the depth required for remediation and in any event BRE Guidance suggests that remediation greater than 600 mm in depth would not be required;
3) The Council has not identified a clean-up target that needs to be achieved;
4) In the absence of any exposure assessment, there has been no evaluation of the different remedial requirements appropriate for front gardens, rear gardens and areas of public open space; and,
5) Taking account of the time required for consultation with residents, the Council has not allowed sufficient time for the remedial works.

6.7.2 In addition to our written submissions[563] on this matter, oral submissions were made in the 'notice modifications session' held by the Inspector on 17 December 2015.

6.8 Discretion not to quash

6.8.1 Although not part of the Council's statement of case or any part of their evidence before the Inquiry, the Council now appear to be putting forward a case that the Secretary of State should use her discretion not to quash the notice.

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[561] Fletcher for the land which it developed, Willenhall Gas Company for the period from 1902-1948, and West Midlands Gas Board for the period 1948-1965.
[562] P8 paras 9.2-9.3.
[563] P8, ID22.

6.8.2 The appellant notes the lateness of the argument and that it is clearly the late realisation of the weakness of the Council's case. The appellant therefore makes the following submissions on this argument.

6.8.3 The portion of the 'Judicial Review Handbook' (Michael Fordham QC, 2012) which has been submitted by the Council relates to the discretion of judges in judicial review proceedings. That is not the situation we have here. Here, we have a Council who is required by law to comply with a clear statutory test and clear statutory guidance. That has clearly not been done. Indeed, the discretion argument only arises if the appeal has succeeded.

6.8.4 The appellant can think of no reason why the Secretary of State should, once having found that there has been unlawful activity on behalf of the Council, nevertheless uphold the notice in any way for the following reasons:

1) There is a clear public interest in the local authority being required to follow the law and statutory guidance. To 'let them off the hook' would be patently unlawful and would be a decision which would no doubt be amenable to legal challenge;

2) The treatment of affected residents has been appalling by the Council. The fact is, that if the notice is upheld there are a number of residents who will be required to subject their property to remediation (which they may have to pay for) without any sound scientific basis that their gardens are contaminated;

3) The *ex post facto* risk assessment of Dr Cole does not support the Council's case for determining the land as contaminated. As we have outlined above, that risk assessment and the consequent weighing of social and economic facts left out of account extremely weighty material considerations. These flow from the impact upon residents of having their land determined as contaminated. They have been all too obvious from the evidence before the Inquiry. Particularly that from Mrs Fullwood.

4) If the Council acted improperly in determining the land to be contaminated, the Remediation Notice should be quashed. If there is still cause for concern the Council should investigate properly and undertake a proper risk assessment. This would be a salutary lesson for the Council.

6.9 **Conclusions**

6.9.1 Before concluding, two general matters are noted.

Quality of evidence

6.9.2 There was a striking disparity between the quality of the evidence offered by each side.

6.9.3 For the Council, Mr Smart lacked credibility, simply in terms of his competence as the author or supervisor of the AECOM reports. He really did not know what he was doing in terms of investigating a gasworks site, perhaps not surprisingly given that he is a hydrogeologist with minimal experience of gasworks site investigation. It is a great pity the Council did not employ a true specialist.

6.9.4 Mr Jarrett was simply seeking to defend his original flawed decision and was willing to say more or less anything which he thought might help him do so. It is ironic that the Council criticised Mr Wielebski for saying that he could not be definitive in relation to some matters. That shows that he is competent and his evidence is trustworthy. The same cannot be said in relation to Mr Jarrett.

6.9.5 Dr Cole came in very late to try and justify the decision. He had no idea of his responsibilities as an expert witness, and has shifted his opinion with the wind.

6.9.6 By contrast, on the question of gasworks and gasworks site investigation and remediation, the appellant provided two genuine experts, a world class expert in Dr Thomas and someone with enormous practical experience in gasworks site investigation in Mr Morton. The contrast in their demeanour and evidence with the Council witnesses was stark. They assisted the Inquiry with careful and considered answers. Their evidence and credibility was not impacted in cross examination.

6.9.7 Whilst the Council has suggested that in cross-examination Mr Morton and Mr Witherington 'betrayed their ignorance of a relevant legal test in this case', the point was only put to Mr Witherington and neither of them are experts in the law. They both assisted the Inquiry with credible answers.

6.9.8 Mr Wielebski has possibly a unique level of experience on house building at the relevant period. Equally he was a helpful, objective witness and the Council has presented no evidence to contradict that which was contained in his proof.

6.9.9 The appellant takes great exception to the Council's suggestion in closing that Mr Witherington is 'well known in the industry for a particular view in relation to whether SPOSH can be given a number'. It is not clear where

that has come from, as it was not put in cross-examination and mis-represents Mr Witherington's approach. He says that SPOSH is an output of a risk assessment process in the form of a number range. Mr Witherington was a highly impressive witness. He knew his subject thoroughly and was not prepared to stray outside his limits of expertise. His evidence, if anything, grew stronger under cross examination.

6.9.10 Both Mr Witherington and Mr Morton are Specialists in Land Condition (SiLC), a demanding qualification held by relatively few people, as explained by Mr Morton. This is the most relevant and apposite qualification to opine in this appeal. Dr Cole may be an expert risk assessor, but he is not a SiLC. It showed.

Reasonableness

6.9.11 In its legal submissions, and at various points in the Inquiry, the Council has sought to shelter behind the word 'unreasonably' in the 2006 Regulations. It appears to suggest that this gives a Council carte blanche to take decisions based on inadequate evidence and false suppositions, provided it felt it had reached the right answer. That is just absurd. It may be agreed, readily, that views may differ on whether a SPOSH exists or who in 1972 did what. However, such decisions must if they are going to be taken reasonably be taken on the basis of proper investigation and analysis of the evidence.

6.9.12 What the word 'reasonably' does indicate is that the test is not whether with hindsight the decision was correct, but whether it was taken reasonably on the basis of the information which the Council had. This appeared to dawn on Dr Cole in cross examination. Later rationalisation of the decision is not relevant.

6.10 **Summary**

6.10.1 In summary therefore, the Council has determined a substantial number of people's homes and gardens to be contaminated without proper data, without proper investigation, and without proper risk assessment. This unfortunately has had a devastating impact on their lives.

6.10.2 Further, the Council has decided, again without proper investigation and on the basis of unsupported theories to regard Jim 2 as entirely liable, and itself as excluded from liability.

6.10.3 This is a sorry, and in many respects shabby, saga. The only proper course is to quash the notice and allow the Council, if it sees fit, to start to undertake a proper assessment of zones 4 and 7.

6.10.4 A final word on the residents. They have been caught up in the middle of this dispute, with the most awful personal and financial consequences.

Their misery needs to be brought to an end. We are confident the Inspector will produce a careful and reasoned report as soon as possible. We hope that it will contain a strong recommendation to the Secretary of State that her decision be an urgent priority and produced as soon as possible.

7 THE CASES FOR OTHER PARTIES

The gist of the material points made by the other interested party who appeared at the Inquiry in their written and oral submissions were:

7.1 *The case for Mrs B Fullwood*

7.1.1 I have lived in Kemble Close, which is in zone 7, for over 34 years.

7.1.2 The determination that the land is contaminated has had a significant detrimental impact on the value of our homes. A number of residents who wish to downsize or move away have been unable to sell their properties. We feel like our freedom to move has been taken away and we are prisoners in our own homes. Furthermore, the situation we find ourselves in discourages us from: investing in property maintenance and improvements, such as extensions; and, making use of our gardens, for example to grow fruit and vegetables, as many used to, and allowing children to play in them. Residents just want the soil removed as quickly as possible.

7.1.3 Furthermore, I am aware that 9 residents of Kemble Close are suffering or have suffered from cancer, the impact of which can have severe consequences not only for the sufferer, but also their families[564]. Whilst I cannot prove a link, I wonder whether the number of cancer sufferers may have been lower, if the Council had cleared the land when they first became aware of the contamination and then claimed the costs back from those who are responsible.

7.1.4 It is also a worry that utilities companies, during the course of their work, routinely dig up local paths and leave soil exposed for periods of time without apparently taking any precautions.

The gist of the material points made by the other interested party who did not appear at the Inquiry in their written submissions were:

7.2 *The case for Aggregate Industries UK Limited*

7.2.1 Aggregate Industries UK Ltd (Aggregate Industries) is the parent company of Fletcher Builders Limited (Fletcher) a former subsidiary company of Aggregate Industries which was dissolved on 21 October 2014.

7.2.2 The Council served a Notice of Identification of Contaminated Land on Fletcher in August 2012 as a potential Class A person, but Fletcher was not identified as an 'Appropriate Person' in the Remediation Notice.

[564] ID16b.

Schedule 2 to the Remediation Notice identified the Council itself as a Class A Appropriate Person, but excluded it from the liability pool by the Application of Test 6 in the 2012 Guidance. Schedule 2 to the Remediation Notice also identified the appellant as a Class A Appropriate Person, and assessed the appellant as 100% liable for properties built by them and 100% liable for what they prepared for development and sold on to others, as the purchaser and developer of that land could not be found.

7.2.3 Ground (d) of the appellant's Grounds of Appeal alleges that the Council has unreasonably failed to determine that other persons were Appropriate Persons in relation to the matters required by the Notice to be done by way of remediation. In particular paragraph 31(e) of the appellant's Grounds of Appeal alleges that the Council ought to have identified Fletcher as another Appropriate Person within Class A. These representations set out the position of Aggregate Industries on the submissions made by the appellant in that regard.

7.2.4 It is the submission of Aggregate Industries that the reference to section 78F(4) apparently intended by paragraph 47 of the appellant's Grounds of Appeal is misconceived, because the appellant was correctly identified by the Council as an Appropriate Person under the provisions of section 78F(2) of the Act in respect of the contaminated land in question, namely the land which is the subject of the Remediation Notice. Accordingly, it is the submission of Aggregate Industries that section 78F(4), which indicates that the owner or occupier of the land must be treated as an Appropriate Person if others cannot be found, has no application in this case.

7.2.5 It is also implied, rather than expressly alleged, by paragraph 46 of the appellant's Grounds of Appeal, that Fletcher should have been treated as an Appropriate Person when the Council served the Remediation Notice. That paragraph expressly asserts that it was unreasonable of the Council to exclude Fletcher from the group of such persons without first making an application to the Court. Aggregate Industries submit that:

1) The appellant was rightly determined by the Council to be an Appropriate Person in respect of the contaminated land to which the Remediation Notice relates;
2) Fletcher should not have been treated for the purposes of the Remediation Notice as an Appropriate Person in respect of that land;
3) It was appropriate and reasonable for Aggregate Industries to seek the dissolution of Fletcher on 21 October 2014; and,
4) It was entirely reasonable and appropriate for the Council to exclude Fletcher from the group of Appropriate Persons after it had been so dissolved.

7.2.6 In the section of schedule 2 (Remediation Requirements) to the Remediation Notice on 'Apportionment of liability between Identified Class A Appropriate Persons', the Council sets out the view that the appellant

was both a 'causer' and a 'knowing permitter' of the presence of the relevant substances by reason of which the contaminated land in question is such land.

7.2.7 It is evident from the terms of the contract of sale dated 14 January 1972 between the appellant (then known as McLean Homes (Midland) Limited) and the Council that under paragraph 9 of the schedule to that Agreement the appellant was expected to demolish the gasworks at the site. The significance of this is that it is likely that in demolishing the gasworks the appellant caused the relevant substances to be in , or under land at the site or to escape from land at the site and would thus be an Appropriate Person as a 'causer' under section 79F(2) of the Act. Support for the view that this in fact occurred can be obtained from technical reports commissioned by the Council:

1) The AECOM Sensitivity Analysis and Supporting Data report dated 4 March 2013 notes that 'the depth profile assessment shows that there is no discernible decrease in B(a)P concentration with an increase in sample depth. This supports the view that during the redevelopment of the site, the gasworks waste was probably mixed with 'clean' natural material and spread across the site as it was levelled and prepared for development; resulting in heterogeneous made ground across the whole development area'.
2) This is reiterated in the July 2011 AECOM report which states that 'it is probable that during the redevelopment of the area, contaminated material stockpiled on the gasworks site was spread across the development area to achieve the required ground levels, such that contaminated ground is not confined to discrete areas and but [sic] now may be present outside the footprint of the former gasworks.'
3) Page 17 of the AECOM Phase II Contaminated Land Risk Assessment dated May 2009 also points out that 'Generally B(a)P concentrations are lower in samples recovered from locations further away from zone 7, suggesting waste stock piled in the zone 7 area was spread across the site during redevelopment works.'

7.2.8 In addition, it would appear that the appellant is also a 'knowing permitter' of the presence of the relevant substances. This is on the basis that it purchased the site on 29 February 1972 from the Council and therefore must have seen and responded to the Council's particulars of sale dated July 1971 which advertised / requested offers for the relevant land and warned against the unsuitability of some parts of the land for building. In addition clause 1 of the Schedule to the contract dated 14 January 1972 from the Council to the appellant states '*In preparing a layout developers will bear in mind that some part of the land comprising the parts of the former Gasworks may be unsuitable for building*' and '*the purchasers will be required to demolish the gasworks*'. Finally the appellant's planning permissions dated 2 February 1972 and 8 November 1972 refers to the 'Gasworks Site'.

7.2.9 It would therefore appear that the appellant was rightly determined to be a Class A Appropriate Person, with reference to the 2012 Guidance, by virtue of section 78F(2) of the Act.

7.2.10 In respect of causation of the presence of the relevant substances, it is clear from the history of Fletcher's involvement in the site, which was subsequent upon the conveyance of land at the site to it under a transfer dated 6 June 1972, that the company had no involvement in originally causing the presence of the relevant substances at the site. It is also evident from what is said above regarding the responsibility of the appellant for spreading B(a)P around the site, and the fact that Fletcher bought from the appellant in 1972 only a portion of the zone 7 area referred to in the AECOM report quoted from above, that it is unlikely that Fletcher had any role in the spread of B(a)P around the site.

7.2.11 It is also unlikely that Fletcher could properly have been regarded as a 'knowing permitter' of the presence of the substances. It seems unlikely that Fletcher would have seen the particulars of sale dated July 1971 which related to the previous sale of the site by the Council to the appellants. There is no evidence suggesting that the particulars of sale, contract or transfer from the appellants to Fletcher make any reference to the site as a gasworks or to its unsuitability for building. The planning permission obtained by Fletcher makes no reference to gasworks, and contains no conditions relating to remediation requirements. Accordingly there would appear to be no evidence that Fletcher was aware of the presence of the contaminating substances during its period of occupation of the site.

7.2.12 Furthermore, it would seem likely that if Fletcher had become aware of the presence of B(a)P during the period of that occupation of the site, it would have been able to benefit from Exclusion Test 5 under the 2012 Guidance, on the basis that the appellant was responsible for the escape of B(a)P from material described as stockpiled within zone 7 into a wider area including the land owned by Fletcher.

7.2.13 The Council make the observation in Schedule 2 to the Remediation Notice that the appellant by building dwellings, introduced pathway and receptors, thus completing the significant pollutant linkage. This would only be relevant in respect of Fletcher if they were also a member of the liability group by reason of having caused or knowingly permitted the presence of the relevant substances. As set out above this would not appear to be the case.

7.2.14 Given that it is self-evident that Fletcher was not an owner or occupier of the relevant land at the time of the service of the Remediation Notice, it follows from the above that Fletcher should not have been treated as an Appropriate Person for the purposes of that notice.

7.2.15 It is the general practice of Aggregate Industries, as is the case with all

comparable large commercial organisations, to procure the removal from the register of subsidiary companies which have permanently ceased trading, in order to save the unnecessary costs of maintaining such companies on the register, and because it is undesirable in the general public interest to keep companies on the register where there is no prospect of further trading. For example, in 2011 24 of Aggregate Industries' dormant subsidiary companies were struck off, in 2012, 25, and in 2013, 30. Following the development of the site by a subsidiary company in the Aggregate Industries group, and the disposal of properties built on the site, it is common for the subsidiary to have holdings only in respect of vestigial common parts of the development, which have little or no market value. Nevertheless, a check is made before each application for the removal of a company from the register, to ensure that no registered titles remain listed in the company.

7.2.16 In the case of Fletcher the company had long been dormant, and it had been the intention of Aggregate Industries for some time that the company would in due course be removed from the register. Moreover, it had no assets of economic value, and accordingly there would be no transfer of value to Aggregate Industries on the dissolution of the company. Accordingly, the company had been placed on the programme established by Aggregate Industries for applications to have its dormant companies removed from the register.

7.2.17 Aggregate Industries removed the company from that programme when informed that Fletcher had been identified by the Council as a potential Appropriate Person. However, they were subsequently advised that in view of the matters set out above, it was unlikely that it would actually be determined to be an Appropriate Person. Furthermore, since the company had effectively no assets at the time of dissolution, it was likely that the Council would not seek to recover costs of remediation from Fletcher on grounds of hardship, given its lack of assets, and would therefore be precluded by section 78H(5) of the Act from serving a remediation notice. In addition, as a practical matter, no useful purpose would be served in requiring a company with no assets to carry out remediation.
Following the lapse of some time without the service of any Remediation Notice on the company, it therefore seemed appropriate and reasonable for Aggregate Industries to seek the removal of Fletcher from the register, which was effected on 21 October 2014.

7.2.18 Prior to the service of the Remediation Notice, the Council had been made aware by correspondence from the solicitors acting for Aggregate Industries, of the dissolution of Fletcher, and of the company's lack of assets prior to dissolution. That correspondence, and previous correspondence, had also raised most of the points set out above on the more general propriety of serving a remediation notice on Fletcher had it remained on the register. Against that background, it must also have been evident to the Council that no useful purpose could have been served by an application under section 1029 of the Companies Act 2006 to restore Fletcher to the register, since it would have been doubtful whether a remediation notice could properly have been served, and in any event

there would have been no assets which could then have been restored to the company, by further proceedings, for the purpose of putting it into a position to be able to comply with the requirements of a remediation notice. It was therefore entirely appropriate and reasonable for the Council to take the view that Fletcher could not be found.

8 INSPECTOR'S CONCLUSIONS

Bearing in mind the submissions that I have reported, I have reached the following conclusions, references being given in square brackets [] to earlier paragraphs where appropriate.

8.1 Background

8.1.1 Having acquired land including the appeal site in 1892, the Willenhall Gas Company constructed and operated the gasworks until it was nationalised and became vested in the West Midlands Gas Board. The manufacture of gas ceased in 1957 and the site was then used for a number of years as a gas holder station, closing around 1965. In 1965 the wider area was acquired by the Urban District Council of Willenhall, the predecessor of Walsall Metropolitan Borough Council, for the purposes of redevelopment for housing. In February 1972 the Council sold the appeal site together with other land to the appellant, with the benefit of an outline planning permission for residential development. The appellant subsequently transferred part of the appeal site, that which contains Kemble Close, and other land to E Fletcher Building Limited (Fletcher) in June 1972. Residential development of the appeal site followed[565].

8.1.2 In 1993 the appellant changed its name from Mclean Homes Midland Limited to Jim 2 Limited [6.2.13]. As a result of a series of mergers, in 1988 Fletcher became part of the Aggregate Industries Group [6.2.14].

8.1.3 In 2007 the Council commissioned Faber Maunsell AECOM (AECOM) to investigate the housing estate built on the former Willenhall Gasworks site, for the purposes of identifying contamination [5.2.4.4]. Following those investigations, on the 27 March 2012 the Council determined the land within zones 4 and 7 to be contaminated land[566].

8.2 Legislative framework

8.2.1.1 The legislative framework is set out in Part IIA of the Environmental Protection Act 1990[567] (the Act) and the Contaminated Land (England) Regulations 2006[568] (the 2006 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. Of the possible grounds of appeal cited within Regulation 7 of the 2006 Regulations, the appellant cites: (a)(i) and (ii); (c); (d); (e); (n)(i) and (ii); (m); and, (b)(i), (ii) and (p).

[565] ID11.
[566] ID11.
[567] CD1.1.
[568] CD1.2.

8.3 **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 of the land to which the notice relates as contaminated land'

8.3.1 'Contaminated land' is defined in section 78A(2) of the Act as being '*any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that – (a) significant harm is being caused or there is a significant possibility of such harm being caused*'. It is also provided that in '*determining whether any land appears to be such land, a local authority shall, subject to subsection (5) below, act in accordance with guidance issued by the Secretary of State in accordance with section 78YA below with respect to the manner in which that determination is made*' [6.3.3-4].

8.3.2 The phrase above, *'any land which appears to the local authority'*, implies a degree of discretion [5.2.1]. This is confirmed by Defra's non-statutory *Guidance on the legal definition of Contaminated Land (July 2008)* (the 2008 Guidance), which indicates that the term '*contaminated land*' is defined according to whether contamination poses a significant level of risk '*and local authorities are given considerable discretion to decide whether such risks exist having studied the details of each specific case*' [4.3.22, 5.2.3.2-3]. However, it is clear, with reference to the Act, that this discretion is to be exercised by the Council having regard to statutory guidance.

8.3.3 Furthermore, the 2008 Guidance indicates that '*If someone were to challenge a local authority's decision, the decision is likely to be legally robust provided the authority can demonstrate that it acted reasonably in accordance with the law. For a challenge to be successful the person would have to demonstrate that the authority had behaved unreasonably (i.e. not just that a reasonable alternative method of making a decision could have yielded a different result)*' [5.2.3.2].

8.3.4 Ground of appeal (a) is that, in determining whether any land to which the notice relates appears to be contaminated land, the Council (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 of the land to which the notice relates as contaminated land [5.1.12(3)][569].

8.3.5 ***Statutory Guidance***

8.3.5.1 Shortly after the Council's determination in March 2012, Defra's *Environmental Protection Act 1990: Part 2A Contaminated Land Statutory*

[569] CAB1 para 6.57(a)(ii).

Guidance, April 2012 (the 2012 Guidance) replaced Defra's *Circular 01/2006 Environmental Protection Act 1990: Part 2A Contaminated Land, September 2006* (the 2006 Guidance) [6.1.12]. However, there is no dispute that at the time when the Council determined the land to be 'contaminated land' for the purposes of section 78A(2), the statutory guidance was the 2006 Guidance [6.3.14-15, 6.4.4]. The Council has confirmed that when making its determination, it had used the then current 2006 Guidance, not least as Defra had indicated that local authorities should continue to have regard to current documentation until such time as replacement documents were ratified and published [5.2.5.57]. I consider that it was this Guidance, rather than the 2012 Guidance, that the Council was required to act in accordance with under the terms of section 78A of the Act [5.2.5.52-55, 6.3.14].

8.3.5.2 The Council has indicated that, before making its determination, it was aware of the content of the emerging 2012 Guidance and had given some consideration to it[570] [5.2.5.59]. I have no reason to believe that that was not the case, notwithstanding those considerations were not documented at the time. In any event, insofar as the emerging 2012 Guidance was also a material consideration at the time the determination was made, to my mind, the weight afforded to it would be limited, as it had not been ratified, and the current 2006 Guidance would take precedence for the reason set out above [5.2.5.55, 58]. Under these circumstances, I am not convinced that having regard to the emerging guidance would or should of itself have resulted in a different decision by the Council as regards determination of the land as contaminated [5.2.5.60, 5.2.6.1(6)(f), 6.4.104-106]. Given the Council considered it was at the point, on 27 March 2012, at which it could make a decision as well as the Council's duty under section 78B to give notice of the identification of contaminated land, it was not unreasonable to proceed to determination without further delay [5.2.5.60-62, 65, 6.4.5, 6.4.99-101]. I consider that this was the case, notwithstanding the Council is likely to have been aware that the emerging 2012 Guidance would be likely to be ratified within a short period, as it was being advised by an acknowledged expert in contaminated land and the emerging guidance was at an advanced stage [5.2.5.56-57, 6.4.102-104].

8.3.5.3 The issuing of the 2012 Guidance in April 2012 did not give rise to a legal obligation on the Council to review the determination it had already made [5.2.4.17, 5.2.5.63].

The 2006 Guidance

8.3.5.4 Under the terms of the 2006 Guidance there are 2 steps in applying the definition of contaminated land[571]:

1) The first step is to determine whether there is a pollutant linkage, between a contaminant, a pathway and a receptor.

[570] Day 2 evidence in chief of Mr Jarrett.
[571] CD1.3 paras A11, A19 and B45.

2) The second step is to determine (a) whether such a pollutant linkage exists in respect of a piece of land; and, (b) whether the pollutant linkage presents a significant possibility of significant harm (SPOSH) being caused to that receptor [4.3.26-27, 6.4.2-3) This will be the case where:

    a. the local authority has carried out a scientific and technical assessment of the risks arising from the pollutant linkage, undertaken according to relevant, appropriate, authoritative and scientifically based guidance on such risk assessments;

    b. that assessment shows that there is a SPOSH; and,

    c. there are no suitable and sufficient risk management arrangements in place to prevent such harm.

8.3.5.5 Table A of Annex 3 to the 2006 Guidance identifies descriptions of harm to human beings that are to be regarded as 'significant harm'. These include disease, which for these purposes, is to be taken to mean an unhealthy condition of the body or a part of it and can include, for example, cancer[572]. The 2006 Guidance indicates that, in relation to human health effects arising from intake or other direct bodily contact with a contaminant, the local authority should regard as a significant possibility any possibility of significant harm which meets the following conditions

- *'If the amount of the pollutant in the pollutant linkage in question, which the human receptor in that linkage might take in or might otherwise be exposed to, as a result of the pathway in that linkage, would represent an unacceptable intake or direct bodily contact, assessed on the basis of relevant information on the toxicological properties of that pollutant.'*

8.3.5.6 Defra's non-statutory 2008 Guidance on the Legal Definition of Contaminated Land (2008 Guidance)[573], indicates the following:

'23. In the absence of a practicable number-based threshold option (and in recognition of the site-specific nature of risks), Part 2A takes an approach where decisions on whether risks constitute SPOSH must be taken on a case-by-case basis by local authorities. In essence, a local authority must do this:

1) By conducting a science-based risk assessment which takes account of toxicological information, and site-specific local circumstances.

2) By making a judgement on whether in the view of the local authority there is a SPOSH. The judgement should be firmly

[572] CD1.3 Annex 3 Table A-Categories of significant harm.
[573] CD 1.10

based on the science-based risk assessment. It should also take due account of the purpose of Part 2A.'

8.3.5.7 Footnote 10 which is attached to para 23(ii) states:

'The *statutory guidance requires that local authorities' decisions on what is an 'unacceptable intake' (i.e. SPOSH) must be assessed on the basis of toxicological risk assessments. Decisions cannot be based solely on such risk assessments because, whilst they can inform an authority about the* possibility of significant harm *at a site, risk assessments cannot answer the policy question about what is acceptable or unacceptable. Thus, in Defra's view, decisions should be firmly based on scientific risk assessment, but they should also take account of the purpose of Part 2A and the local context in which the decision is being made.'*

8.3.6 ***Potential pollutant linkage and possibility of significant harm***

8.3.6.1 The Council's *Record of Determination* (RoD) cites the existence of the following pollutant linkage as the basis for determination of the land as contaminated: pollutant - Benzo(a)pyrene (B(a)P) present in soils; pathways – direct soil/dust ingestion, outdoor dermal uptake from soil contact and outdoor dust inhalation; and, receptor – young female child potentially resident within the determined area[574]. The AECOM conceptual model from which this assessment is drawn, also identifies the soils as being made ground, lacking in homogeneity[575].
The existence of this pollutant linkage and the heterogeneous character of the made ground are not disputed by the appellant [5.2.5.51].

8.3.6.2 B(a)P is a persistent organic pollutant, which has been designated by the International Agency Research on Cancer as a Human Carcinogen (Group 1), which means that the evidence is sufficient to determine that the agent is carcinogenic to humans[576]. In relation to genotoxic carcinogens such as this, for which there is no identified toxicity threshold, it is generally assumed by regulators that any exposure, no matter how small, will carry some level of risk, the level increasing with increased exposure [5.2.4.6]. With reference to Table A of Annex 3 to the 2006 Guidance, the threat to human beings posed by B(a)P falls within the category of 'significant harm'[577].

8.3.6.3 I conclude it is clear that there is a pollutant linkage with a possibility of significant harm.

[574] CD6.5A Appendix 1 Schedule 2 para 1.
[575] P7 para 4.16, CD16.1.7 para 5.4.3, see also ID11 paras 4.16-17.
[576] ID11 para 4.5
[577] CD1.3 Annex 3 Table A section 1.

8.3.7 ***Use of guideline values***

8.3.7.1 The Council acknowledges that a 'risk assessment' for these purposes can cover a wide range of tasks from devising a conceptual model, identifying pollutant linkages, screening data against guideline values, right up to a detailed quantitative risk assessment [5.2.6.1(2)]. In the context of carrying out the required scientific and technical assessment of the risks, the 2006 Guidance indicates that to simplify such an assessment of risks, the local authority may use authoritative and scientifically based guideline values for concentrations of the potential pollutants in, on or under the land in the pollutant linkages of the type concerned [5.2.4.9]. However, the 2008 Guidance confirms[578] that whilst assessors can use SGVs, such as SSACs, as screening thresholds for Part IIA decisions on SPOSH, if the SGV is exceeded, the assessor will usually need to conduct a detailed quantitative risk assessment (DQRA) to discover whether there is a SPOSH [5.2.6.1, 5.2.7.7(4)]. Whether or not SPOSH exists will depend on the existence and nature of any pollutant linkage, the results of risk assessment and, ultimately, the judgement of the local authority [5.2.4.7-8].

8.3.7.2 In order to derive an authoritative and scientifically based guideline value AECOM used the CLEA model v1.04, an approach supported by the 2008 Guidance[579]. With reference to health criteria values[580] (HCV) and site-specific adjustments, it derived a site specific assessment criterion (SSAC) for B(a)P of 1.02 mg/kg. This SSAC can be considered to be a concentration of a particular contaminant at which there is likely to be a minimal risk to human health [5.2.4.7-8, 6.4.41, 50]. Derived in this way, I consider that it amounted to an authoritative and scientifically based guideline value.

8.3.8 ***Site investigation***

AECOM reports

8.3.8.1 Concerns have been raised by the appellant with respect to a number of aspects of the site investigations/reporting undertaken by AECOM and the degree to which reliance should have been placed upon it [6.4.36-44].

8.3.8.2 Defra's 2008 Guidance confirms that authorities should seek expert advice when needed to confirm their understanding of the science required to inform the judgement as to whether there is a SPOSH or not [4.3.22(8), 5.2.3.2(d)]. The Council has confirmed that it appointed AECOM to provide expert advice and considers that it was reasonable to rely upon it [5.2.6.1(1)]. In such circumstances, I consider that it would be reasonable

[578] CD1.10 para 36-39.
[579] CD1.10 pages 497-499.
[580] Health criteria value-a dose expressed as a chemical intake per unit body weight per day that poses, in relation to non-threshold substances, a minimal risk to human health.

to expect that the Council responsible for ensuring, as far as possible, that its advisors are appropriately qualified and competent, and in any event, the decision to determine the land as contaminated remains with the Council [5.2.6.1(1)][581]. These requirements are confirmed by the 2012 Guidance[582]. I turn to consider the concerns raised.

8.3.8.3 Between 2007 and 2011 AECOM published 7 reports charting the progress of its site investigations [5.2.4.4]. These formed the basis of the Council's decision to determine zones 4 and 7 as contaminated land.

8.3.8.4 The RoD indicated that the reasoning for the zone 4 designation as contaminated land included that: it encompasses private gardens; over 40% of the samples exceeded the SSAC; and, the maximum value was 40 times the SSAC. In relation to zone 7, which also included private gardens, it indicated: that 14 of the 16 samples exceeded the SSAC; and, the maximum value was over 200 times the SSAC [5.2.4.13 3)].

8.3.8.5 The RoD, whilst making reference to the findings of the investigations, did not cite particular sampling results. Nor was there a requirement to do so, as the 2006 Guidance requires only a summary of the evidence upon which the Council's determination was based, with reference to other documents if necessary [5.2.4.11, 14].

8.3.8.6 However, due to a lack of clarity in the evidence submitted by the Council in advance of the Inquiry, there has been significant confusion over the particular sampling results datasets relied upon by the Council at determination and later stages [5.2.4.20]. Clarification of the sample results datasets relied upon by the parties was provided at the Inquiry in the form of a Statement of Agreement (SoA)[583]. This included, amongst other things, the data used to inform AECOM Technical Note 2013[584] and also datasets for a number of scenarios, which I will refer to as SoA1-4[585] and set out below. These datasets do not include B(a)P concentrations extrapolated from total polyaromatic hydrocarbon (PAH) results, which were included in AECOM's *Phase II Contaminated Land Risk Assessment Report, May 2009* (AECOM 2009)[586] but not subsequent reports, such as *The final Consolidated Contaminated Land Risk Assessment* report (AECOM 2011) [5.2.5.21-22, 6.4.4]. The datasets which were used to calculate the SoA2 scenario (including samples at a depth of ≤ 1 metre) are a more comprehensive reflection of the available results than those upon which the Remediation Notice[587] and AECOM Technical Note 2013[588] was based. I consider therefore, that greater weight should be afforded to findings based on SoA2.

[581] CD1.5 paras 3.19-20.
[582] CD1.5 paras 3.19-20.
[583] ID15.
[584] CD16.1.11.
[585] ID15.
[586] CD16.1.3.
[587] CD6.8 page 259.
[588] CD16.1.11.

Description of dataset		**Zone 4** (mg/kg)	**Zone 7** (mg/kg)
Remediation Notice and AECOM Technical Note 2013- including samples at a depth of ≤ 1 metre.	range	<1-48	<0.5-220
	mean	9.19	38
SoA1 – including samples at all depths.	range	<1-48	<0.5-290
	mean	9.22	34.12
SoA2- including samples at a depth of ≤ 1 metre.	range	<1-48	<0.5-220
	mean	9.14	28.78
SoA3- including samples at a depth of ≤ 1 metre (except WS13)	range	-	<0.5-191
	mean	-	20.81
SoA4- including samples at a depth of ≤ 1 metre (except WS13 and SMW2)	range		<0.5-70
	mean	-	13.41

8.3.8.7 AECOM 2009 concluded that there was sufficient data to classify zone 7 as contaminated land under Part IIa of the Act. That report was the only technical report identified as informing the Council's decision in relation to zone 7.

8.3.8.8 The findings set out in the RoD to the effect that most sample locations within the zone reported elevated levels of B(a)P, sampling locations were distributed across the zone and additional sampling was unlikely to show the absence of contamination, appear to me to be reasonable based on the analysis results [6.4.44]. Furthermore, the lab data sheets, which were missing from AECOM 2009, were provided in large part during the Inquiry and in my view, as it is likely that samples would have been analysed in batches using the same method, they provide sufficient assurance that the results of the soils analysis can be relied upon [5.2.5.69-70][589].

8.3.8.9 However, Mr Smart who took a leading role in the AECOM investigations, confirmed that in the main his background is hydrogeology, in relation to which there are no issues at the appeal site. Furthermore, prior to the appeal site he had experience of investigating only 3 other gasworks sites and he is not a registered Specialist in Land Condition (SiLC). By comparison he acknowledged that neither he nor his team at AECOM are as experienced in investigating former gasworks sites as Mr Morton, who has investigated 70 and gave evidence on behalf of the appellant [6.4.79][590].

8.3.8.10 Dr Cole, who was not involved in the preparation of the AECOM investigation reports, has acknowledged that the manner in which some of the report's findings were phrased/depicted were, at best, misleading. For example, contrary to the view expressed by AECOM 2009, Dr Cole confirmed that figures 7, 8 and 9, which purport to show contamination contours, do not accurately represent the extent of contamination across the site [6.4.37].

[589] ID35, 38 and 42.
[590] Cross-examination of Mr Smart on Day 1.

8.3.8.11 Furthermore, the report indicates that '*as all the sample locations usually reported B(a)P concentrations significantly above the HCV of 1.02 mg/kg, it is considered unlikely that additional samples within this zone will show the absence of contamination*'. Dr Cole also agreed that the statement that '*all sample locations usually reported B(a)P concentrations significantly above the HCV*' was factually incorrect. Furthermore, it may be '*unlikely that additional samples would show the absence of contamination*', given that results below the level of detection for B(a)P were associated with only a small number of samples. Nonetheless, this is of little assistance to the decision maker, as it does not automatically follow that results associated with additional samples would be above or even significantly higher than the SSAC.

8.3.8.12 In addition, AECOM, in its reporting, and the Council, in its ROD, both mistakenly refer the 1.02 mg/kg SSAC as a HCV. It is not, it is a SSAC. The 2008 Guidance explains terms such as HCV and Dr Cole described the misuse of this term in the AECOM reports as a 'schoolboy error' [6.4.38]. As explained by Dr Cole a HCV is a dose expressed as a chemical intake per unit body weight per day that poses, in relation to non-threshold substances, no appreciable or a minimal risk to human health. Whereas the SSAC is a soil concentration used to screen out soil contaminants that are not of concern and do not warrant further consideration. This is of particular concern as exceedances of the SSAC, apparently misinterpreted as an HCV, formed a cornerstone of the Council's determination.

8.3.8.13 In my view, there are clear indications that the AECOM advice relied on by the Council fell short of 'expert advice' and, in my view, it would have been reasonable to expect the Council to recognise this and not repeat mistakes such as the use of incorrect terms, in light of the guidance available.

Zoning of the site

Historic uses

8.3.8.14 Sub-division, or zoning, of areas the subject of contaminated land investigations was endorsed in the 2006 Guidance [5.2.5.3]. The Council has indicated that the sub-division of the study area into zones was primarily determined on the basis of existing uses. Whilst its evidence as to the extent to which the historic uses were taken into account is inconsistent [5.2.5.4-7, 6.4.71-72], the way in which the area has been sub-divided supports the view that it was not ignored completely [5.2.5.11]. Zones 1, 2, 8 and 9 lie outside the former gasworks site. The western and central areas of the former gasworks site, which contained the bulk of the gasworks buildings and plant have been divided into 4, zones 3, 5, 5b and 6. Zones 3 and 6, which comprise an area of open space at present, have been arranged such that zone 3 covers the area formerly occupied by the gas holders and zone 6 by various other items of gasworks infrastructure. The eastern side of the former gasworks site

which appears to me to have contained relatively little gasworks infrastructure has been subdivided into zones 4 and 7[591].

8.3.8.15 The appellant has suggested that when zoning the area greater attention should have been paid to historic uses within the former Gasworks site. The concern being that high sample results may be hotspots associated with items of gasworks plant, which if not considered as such, could have an undue influence on the mean concentration for the zone in which it is found.

8.3.8.16 Dealing first with the characteristics of the ground. There is no dispute that turf or topsoil is present in all soft landscaping areas and that topsoil varies in thickness between a minimum of 50-100 mm and a maximum of 200-300 mm. There are some areas where there is no topsoil indentified beneath hardstanding, such as paving slabs. The ground investigation shows that zones 4 and 7, which lie within the site of the former gasworks, are underlain by a layer of made ground, which overlies drift deposits. The made ground is both vertically and laterally variable (heterogeneic) in material type; that distinct site wide layers of made ground of the same material type were not present, but material may form distinct lenses. Whilst some logs suggest vertical stratification of the made ground, the layering is not consistent across logs and does not provide a basis for zoning data based on material type. It is also agreed that made ground material of this type is typically chemically heterogeneic at different scales[592].

8.3.8.17 It is thought that the heterogeneic nature of the made ground is likely to be a result of the manner in which the ground levels in zones 4 and 7 were raised over the lifetime of the gasworks. Historic maps show that filling took place in these areas from west to east during the operation of the works and the make-up of the ground at anyone place would have been dependent on the nature of the waste material being used as fill at the time. Waste materials are likely to have included waste ash, clinker, spent oxide, demolition materials and arisings from foundations, including natural soils, as the gasworks developed[593]. There is no dispute that B(a)P is present in gasworks wastes, such as ash, coal, coal tar, soot and clinker [5.2.5.8][594].

8.3.8.18 As to the concern that high sample results may be hotspots associated with items of gasworks plant, having had regard to the historic records, it appears that none of the sample locations for zone 4 are situated close to the former positions of gasworks infrastructure, of which there was very little in that zone. As to zone 7, of the examples cited by the appellant, only one within the determined zone 7 is close to the former position of gasworks infrastructure. That is WS55A, which gave a B(a)P

[591] CD16.1.7 figures 3 and 6.
[592] ID11 paras 4.14-17.
[593] CD7.3 pages 136-137.
[594] ID11 para 4.6.

concentration of 290 mg/kg at 2 metres depth[595]. The Council accepted that the location of this sample was close to the position of the former gasworks purifiers. Furthermore, whilst it is possible that that result may have been caused by material associated with the purifiers, it could also be explained by tipping that took place in the zone over time [6.4.77]. In any event, as it was found at a depth greater than 1 metre it is not included in the dataset used by the Council in support of the determination. The zone 7 dataset (≤ 1 metre) includes other high results, such as WS13 and SMW2, at locations set well apart from the former positions of gasworks infrastructure. In my judgement, it is not unreasonable to regard those as being more likely to have resulted from historic tipping rather than proximity to former gasworks infrastructure.

8.3.8.19 I consider that information available on historic uses of the site does not indicate that the Council's approach to zoning was unreasonable.

Outliers

8.3.8.20 I accept the premise that in general, given the heterogeneous nature of the made ground within zone 4 and 7, it is not unreasonable to expect significant variation in sample results and distribution, with 'high concentrations next to low' [5.2.5.8]. However, that is not the end of the matter.

8.3.8.21 The dataset for zone 7 includes 2 results which are far higher than any of the others. They are SMW2 (191 mg/kg) and WS13 (220 mg/kg). SMW2 was positioned in the rear garden of No. 3 Brookthorpe Drive, positioned towards the northwestern corner of zone 7, and WS13 was located further to the north outside of zone 7 as determined. There is no doubt that these results, which are far higher than the next nearest at 51 mg/kg (WS60), have a significant influence on the derived statistical mean for the zone, as illustrated by the table above [6.4.97]. The appellant argues that the results should have been treated separately as outliers or further testing should have been done to establish whether they ought to remain in the dataset. The approach favoured by the Council was to assume that all data is representative of the mixed population, which means you use all the data you have, including the outliers [5.2.5.24]. In support of that approach, Dr Cole expressed the view that the odds would be low of random sampling picking out high concentrations if those concentrations were not prevalent throughout the soil [5.2.5.26][596].

8.3.8.22 However, the Chartered Institute of Environmental Health/CL:AIRE *Guidance on Comparing Soil Contamination Data with a Critical Concentration* (CIEH Guidance) provides advice on the treatment of outliers. It indicates that in general, outliers should be excluded from a

[595] ID15.
[596] Re-examination of Dr Cole.

dataset only where they: are obviously and demonstrably the result of an error; or, clearly indicate that more than one soil population exists within the dataset. It indicates that various outlier tests are available that assessors can use to identify anomalous data in the dataset [5.2.5.27][597].

8.3.8.23 The evidence that is available does not indicate that those results obviously and demonstrably arise from an error in sampling or analysis. As to the application of statistical tests, Appendix B to Defra's letter to the Council dated 23 March 2010 contained an Assessor's comments on AECOM 2009, noting that '*no statistical assessment has been undertaken on the results as recommended in current guidance. Such an assessment would identify if the data for a zone is from the same sample population or if there are outlier samples indicative of a different sample population which would require further investigation*' [5.2.7.11][598]. This statistical assessment does appear to be absent from the report. Furthermore, Dr Cole has confirmed that, whilst statistical analysis was provided for other individual zones in the consolidated report issued by AECOM in 2011, none was included for zone 7[599] [6.4.16]. It is not clear why this was the case, not least as statistical analysis undertaken by Dr Cole, of AECOM, 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 lower concentrations[600].

8.3.8.24 The CIEH Guidance indicates when exploring possible reasons for the presence of outliers assessors should re-examine field records to establish whether observations made at the time the samples were collected can explain the results obtained. Furthermore, it may be necessary to undertake further site sampling to verify conditions in the vicinity of outlier values.

8.3.8.25 In the case of SMW2, no field records have been provided, in the absence of which it cannot be ruled out that the result may be due to something at that location which would show it represents a separate soil population from that associated with the remainder of the dataset, which should be dealt with separately[601].

8.3.8.26 The borehole log for WS13 does not give any clear indications that it represents a soil population that can be easily delineated from others within the dataset [5.2.5.25]. However, there are other factors which indicate that greater scrutiny was required. WS13 is not located within the boundary of zone 7 as determined. It is located just to the north of the curtilage of No. 1 Brookthorpe Drive, outside the boundary of zone 7 as determined. The Council has indicated that this sample location was

[597] CD16.2.4 page 3196.
[598] P1 Appendix D bullet 2.
[599] P3 para 63.
[600] P3 para 75.
[601] P7 para 5.74.

used as it was more convenient for the site investigation equipment and less inconvenient for the residents of No. 1. Furthermore, it has identified that historic plans indicate that both were part of an area used for the disposal of gasworks waste and there is no evidence to show that the material within the garden of No. 1 would be any different to the material just outside [5.2.5.12-15]. I consider that this lack of evidence is unsurprising given the Council's decision not to investigate either the location of WS13 or the garden of No. 1 in more detail. Furthermore, whilst I accept that accessing the rear garden of a dwelling with a drilling rig could be regarded as inconvenient, it is not self-evident that any follow up exploration would have required such equipment, given that the sample in question was taken from a depth of only 0.6 metres. I consider that there is significant uncertainty as to whether WS13 can be regarded as representative of the curtilage of No. 1 Brookthorpe Drive, let alone the wider zone 7 area.

8.3.8.27 In its advice to the Council, albeit after its determination, ENVIRON noted that the two high results in the dataset have a significant influence on the derived statistical mean for the zone and indicated that further analytical investigations could be focussed at those locations [6.4.92]. In light of the significant influence of these outliers on the derived statistical mean, and therefore, the potential impact on the outcome of the assessment of risk, I consider that it would be reasonable to expect those locations to have been explored in more detail. In the absence of such work there is a significant degree of uncertainty as to whether WS13 and SMW2 should form part of the dataset for zone 7 or be treated separately. Mr Smart acknowledged that the Council and AECOM simply do not know whether the high values in zone 7 represent a genuine risk across the zone or whether they are merely hotspots [6.4.95].

8.3.8.28 The Council has indicated that Defra informed it that, based on the findings of AECOM 2009, funding of further work within zone 7 would not be justified. However, no evidence has been submitted to document those exchanges, in the absence of which the context of such a decision is entirely uncertain. It may, for example, have been influenced by the lack of statistical analysis referred to in the assessors report referred to above, which if done may well have supported the case for investigation of outliers. The Secretary of State would of course be free to make her own enquiries on this matter, if thought necessary. Based on the evidence before me, I consider the Council's assertion that it would not have been feasible to carry out further investigations into zone 7 due to resource constraints should be afforded little weight and it does not support its lack of further exploration in relation to WS13 and SMW2 to any significant degree [5.2.5.45-47, 6.4.93].

8.3.8.29 Prior to its determination, the Council chose not to investigate these values further through means suggested by the CIEH Guidance, such as through the application of statistical assessment or further site sampling [5.2.7.11]. Consequently, there is a significant degree of uncertainty as to whether the high values in zone 7 represent a genuine risk across the zone or whether they are merely hotspots, to be accounted for by

refining zoning decisions and treating them individually [6.4.94][602].

Conclusion

8.3.8.30 In my judgement, when zoning zones 4 and 7, the Council had adequate regard to historic uses [5.2.5.8, 10]. However, with reference to the CIEH Guidance, I consider that the Council 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 [5.2.5.9].

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

8.3.8.31 Topsoil was identified in some, but not all, of the exploratory holes drilled across the site and there was significant variation in the depth of topsoil found, between a minimum of 50-100 mm and a maximum of 200-300 mm. Furthermore, whilst a trial pit in one of the gardens within the site showed no intermixing between the turf/topsoil layer and made ground below [6.4.82], wider research suggests that it is reasonable to assume that soil will become mixed overtime to a depth of up to 600 mm as a result of normal garden activities, such as cultivation of plants [5.2.5.29]. These are not matters that can reliably be prohibited by the Council. Against this background, I consider that it would be unreasonable to assume that an un-mixed layer of topsoil would remain in place over time and the Council's decision not to treat topsoil as a separate soil population in their analysis was not unreasonable [5.2.5.28-33, 6.4.82-85].

8.3.8.32 There is no dispute that shallow soils are those to which human receptors are most likely to be exposed [6.4.86-87]. However, it does not automatically follow that samples at a lower level are of no relevance. The review of sample results drawn from the top 1 metre of ground, undertaken by AECOM in March 2013, indicated that there is no discernable variation in the concentrations of B(a)P with depth; elevated concentrations having been found throughout the soil profile above 1 metre [5.2.5.16]. On this basis it was not unreasonable for the Council to regard sample results obtained from the top 1 metre, setting to one side outliers about which I have expressed concerns, as representative of those soils to which human receptors would be most likely to be exposed. The legitimacy of this approach is not weakened by the reference only to samples taken from between 0-0.2 metres below ground in the Conland case study, as it is not clear that the ground conditions were comparable to those at the appeal site; made ground, heterogeneous in character. In my judgement, that the Council did not treat topsoil as a separate soil population was not unreasonable [5.2.5.17-20, 6.4.87-89].

[602] CD16.2.4 page 3196.

Conclusions

8.3.8.33 Nonetheless, I conclude that there were a number of signals in AECOM's reporting which called into question its advice, which the Council could reasonably be expected to have acted on. It did not do so. Furthermore, the Council's determination relied in part on (a) the extent to which the SSAC had been exceeded by certain values, up to 2 orders of magnitude; and, (b) the mean values were significantly in excess of the screening value [5.2.5.34]. These findings were based, in no small part, on the assumption that the samples from SMW2 and WS13 could reasonably be assumed to form part of the zone 7 dataset. The Council 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 [5.2.5.9]. Defra had pointed out that AECOM 2009, upon the results of which the Council's determination of zone 7 was based, did not follow current guidance in certain respects, such as in relation to statistical assessment which would assist in the identification of outliers [5.2.7.11][603]. In this respect the Council 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.

8.3.9 ***SPOSH***

8.3.9.1 The existence of a pollutant linkage is not disputed. The identified contaminant is B(a)P, which has the potential to cause significant harm to human beings. However, there is no authoritative assessment to show that harm is being caused[604] [7.1.3] and so I turn to the question as to whether there is a significant possibility of significant harm (SPOSH).

8.3.9.2 As I have indicated, the 2008 Guidance confirms[605] that although assessors can use SGVs as screening thresholds for Part IIA decisions on SPOSH, if the SGV is exceeded, the assessor will usually need to conduct a detailed quantitative risk assessment (DQRA) to discover whether there is a SPOSH [5.2.6.1, 5.2.7.7(4)]. Whether or not SPOSH exists will depend on the existence and nature of any pollutant linkage, the results of risk assessment and, ultimately, the judgement of the local authority [5.2.4.7-8].

8.3.9.3 Furthermore, the 2006 Guidance indicates that a significant possibility is one which meets the conditions set out in its Table B. The conditions of relevance are: *if the amount of pollutant in the pollutant linkage in question which a human receptor in that linkage may take in or might otherwise be exposed, as a result of a pathway in that linkage, would*

[603] P1 Appendix D bullet 2.
[604] Mr Jarrett confirmed in evidence in chief day 2- He discussed the possibility of a cancer cluster study with the Area Health Authority, who confirmed that the area in question is too small to establish a reliable finding.
[605] CD1.10 para 36-39.

represent an unacceptable intake or direct bodily contact, assessed on the basis of relevant information on the toxicological properties of that pollutant. Such an assessment should take into account: the likely total intake of, or exposure to, the substance from all sources, the relative contribution of the pollutant linkage in question; and the duration of intake or exposure.

8.3.9.4 As the 2008 Guidance identifies, the 2006 Guidance does not explain what 'unacceptable ' means[606]. It also acknowledges that the 2006 Guidance '*requires that local authorities' decisions on what is an 'unacceptable intake' (i.e. SPOSH) must be assessed on the basis of toxicological risk assessments.* However, it indicates that '*Decisions cannot be based solely on such risk assessments because, whilst they can inform an authority about the possibility of significant harm at a site, risk assessments cannot answer the policy question about what is acceptable or unacceptable. Thus, in Defra's view, decisions should be firmly based on scientific assessment, but they should also take account of the purpose of Part 2A and the local context in which the decision is being made*.'[607]

8.3.9.5 By way of example, it was Dr Cole's view that an intake an order of magnitude above the HCV he derived for B(a)P, as part of his exposure and toxicological risk review, would meet the requirements of the statutory guidance as regards an unacceptable level of exposure [5.2.5.35].

8.3.9.6 Against that background there are a number of shortcomings in relation to the approach taken by the Council in its determination. Although the AECOM 2009 and 2011 reports included a chapter entitled 'human health risk assessment', the reports did not extend beyond devising a conceptual model, identifying pollutant linkages, screening data against the identified SSAC of 1.02 mg/kg and drawing conclusions, in relation to B(a)P simply on the basis of the degree to which that SSAC, rather than an HCV, was exceeded. For its part, the Council has indicated that exceedance of the 1.02 mg/kg figure was used as a starting point and that it was not the only factor considered to determine the existence of SPOSH [5.2.5.34, 6.4.34]. It indicates that other factors taken into account included: the extent to which that SSAC, rather than an HCV, was exceeded, '*which in many cases amounted to an order of magnitude and two orders of magnitude in some cases; and, the depth below the surface from which samples were obtained*'[608]. However, this on its own is not necessarily determinative. The 2008 Guidance confirms that in some cases an SGV may be exceeded by tens of times and there might be no SPOSH[609].

8.3.9.7 As regards the requirement to undertake a DQRA, the ROD indicates that

[606] CD1.10 para 13(ii).
[607] CD1.10 para 23 including footnote 10.
[608] CD6.3 paras 4.6-7.
[609] CD1.10 para 39(iv).

the Council did not simply rely on the findings of AECOM [5.2.6.1(4)]. It also took account of the likelihood of occupiers or users of the land being exposed to that contamination, with reference to the extent of surface cover/landscaping and the potential for disturbance of soils [5.2.4.13, 5.2.5.34].

8.3.9.8 However, the ROD does not make clear the extent to which, if any, the Council's judgement was informed by consideration of whether the amount of pollutant to which a human receptor may be exposed would represent an unacceptable intake or direct bodily contact, a requirement of the 2006 Guidance, as referred to above [5.2.7.10]. Dr Cole has indicated that estimating the possibility of an exposure which results in an unacceptable intake is determined principally by 2 factors: 1) the representativeness of the chosen soil concentration metric used to characterise exposure; and, 2) the intake from that exposure meeting the definition of unacceptable intake[610].

8.3.9.9 With respect to 2), whilst Dr Cole has indicated that the requirements of the 2006 Guidance were considered by both AECOM and the Council in the lead up to the determination[611], there is no evidence to show that a toxicological assessment was actually undertaken [6.4.7]. In his written evidence Dr Cole acknowledges that the Council had not undertaken a toxicological assessment, in spite of the guidance on the matter at the time referred to above [5.2.7.10][612]. I consider that in this respect the Council's approach departed significantly from the 2006 Guidance, such that it can be regarded as non-compliant with the Guidance taken as a whole, and unreasonable [4.4.11-12, 5.1.12(4), 6.4.17, 6.4.62-66]. There is no compelling evidence before me to demonstrate that compliance with the Guidance in this respect would have caused undue delay or caused unreasonable costs to be incurred[613]. Whilst Dr Cole has undertaken an exposure and toxicological review for the purposes of the Inquiry, he expressed the view, in cross examination, that if the Council failed to carry out some reasonably required assessment and someone later does one, that would not be relevant to the test of reasonableness [5.2.7.2, 6.4.16]. In my judgement, the fact that he has undertaken an exposure and toxicological review for the appeal is not relevant to the question as to whether the Council acted in accordance with the statutory guidance when making its determination [5.2.5.42].

8.3.9.10 I give no weight to the appellant's criticism of the Council to the effect that it had failed to refer the case for review to the Conland Expert Panel. The Council's determination had been made before the panel was established in October 2012. The Conland Expert Panel's web page makes clear that its role is to provide guidance to local authorities who cannot decide whether a site is category 2 or 3. This being the case, I consider that a request from the Council to review a determination

[610] P2 para 60.
[611] P2 para 122.
[612] P2 Appendix 9 page 4.
[613] P3 para 103.

already made would have been unlikely to fall within the terms of reference of the panel [5.2.5.66-68].

Conclusion on the Council's approach to the determination as contaminated

8.3.9.11 Under the terms of section 78A of the Act, it was the 2006 Guidance that the Council was required to act in accordance with at the time that it determined the land as contaminated. However, in determining whether any land to which the notice relates appears to be contaminated land, the local authority failed to act in accordance with: the Guidance issued by the Secretary of State under section 78A(2), the 2006 Guidance; and, the CIEH Guidance. In this context, I consider that the Council 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 [6.4.108]. I consider therefore that it unreasonably identified the land to which the notice relates as contaminated land.

8.3.10 ***The Secretary of State's discretion***

8.3.10.1 Section 78L(2)(b) confirms that the Secretary of State has a discretion whether to quash, modify or confirm the Remediation Notice [6.4.110]. The Council has suggested in the event it is found that it acted unreasonably in determining the land as contaminated, but, in light of evidence submitted at the Inquiry, a decision made now would be that this land could be reasonably designated as contaminated land, then there would be no utility in quashing the Remediation Notice [5.2.8.1-7]. The appellant contends that it would be entirely unjust in a situation where a council has unreasonably determined land as contaminated, forcing the recipient to fight an appeal, then to deny the successful appellant the remedy of quashing [6.4.110-111, 6.8.1-3]. I do not agree. It appears to me that a good and principled reason for the Secretary of State to exercise her discretion in this way, denying the successful appellant the remedy of quashing, would be that forcing the Council to revisit its determination if the same outcome is expected, would simply unduly delay necessary remediation to the detriment of residents [5.2.8.7]. This would be contrary to main aim of Part IIA of the Act, which is identified by the 2008 Guidance as to help address the problem of historical contamination of land and the risks it can pose to people's health and the environment[614].

8.3.10.2 I turn then to consider whether, if it were considered now, the decision would be that this land could be reasonably determined as contaminated land. As set out below, Dr Cole has also undertaken assessments with reference to the 2012 Guidance and the technical guidance on soil contamination ('SP1010') that followed, as well as with reference to the 2006 Guidance.

2012 Guidance

8.3.10.3 There is no dispute that the precautionary principle is of relevance to the determination of contaminated land. The 2012 Guidance confirms that the authority should take a precautionary approach to the risks raised by contamination, whilst avoiding a disproportionate approach given the circumstances of each case[615]. The 2012 Guidance sets out a 4 category model, which should be used in deciding whether or not land is contaminated land on grounds of SPOSH. It does not advocate determination on the basis of the principle of 'as low as reasonably practicable' [5.2.7.12(7), 6.4.10(4), 18]. Categories 1 and 2 would encompass land which is capable of being determined as contaminated and categories 3 and 4 land that is not. It indicates that local authorities should assume that SPOSH exists in any case where it is considered that there is an unacceptably high probability, supported by robust science based evidence, that significant harm would occur if no action is taken to stop it; a category 1 case. It should not be assumed that a SPOSH exists where it is considered that there is no risk or that the level of risk posed is low; a category 4 case.

8.3.10.4 As regards category 4: the AECOM Technical Note 2013[616] provided an assessment of the mean B(a)P soil concentrations for each zone against the national background concentration (NBC) of 3.6 mg/kg, published by Defra, and the local background concentration (LBC) of 0.97 mg/kg, based on soil concentrations found in zone 5b, which was thought to be outside the operational footprint of the former gasworks. AECOM 2013 identified that the mean concentration for zone 4 (9.19 mg/kg) exceeded the NBC by a factor of 2.5 and it was exceeded by the mean for zone 7 (38 mg/kg) by a factor of 10. I calculate that the latter would reduce to a factor of 3.7 if the results for locations WS13 and SMW2 were to be excluded from the calculation of the mean (13.41 mg/kg). On the basis of AECOM 2013, Dr Cole concluded in his evidence that the reported levels are unlikely to be classifiable as normal levels of contaminants in soil, which might otherwise fall within category 4[617].

8.3.10.5 No party is suggesting that the appeal site is either a category 1 or 4 case. Therefore, the dispute is over whether the land falls into category 2 or 3 [5.2.5.40].

8.3.10.6 The 2012 Guidance indicates, at paragraph 4.25(a), that land should be placed in category 2, if the local authority concludes, on the basis that there is a strong case for considering that the risks from the land are of sufficient concern, that the land poses a SPOSH. It should be placed into category 3 if the authority considers that the strong case described in paragraph 4.25(a) does not exist, and therefore the legal test for SPOSH

[614] CD1.10 para 1.
[615] CD1.5 para 1.6.
[616] CD16.1.11.
[617] P3 paras97-98.

is not met. If the authority considers, on the basis of its assessment, that it cannot make a decision as to whether the strong case described in paragraph 4.25(a) does or does not exist, it should make its decision on the basis of other factors which it considers relevant, including the social and economic factors set out in paragraph 4.27. To my mind, this is a clear acknowledgement that it may not be possible to determine a 'threshold value' above which land may be regarded as contaminated in all cases [5.2.5.36-41].

8.3.10.7 In March 2014, Defra published additional technical guidance, SP1010, on the methodology to be used for the derivation of category 4 screening levels, which indicated that a B(a)P level of 5 mg/kg should be regarded as presenting minimal risk[618], a low level of toxicological concern (LLTC)[619].

8.3.10.8 In light of these documents, the Council commissioned a piece of additional risk assessment by Dr Pease (DP) of ENVIRON[620], who is an expert in risk assessment for contaminated land [5.2.5.64][621]. DP's report indicated that the SSAC of 1.02 mg/kg used by the Council, in its assessment to support its determination, could be considered: to represent a negligible level of risk from a policy point of view; and, to be towards the bottom of category 4. She identified that the 5 mg/kg level can be regarded conceptually as being near to the top of category 4, a category 4 screening level (C4SL) [6.4.50-51]. DP was asked to give an opinion on whether a SPOSH is present. In relation to zone 4 DP indicated that the 3 highest of the 10 sample results, ranging from 23-48 mg/kg, are likely to be borderline on the category 2/category 3 boundary. She indicated that sensitivity analysis and probalistic exposure assessment would suggest that the likelihood of exposures exceeding the LLTC intake would be much less if residents were advised not to grow vegetables in their gardens. Furthermore, this may mean that, with further DQRA, risks could be manageable such that the zone could be placed more clearly in category 3. In relation to zone 7, she identified that: it is the two high values (WS13 and SMW2) that drive the higher statistical mean of the dataset; it is not likely that DQRA can refine those values; and, further analytical investigations could be focussed at this location in zone 7[622]. She did not confirm that a SPOSH is present in relation to either zone.

8.3.10.9 Dr Cole's interpretation of DP's work is that it infers: in relation to zone 4, DQRA might demonstrate that a strong case for an unacceptable risk does not exist, which would equate to a category 3 position; and, in relation to zone 7, if it can be shown that the current mean concentration of 38 mg/kg is reliable, there would be a strong case that an

[618] P4 paras 132-133.
[619] CD16.1.13 page 1915.
[620] CD16.1.13.
[621] Day 2 cross-examination of Mr Jarrett.
[622] CD16.1.13.

unacceptable risk exists. However, as I identify below, it was established during the Inquiry that the mean concentration of 38 mg/kg is not reliable. In addition, I consider that if further investigation indicated that the results for WS13 and SMW2 should be regarded as outliers, considered separately and excluded from the dataset for zone 7, the mean for the remaining dataset would not be significantly higher than that for zone 4. The Council did not consult AECOM on DP's recommendations and decided not to undertake further DQRA for zone 4 or to investigate zone 7 further [6.4.49, 53, 94]. This is surprising, given that DP is a recognised expert in the field and the Council's acknowledged need to rely on expert advice, due to the complexity of the technical evidence [5.2.4.22-25, 5.2.6.1, 6.4.30].

8.3.10.10 The Council has indicated that it subsequently undertook a review of its determination, in light of the 2012 Guidance, and concluded that zones 4 and 7 still met the definition of contaminated land and that it should proceed to secure remediation [5.2.4.29-32]. However, that assessment was based at least in part on the assumption that the mean figure of 38 mg/kg, which was taken to represent zone 7 and also zone 4 to an extent, through averaging across the zones, was reliable. That is now agreed not to be the case and so I consider that the Council's finding can not be regarded as having been made on a robust basis and should be afforded little weight[623].

8.3.10.11 In his original proof of evidence, Dr Cole has undertaken a DQRA, including an exposure and toxicological review of the site. Dr Cole concluded that a soil concentration of approximately 25-39 mg/kg represents an unacceptable risk. Against that background, he suggested that, based on the numbers alone a strong case existed for considering that zone 7, with a mean concentration of 38 mg/kg, poses a SPOSH. He found that the risk assessment outcome for zone 4 was less strong, with the mean falling within a range from 5 mg/kg, 'a low level of concern', to less than 25 mg/kg, 'a level not clearly of toxicological concern'. He considered in that case a decision as to whether the strong case described in paragraph 4.25(a) does or doesn't exist could not be made and a judgement would be required based on the factors set out in paragraph 4.27 of the 2012 Guidance[624].

8.3.10.12 Mr Witherington indicated that whilst he considers that Dr Cole's approach to the exposure and toxicological review of the site is the robust and scientific approach that the statutory Guidance calls for, he has concerns that the underlying assumptions were unduly precautionary and so does not support Dr Cole's conclusions [5.2.5.42, 5.2.7.1]. However, the appellant has not presented an alternative DQRA and Mr Witherington confirmed that he did not have any evidence to demonstrate that adopting more optimistic assumptions in an exposure and toxicological review could be justified. He confirmed that he does

[623] P4 paras 132-166.
[624] P3 pages 51-52.

not specialise in human health risk assessment and acknowledged that Dr Cole does [5.2.6.11]. Under these circumstances, the appellant's concern that Dr Cole's exposure and toxicological review of the site was unduly precautionary appears to be unsupported.

8.3.10.13 However, at the Inquiry, errors were identified in the work set out in Dr Cole's original proof of evidence, which necessitated a significant number of corrections to figures quoted[625]. This included acceptance by Dr Cole that in relation to zone 7 the relevant mean concentration was not 38 mg/kg. Instead, as set out in the SoA, it lay in the range 28.78-34.12 mg/kg. Whilst this did not alter the views of the appellant's witnesses, nor would it be expected to, given that the appellant's position is that the basis of the determination was unreliable. Contrary to the view of Dr Cole, it is clear that the correction of the mean did make a significant difference to the outcome of his review [5.2.7.12.(9)]. On the basis of the corrected data Dr Cole withdrew the previous conclusion of his DQRA in relation to zone 7, set out above, and indicated that it is not possible to say the strong case described in paragraph 4.25(a) does or does not exist in relation to zone 7 and therefore, it should also be considered with reference to the factors set out in paragraph 4.27 of the 2012 Guidance [5.2.7.12(11), 6.4.20, 54]. In my view, further doubt over the existence of a strong case is cast by the uncertainty over whether the results for WS13 and SMW2 should be regarded as outliers, considered separately and excluded from the dataset for zone 7, which would result in the mean for the remaining dataset (13.41 mg/kg) not being significantly higher than that for zone 4. The position would not be materially different if zone 7 were to be split into a southern subzone (mean 17.23 mg/kg) and northern subzone (mean 10.72 mg/kg excluding outliers), as suggested by Mr Witherington [5.2.5.9][626].

8.3.10.14 Paragraph 4.27 identifies that the factors which should be taken into account include, amongst other things: the likely health benefits and impacts of regulatory intervention, including any indirect impacts such as stress related health effects; and, the costs/benefits of remediation. The 2012 Guidance confirms that the local authority is not required to make a detailed assessment. Rather it is expected to make a broad consideration of factors it considers relevant [6.4.54]. The 2012 Guidance confirms that the authority should take a precautionary approach to the risks raised by contamination, whilst avoiding a disproportionate approach given the circumstances of each case [4.3.29].

8.3.10.15 For the purposes of the appeal Dr Cole provided, in his proof of evidence, an appraisal of the factors set out in paragraph 4.27, based on the remediation solution proposed by the Council of excavation and replacement of soil. He concluded that the health benefits of remediation, such as a reduction in long-term stress caused by the knowledge of the presence of hazardous substances in the ground and

[625] ID26 subsequently superseded by ID33.
[626] ID15.

associated adverse impacts on the housing market, would outweigh the potential short-term health impacts of remediation. On the basis of his assessment, he considered that the Council would be justified in placing zones 4 and 7 in category 2[627].

8.3.10.16 I have no doubt that some level of property blight, including difficulties selling and mortgaging houses, and stress amongst residents was associated with the condition of the land prior to the Council's determination. The Council has indicated that this first arose as early as 2006, when environmental searches, linked to potential property sales, revealed that the housing was built on an old gasworks site developed without any apparent remediation having been carried out [5.1.6, 6.4.58]. Nonetheless, the appellant has indicated that the formal determination of the land as contaminated, indicating a confirmed significant possibility of significant harm, is likely to have had the effect of magnifying the difficulties and heightening the concerns of residents to some degree [6.1.3]. In this context, it indicates that Dr Cole has left out of account two hugely important negative factors; the financial impact on residents of the land being identified as contaminated and also the stress it would inevitably and certainly has caused [6.4.55]. Based on the evidence of a local resident, the credibility of whom was not disputed, these effects have been felt [5.1.5, 6.1.3, 7.1.2]. Dr Cole confirmed that these factors were not taken into account in his paragraph 4.27 appraisal and he accepted at the Inquiry that they are important factors, which should be taken into account when making the balanced judgement required by paragraph 4.27 to inform a determination of contaminated land [5.1.7, 5.2.4.31, 6.4.20, 55-56, 58, 6.8.4]. It is not clear whether, if the appraisal were re-run, these factors would now be determinative. Nonetheless, the omission of important factors, which may weigh against determination, indicates that Dr Cole's appraisal cannot be regarded as the robust assessment needed to support determination [6.4.19].

8.3.10.17 I acknowledge that, as Dr Cole is a Director of AECOM, his review of AECOM's work undertaken for the Council, although he was not involved, and the Council's assessment that followed is unlikely to have been undertaken from an entirely impartial standpoint [5.2.7.1, 3-4, 6.4.12-15]. In my view, whilst this suggests his evidence should be treated with a degree of caution, it does not automatically follow that the weight given to his evidence should be reduced. However, the corrections that have had to be made to his evidence during the course of the Inquiry cast significant doubt over the reliability of his findings and limit the weight attributable to them [6.4.11, 19].

8.3.10.18 Whilst some reference has been made to what other authorities are doing as regards determination of contaminated land, I consider them to be of little assistance. Although Dr Cole has indicated that in his experience land has been determined as contaminated in the UK based on a B(a)P concentration as low as 5 mg/kg, there is no evidence to show that the

[627] P3 paras 116-120.

circumstances were comparable to those at the appeal site or that that finding was shown to be robust with reference to Statutory Guidance and he acknowledges that, more generally, a wide range of B(a)P concentrations has been relied upon in the determination of contaminated land [5.2.6.1(7)].

8.3.10.19 As regards the Conland case study, the Conland Expert Panel did not endorse a value of 10 mg/kg as representing SPOSH [5.2.5.38, 5.2.6.2-9]. It found that the data, full details of which have not been provided, was not determinative of a strong case in one of the zones and reliance there was placed upon a benefit/impact assessment, which is also not in evidence. In the appeal case, the mean value for zone 4 falls below that level and the value for zone 7 would be only slightly above it if further investigation indicated that the results from WS13 and SMW2 should be dealt with separately. Under these circumstances and given the uncertainties already identified as to whether conditions on the 2 sites are comparable, I consider that the case study does not offer any material support to either the Council's or the appellant's cases. As an aside, based on the evidence presented, I am not convinced that Dr Cole's role as a member of the Conland Expert Panel, whose review led to the case study of the former factory site submitted at the Inquiry, undermines his ability to give impartial expert advice regarding the determination of the appeal site. As observed by the Council, he is merely giving his expert opinion on two different cases. I give no weight to the appellant's concerns in that respect [5.2.7.5, 6.4.21-28].

8.3.10.20 The 2012 Guidance acknowledges that the uncertainty underlying risk assessments means that there is unlikely to be a single correct conclusion on precisely what is the level of risk posed by land. It is for the local authority to use its judgement to form a reasonable view of what it considers the risks to be on the basis of a robust assessment of available evidence in line with this Guidance[628]. However, in my judgement, for the reasons set out above, the assessments undertaken by the Council or on its behalf by AECOM with the intention of meeting the requirements of the 2012 Guidance, do not amount to the robust assessment required by guidance to support a determination of contaminated land [5.2.4.29, 5.2.7.8].

2006 Guidance

8.3.10.21 For the purposes of the Inquiry, Dr Cole has undertaken his own assessment to determine whether the predicted levels of exposure would meet the definition of unacceptable intake, with reference to the 2006 Guidance [5.2.6.1(5), 5.2.7.7][629]. He concludes that it would in relation to zone 7. This is on the basis of a mean concentration originally of 38 mg/kg and revised to a range of 28.78-34.12 mg/kg during the Inquiry, leading to his finding that the predicted exposure would exceed his identified

[628] CD1.5 para 3.32.
[629] P3 paras 85-88, 92-93.

HCV by more than an order of magnitude, his suggested benchmark for unacceptable exposure[630]. However, as I have indicated, the actual mean may fall well below these figures, dependent on the account taken of outliers, which casts significant doubt over the reliability of his conclusion. In relation to zone 4 he acknowledged that the case is less strong, the predicted exposure being less than an order of magnitude greater than his identified HCV. In any event, this assessment is of little assistance, not least as the 2006 Guidance is no longer extant.

8.3.11 ***Conclusions***

8.3.11.1 I acknowledge that there is no absolute requirement of the assessment process to remove uncertainty completely, and a balance has to be struck between the benefit of additional information and cost, both monetary cost and delay in the decision making process [5.2.4.27][631]. However, the determination of land as contaminated has serious consequences not only for those who have been identified as liable for the costs of remediation, but also for owners and residents of the properties, with reference to matters such as: associated health concerns, property blight and disruption both during the processes associated with determination and remediation [5.1.5-8, 6.1.3, 5, 7.1.1-4]. There is a clear public interest in ensuring such decisions are made in a rigorous and robust manner, with proper reference to statutory guidance [6.1.2, 6, 6.8.4, 6.10.1-4]. As to the reference made to the concern of residents over the time taken by the Council in investigating the site and that further investigation would be more time consuming; in light of the implications of determination, a less than robust assessment is in no one's interests [5.2.5.48].

8.3.11.2 In relation to ground of appeal (a), I conclude that under the terms of section 78A of the Act, it was the then extant 2006 Guidance the Council was required to act in accordance with at the time that it determined the land as contaminated. However, the Council failed to act in accordance with the 2006 Guidance issued by the Secretary of State and unreasonably identified the land to which the notice relates as contaminated land, and so the appeal should be allowed in relation to ground of appeal (a) [8.3.9.11]. Furthermore, the assessments undertaken more recently by the Council or on its behalf by AECOM with the intention of meeting the requirements of the now extant 2012 Guidance do not provide compelling support either: for the Council's contention that it is highly likely that a decision made now would be that this land could be reasonably designated as contaminated land; or, that the Secretary of State's discretion not to quash the Remediation Notice should be exercised [5.2.8.6, 6.4.110-111].

8.3.11.3 Whilst there is no dispute that the appellant has not undertaken its own site investigation, toxicological risk assessment or DQRA, I consider that

[630] ID33.
[631] P3 para 103.

this is of little relevance under the circumstances identified above [5.2.5.49, 5.2.6.1(6)].

8.4 **Ground (c) Liability of Jim 2** ('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')

8.4.1 I have found, with reference to ground of appeal (a), that the Council unreasonably identified the land to which the notice relates as contaminated land. However, the Secretary of State may not share my view on that matter. Therefore, it is necessary to consider, if the land is determined as contaminated, whether the Council 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.

8.4.2 Section 78F of the Act has effect for the purpose of determining who is the Appropriate Person to bear responsibility for any particular thing which the enforcing authority determines is to be done by way of remediation in any particular case. Section 78F(2) of the Act indicates that an Appropriate Person is any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land[632]. Paragraph 9.8 of the 2006 Guidance indicated that what is 'caused or knowingly permitted' is the presence of a pollutant in, on or under the land. The glossary to the guidance defines a 'pollutant' as a contaminant which forms part of a pollutant linkage and a 'contaminant' as a substance which is in, on or under the land which has the potential to cause harm[633]. The approach set out in the 2012 Guidance is not materially different. The terms 'contaminant', 'pollutant' and 'substance' used in that Guidance are taken to have the same meaning, that is; they all mean a substance relevant to the Part 2A regime which is in, on or under the land and which has the potential to cause significant harm to a relevant receptor. Furthermore, as part of the process of determining that the land is contaminated land, the enforcing authority will have identified at least one significant contaminant linkage (contaminant, pathway, receptor) and Appropriate Persons are those who have caused or knowingly permitted the linkage[634].

8.4.3 The RoD in this case confirms that the pollutant which, with reference to the identified pollutant linkage, resulted in the land being determined as contaminated land is B(a)P present in soils [5.4.3.7(10)-(13)][635]. The Remediation Notice identifies the appellant as a causer and knowing

[632] CD1.1 page 42.
[633] CD1.3 pages 249, 376 and 380.
[634] CD1.5 para 6 page 391, para 7.3-7.6 pages 428-429.
[635] CD6.3 page 111.

permitter[636]. In my judgement therefore, the test in relation to section 78F(2) of the Act is whether the appellant caused or knowingly permitted B(a)P to be in, on or under the land [6.5.46]. It is not, as the Council suggests, whether, in more general terms, it caused or knowingly permitted contamination to be present in, on or under the land [4.4.38]. I consider that my approach in this respect is consistent with the section of the *St Leonard's Court* case, drawn to my attention by the Council, in which specific reference was made to bromate and bromide [5.4.1(1)]. It follows that the test with reference to Regulation 7(1)(c) of the 2006 Regulations is whether the Council unreasonably determined the appellant to be the Appropriate Person on the basis that it had caused or knowingly permitted B(a)P to be in, on or under the land [5.4.1, 6.5.47].

8.4.4 ***Caused***

8.4.4.1 The 2006 Guidance indicated that, in the Government's view, the test of 'causing' will require that the person concerned was involved in some active operation, or series of operations, to which the presence of the pollutant is attributable. Such involvement may also take the form of a failure to act in certain circumstances[637]. It seems to me that the *St. Leonard's Court case* is an illustration of this. The developer there, having been warned that exposing soil to rainfall could mobilise contaminants, removed impermeable surfaces and failed to protect the soils thereby exposed to rainfall leading to contamination being more extensively present[638]. I share the view of the appellant that simply leaving in place a contaminant which some other party caused to be present does not amount to causing its presence or failure to act, although it may, depending on the facts, be knowingly permitting its presence [4.3.38-43, 5.4.2.1, 6.5.2][639].

8.4.4.2 Dr Thomas has confirmed that coal gas manufacture produced a number of by-products, including ammoniacal liquor, purifier waste, coal tar, coke, ash and clinker. Markets for these by products changed through history and, during periods of low demand, all of them could have been dumped on gasworks land. For example, ash was often used to raise ground levels and, aside from deposition on site due to spillage, unwanted coal tar was sometimes allowed to drain into the ground at gasworks. Furthermore, B(a)P is a common contaminant associated with the carbonisation of coal and is found in coke, coal tar, ash and clinker[640]. In addition, coal was usually stored on gasworks in large heaps and over long periods could become mixed with the soil or cross-contaminate the soils through leaching. Some coals could have elevated concentrations of

[636] CD6.8 page 252.
[637] CD1.3 Annex 2 para 9.9.
[638] CD2.6 paras 896-903.
[639] P4 para 311.
[640] P6 paras 44-57 and ID11 para 4.6.

B(a)P [5.4.2.7][641].

8.4.4.3 The Council accepts that zones 4 and 7, which are situated within the former footprint of the Willenhall gasworks site, comprise an area of land used for waste disposal by the gasworks companies during its operation [6.5.7, 26]. This is supported by Ordnance Survey plans for the period 1902-1960, which show that an area of raised ground was progressively formed across the eastern half of the gasworks site. AECOM considers it likely that the fill used to raise this area was waste materials arising from the gas production processes [5.4.2.6][642]. Zone 7 was also host to a number of gasworks buildings, including the purifiers, which it is known from the historical records were built on land which had been infilled [6.2.4, 6.5.7]. It is agreed between the parties that gas making operations ceased in 1957 and that any filling of the site with gasworks waste was completed prior to ownership by the appellant in 1972 [6.5.23].

8.4.4.4 The Council is not alleging that the appellant brought any gasworks waste or any other material containing B(a)P onto the site [6.5.24]. Instead the Remediation Notice suggests that in clearing the gasworks and levelling the site in preparation for development, demolition materials and waste from the gasworks operation were spread over the site [6.5.4].

8.4.4.5 The ditch course, known as Tar Brook, is shown on historical plans running north/south immediately to the east of the former gasworks site. The Council has confirmed that it has been culverted and runs along a route to the rear of Kemble Close [5.4.2.23][643]. It appears therefore, that it is located outside of zones 4 and 7 as determined[644]. The Council contends that the identification of contamination in the ground above Tar Brook and in other zones that lie beyond the boundaries of the former gasworks site, such as zones 1, 2 and 8, suggest that contaminated material was spread there by the appellant. Whether that was the case or not, it appears to me to be of little relevance in this appeal, as to my mind it is unlikely that the removal of contaminated material from zones 4 and 7 would be likely to exacerbate contamination levels within zones 4 and 7 [5.4.2.23-26, 37-38, 6.5.9-21].

8.4.4.6 The Council acknowledges that it was usual practice for buildings to be demolished as part of the decommissioning process of a gasworks, which would have taken place prior to the Council taking ownership of the site in 1965, leaving only those structures associated with gas storage and distribution [5.4.2.9]. Historic photos suggest that by 1971, whilst some buildings remained in other parts of the gasworks site, a significant number of the buildings associated with zone 7 had been demolished, which appears to have resulted in demolition material being deposited in

[641] P6 paras 31 and 46.
[642] P1 para 18-20.
[643] CD16.1.7 Figure 2.
[644] ID2.

piles on the surface [5.4.2.8, 37(1), 6.2.4, 6.5.7, 6.5.41-42].

8.4.4.7 There is some evidence to indicate that, when gasworks were decommissioned, it was not unusual for voids, such as redundant collecting wells, to be filled with demolition material [5.4.2.20, 6.5.37][645]. However, Mr Wielebski has confirmed, based on his experience of construction industry practice since 1968, that was unlikely to be the practice of a developer in the 1970s. He maintained it is more likely that structures and demolition material would have been removed from the site to landfill, not least as this was a cheap solution at that time [5.4.2.15-19, 21, 6.5.38, 40, 43, 67-68]. He indicated that in general off-site landfill would also be the destination for excavation arisings. Whilst he acknowledged that ash was commonly used at the time to assist with drainage beneath gardens [5.4.2.29, 6.5.35], there is no compelling evidence to show that this was done within zones 4 and 7. It appears more likely that excavation arisings may have been moved off the gasworks site to neighbouring, previously lower lying, areas such as zones 1 and 2 [5.4.2.29, 6.5.32,35].

8.4.4.8 Even if voids within zones 4 and 7 were filled using material from those zones, it cannot be known with any reasonable degree of certainty that this would have been likely to exacerbate the levels of contamination, particularly given the heterogeneic character of the made ground. The circumstances are significantly different to those in the *St Leonard's Court case*, in which it was determined that high concentrations of contaminants found close to the surface were subsequently likely to have been flushed into lower ground through exposure to rainfall [5.4.2.30-34].

8.4.4.9 Whilst the appellant developed the properties in zone 4 and the Brookthorpe Drive dwellings in zone 7, Fletcher developed the Kemble Close properties, which comprise the eastern section of zone 7. I accept that preparation of zones 4 and 7 for development would be likely to have involved some re-grading and levelling of the site as well as filling of voids, involving moving material from one place to another [5.4.2.13, 18-19, 22, 29]. However, in my view, irrespective of who undertook that work, it cannot reasonably be said that such operations would have been likely to exacerbate the levels of B(a)P in those zones [5.4.2.2-4]. This given that the ground levels in zones 4 and 7 had been raised over a significant number of years using waste material from the gasworks, some of which are likely to have contained B(a)P, and the heterogeneity in soil conditions suggested by the site investigations [6.5.27-33]. Furthermore, Mr Smart confirmed that there were no stockpiles of gasworks waste when the site was closed down, which might otherwise have been distributed across the site by the developers [6.5.25, 44, 7.2.7].

8.4.4.10 I conclude it is unlikely that the appellant caused or exacerbated contamination by B(a)P within zones 4 and 7, and the Council's finding to the contrary was unreasonable [6.5.45].

[645] CD16.2.9 sections 2.6-2.9.

8.4.5 ***Knowingly permitted***

8.4.5.1 It is not in dispute that 'knowingly permitting' requires: knowledge of a substance; the power to remove that substance; the opportunity to exercise that power; and, failure to do so [5.4.3.3].

8.4.5.2 The Particulars of Sale used by the Council indicated that '*in preparing a layout developers will bear in mind that some part of the land comprising the parts of the former Gasworks may be unsuitable for building'*. In my judgement, this does not, contrary to the view initially expressed by the Council, amount to a clear indication of contamination of the land. The Council later acknowledged that the same words may have been intended to indicate that there were physical structures on the site, such as pits and gas holders, which in engineering terms would not be suitable to build houses on [6.5.53-54, 7.2.8]. In my judgement, this is a more likely explanation of the intention and its interpretation, given the following: that the area where the gas holders and many of the underground tanks were sited was developed as open space; neither the particulars of sale nor the sale agreement nor any of the planning permissions refer to contamination; and, whilst in the 1970s there was a growing concern regarding the redevelopment of contaminated land, guidance on the problems associated with the development of former gasworks sites was not published until later [6.5.48-51, 56-59][646].

8.4.5.3 Against that background, I consider it unlikely that the developers associated with the appeal site in the 1970's would have understood the health risks associated with B(a)P, notwithstanding that in 1933 B(a)P was identified as the substance that caused a variety of cancers, as a result of occupational exposure to coal tar [5.4.3.7(9), 5.4.3.13-19]. However, it appears to me that this is of little relevance to a determination of 'knowingly permitted'. In the *Circular Facilities* case it was found (obiter comments) that knowledge is only required as to the presence of the substance by reason of which the contaminated land in question is such land, in that case organic material. Furthermore, there did not have to be knowledge of the potential harm to which the presence of the substance in the soil could give rise [5.4.3.5, 7(13), 6.5.2, 6.9.7][647].

8.4.5.4 My attention has been drawn to section 78F(9) of the Act, which indicates that a person who has caused or knowingly permitted any substance (substance A) to be in, on or under any land shall also be taken for the purposes of this section to have caused or knowingly permitted there to be in, on or under that land any substance which is there as a result of a chemical reaction or biological process affecting substance A. In the *Circular Facilities* case it was found that there is no basis for limiting the ambit of the section to exclude responsibility to those who do not know of the potentiality for the chemical reaction or biological process which can affect substance A to produce substance B.

[646] P6 paras 32-39.
[647] CD2.3 paras 3-5, 9, 43, C5.

The knowledge of the substance A is taken to be the knowledge of the substance B generated by the process.

8.4.5.5 B(a)P is not a substance that results from a chemical reaction or biological process affecting coal tar, coke, ash or clinker. The relationship between those materials and B(a) P is not so remote. They are materials with particular characteristics, which include B(a)P as an inherent constituent [4.5.5]. As such I consider it reasonable to regard knowledge of the presence of coal tar, coke, ash or clinker as knowledge of the presence of their component parts, including B(a)P. In contrast, it would not be enough for the appellant to have been aware of the presence of materials described more generally, such as gasworks waste, using the term generically, to impute knowledge of the presence of B(a)P. As I have indicated, gasworks waste would have included a variety of different waste streams, a number of which did not contain B(a)P [5.4.3.11, 12, 6.5.69]. The same could be said in relation to 'organic materials' and 'soils' [4.5.13, 5.4.3.6-7].

8.4.5.6 Mr Wielebski has confirmed it is likely that some ground investigation works would have been undertaken on site as part of the 'land acquisition/tender due diligence process', prior to purchasing the site[648]. I do not have records of the results. Mr Smart accepted that the AECOM site investigations showed very limited evidence of gross coal tar contamination in the made ground [6.5.52, 65]. These circumstances differ from those in the *National Grid* case, where a pit containing coal tar was uncovered, and so the associated findings, which included it was likely that the developer would have been aware of the presence of coal tar under the ground and it would have been arguable that they had knowingly permitted the coal tar to remain there[649], appear to be of little assistance in the case before me [5.4.3.1, 7, 6.5.66].

8.4.5.7 I accept that chemical analysis for B(a)P and/or hydrocarbons would have been unlikely to form part of the pre-purchase site investigation undertaken by the developers of the appeal site. Nonetheless, I have no reason to believe that their findings would have differed from those of the Council as regards indicating that the made ground across the site included ash, clinker, coal and coke, amongst other things, as well as signs of hydrocarbon/tar contamination at depths >1 metre [6.5.66][650]. Given: the history of infilling across the site; the ground investigations likely to have been undertaken prior to purchasing the site; and, the likely level of scrutiny by senior employees of the appellant, I consider it likely that the appellant can have been in no doubt that a large part of the site was made ground comprising gasworks wastes, including a number of those described above as containing B(a)P [5.4.3.5 (2), 8-10, 6.5.60-64, 67-68].

[648] P5 para 5.6.
[649] CD2.4 para 19.
[650] CD7.3 paras 4.3.2-3, 5.2.2.

8.4.5.8 Therefore, in my judgement, the appellant can be regarded as having knowledge of the presence of B(a)P. Furthermore, following the transfer of land from the Council, the appellant was in control of the land developed by Fletcher for just over 3 months, during which time the appellant acknowledges that it had some opportunity to remove the B(a)P [6.6.30]. It controlled the remainder of zone 7 and zone 4 for a much longer period [6.5.12]. There is no evidence before me to show that those periods would not have been sufficient to allow the appellant an adequate opportunity to remediate the area, had it chosen to do so [5.4.2.37(4)(e), 5.4.3.2,4, 6.6.30]. On the contrary, the period agreed by the Council and appellant at the Inquiry for the now more complex operation of removing material from the developed site and reinstatement works is only 6 months. In my judgement, the 3 month period during which the whole site was controlled by the appellant is likely to have been adequate [4.4.29].

8.4.5.9 I conclude it is likely that, in relation to zones 4 and 7, the appellant knowingly permitted B(a)P, by reason of which the contaminated land in question is such land, to be in, on or under that land. The Council's finding to that effect was reasonable [4.4.18, 6.5.70].

8.4.6 ***Conclusion***

8.4.6.1 I conclude it is unlikely that the appellant caused or exacerbated contamination by B(a)P within zones 4 and 7, and the Council's finding to the contrary was unreasonable. However, it is likely that, in relation to zones 4 and 7, the appellant knowingly permitted B(a)P, by reason of which the contaminated land in question is such land, to be in, on or under that land. The Council's finding to that effect was reasonable. On that basis, the Council did not unreasonably determine that the appellant is an Appropriate Person to bear responsibility for any thing required by the notice to be done by way of remediation. In relation to ground of appeal (c), I conclude overall that the appeal should be dismissed.

8.5 **Grounds (d) and (e): Other appropriate persons** ('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' and '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)'

8.5.1 Section 78F(6) of the Act indicates that where two or more persons, apart from this sub-section, be Appropriate Persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued by the

Secretary of State whether any, and if so which, of them is to be treated as not being an Appropriate Person in relation to that thing [6.3.8].
The relevant Guidance, which came into effect shortly after the Council's determination of land as contaminated and remains extant, is the 2012 Guidance.

8.5.2 ***The Council***

8.5.2.1 The Council acknowledges that it could be argued that, as it owned the site from 1965 until it was sold to the appellant in 1972 and could be regarded as having permitted contamination to remain on the site, it could be considered to be a Class A Appropriate Person [6.6.15][651]. However, it considers that it should be excluded from liability under the terms of exclusion Test 6 set out in the 2012 Guidance.

8.5.2.2 Test 6 indicates that if all of the circumstances, (a) to (d), apply the enforcing authority should exclude any person meeting the description set out in (d)[652].

8.5.2.3 With reference to (a), the developers of zones 4 and 7 carried out relevant actions (later actions) by making a material change in use of the land in question for which specific applications for planning permission were required. That is, by obtaining and implementing planning permission for residential use. With reference to (b), the effect of those later actions has been to introduce the receptors, the residents of the residential properties, which form part of the significant contaminant linkage in question [5.5.7-8].

8.5.2.4 The appellant argues that the Council cannot benefit from (c) or (d), due to its role in developing the site. The Council purchased the former gasworks site under Part V of the Housing Act 1957 and as a consequence was required to dispose of the land subject to a condition of residential development. The particulars of sale indicated that outline planning permission had been obtained for residential development [6.6.8-11]. However, when the Council sold the site to the appellant no such condition of residential development was imposed, nor was residential development of the site secured by any other formal obligation [5.5.9-10]. Under these circumstances, in my judgement, notwithstanding that the site was sold to a house builder, it was not inevitable that the site would be developed for housing.

8.5.2.5 Furthermore, whilst there is no dispute that the Council demolished at least one dangerous building and filled in a tank at the former gasworks site prior to May 1971, there is no evidence to show that those or associated works took place within zones 4 or 7 [5.4.2.10-11, 5.5.5, 13, 6.6.13-14]. Although the Council obtained outline planning permission for housing

[651] P4 paras 192 and 320.
[652] CD1.5 pages441-442.

development in May 1971, neither the Council nor the appellant were obliged to implement it, which would have made a material change to the use of the land, and they did not [5.5.6, 11]. The particulars of sale indicated that a specific section of the site would have to be laid out as public open space. However, the layout of the site was otherwise a matter for the developer in the first instance[653]. It appears to me that future developers were not obliged by the Council's actions to site houses in zones 4 or 7, thereby introducing receptors [6.6.12, 16].

8.5.2.6 With reference to (c), if the residential properties had not been built in zones 4 and 7 by the appellant and Fletcher there would not have been a significant contaminant linkage, because of the absence of a receptor. With reference to (d), the Council is a member of the liability group in question solely by reason of having carried out earlier actions which were completed before any of the later actions, referred to above, were carried out.

8.5.2.7 I consider that, with reference to the Council, all of the circumstances (a) to (d) apply and as a person meeting the description set out in (d) it was not unreasonable for the Council to exclude itself from the liability group, with reference to Test 6. In this respect it acted in accordance with the 2012 Guidance when formulating the Remediation Notice [6.6.19-21].

8.5.3 *The gas companies*

8.5.3.1 Prior to the purchase of the former gasworks site by the Council, it hosted a gasworks which was initially operated by the Willenhall Gas Company and later by the West Midlands Gas Board [6.2.3]. The evidence indicates that they are likely to have caused B(a)P to be present in zones 4 and 7 and that the operators involved in decommissioning the facility had an opportunity to remove it, which they did not take [6.6.29, 30].

8.5.3.2 Nonetheless, even if these companies could still be found, which they cannot, I consider that they would be excluded from liability for remediation based on the application of exclusion Test 6, for the same reasons set out above in relation to the Council [5.6.21]. Section 7(d) of the 2012 Guidance, which deals with apportionment between members of a single Class A liability group, is of little relevance in this context [6.6.29][654].

8.5.4 *E. Fletcher Limited and others*

8.5.4.1 The Council has confirmed that as a result of Fletcher's prior involvement in the bidding process associated with land at Lodge Farm and the gasworks site, it would have known about the previous gasworks use of

[653] P4 Appendix IJ5.
[654] CD1.5 para 7.62.

land in zones 4 and 7 prior to its purchase of part of the land in zone 7 from the appellant. Furthermore, excavation undertaken during construction of dwellings by Fletcher would have revealed the presence of gasworks waste, which it allowed to remain on site. By building and selling dwellings, it introduced receptors, thereby completing the significant pollutant linkage. For these reasons the Council considers Fletcher to be a Class A Appropriate Person in relation to the properties in Kemble Close, contrary to the submissions of Aggregate Industries [7.2.10-11]. I consider that Fletcher can be regarded as a 'knowing permitter' for the same reasons I have given in relation to the appellant. Furthermore, Fletcher would not benefit from exclusion Test 5, set out in the 2012 Guidance, given my finding it is unlikely that the appellant caused or exacerbated contamination by B(a)P within zones 4 and 7 [7.2.12-14]. Nonetheless, in any event, the company was dissolved, following determination of the land as contaminated and the Council's notification of the company that it was regarded as a potential Appropriate Person [7.2.15-18]. Consequently, the Council regards it as a person who can no longer be found for the purposes of treating it as an Appropriate Person, a matter not now disputed by the appellant[655].

8.5.4.2 In its grounds of appeal the appellant also raised the position of the following parties: leaseholders who acquired plots under 99-year building leases, around 1972-73 according to the appellant; Triton Investments Limited, which acquired the freehold on certain plots on 20 November 1973; and, Shenstone Properties Limited, which acquired the freehold of certain plots in 1987. However, in its opening statement it confirmed that it no longer wished to pursue its appeal under ground (d) in respect of those parties [2.1.2, 5.5.1, 2]. Furthermore, in light of my finding as regards the appellants status as a 'knowing permitter', it appears that section 78F(4) of the Act, which relates to circumstances in which no Appropriate Persons who caused or knowingly permitted the contamination are found, has no application in this case [7.2.4].

8.5.5 ***Conclusion***

8.5.5.1 I conclude that the Council did not unreasonably fail to determine that someone 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. In relation to ground of appeal (d), the appeal should be dismissed. The only appropriate person that can still be found, in relation to any particular thing which is to be done by way of remediation, is the appellant. Therefore, sections 78F(6) and (7) of the Act is of little relevance [6.3.8-9]. In relation to this matter the Council did not fail to act in accordance with the extant 2012 Guidance issued by the Secretary of State and, with reference to ground of appeal (e) the appeal should be dismissed.

[655] P4 paras 316-319.

8.6 **Ground (n): Costs** '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'

8.6.1 Section 78F(7) of the Act indicates that where 2 or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, they shall be liable to bear the cost of doing that thing in proportions determined by the enforcing authority in accordance with guidance issued for the purpose by the Secretary of State [6.3.9][656]. Paragraph 8.5 of the 2012 Guidance indicates that in making a cost recovery decision, the Council should have regard to the following general principles: (a) the Council 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; and, (b) the 'polluter pays' principle should be applied with a view that, where possible, the costs of remediating pollution should be borne by the polluter [5.6.8-9][657]. The authority should therefore consider the degree and nature of responsibility of the relevant Appropriate Person(s) for the creation, or continued existence, of the circumstances which lead to the land in question being identified as contaminated land.

8.6.2 Section 78P(2) of the Act indicates that in deciding whether to recover the cost, and, if so, how much of the cost, the enforcing authority shall have regard to (a) any hardship which the recovery may cause to the person from whom the cost is recoverable; and, (b) to any guidance issued by the Secretary of State for the purposes of this subsection [7.3.11]. The relevant Guidance, which came into effect shortly after the Council's determination of land as contaminated and remains extant, is the 2012 Guidance. Paragraph 8.6 of the 2012 Guidance indicates that in general the Council should seek to recover all of its reasonable costs. However, it should waive or reduce the recovery of costs to the extent that it considers this appropriate and reasonable, either: (i) to avoid undue hardship to the Appropriate Person; or (ii) to reflect one or more of the specific considerations set out in the statutory guidance, in sub-sections such as 8(c) [5.6.8, 10][658].

8.6.3 Paragraph 8.8 of the 2012 Guidance indicates that in general, the enforcing authority should expect anyone who is seeking a waiver or reduction in the recovery of remediation costs to present any information needed to support such a request [5.6.11].

[656] CD1.1 page 43.
[657] A 'polluter' being a person who caused or knowingly permitted the contamination [5.1.12(6)].
[658] CD1.5 paras 8.5 and 8.6.

8.6.4 ***Hardship***

8.6.4.1 Whilst the Council has drawn attention to paragraph 8.16 of the 2012 Guidance, it appears to relate to cases involving a small or medium sized enterprise. However, it is not suggested that the appellant is such an enterprise and so this appears to be of little relevance in this case [5.6.16].

8.6.4.2 The Council has estimated that the remediation requirements set out in the Remediation Notice would cost between £2-4 million. Based on its own research [5.6.18-19], the Council has confirmed that the appellant is a subsidiary company of Taylor Wimpey plc, one of the largest and most successful currently active developers in the country. Furthermore, although the appellant is now dormant, it has a financial asset in the form of a £25.2m debt owed to it by another Taylor Wimpey subsidiary company. It also has the financial support of its wealthy parent company. These matters have not been disputed by the appellant. The appellant has indicated that any attempt to recover the cost of remediation works from it would result in it being made insolvent and this hardship would be wholly disproportionate to any sum which might, notionally be recoverable from the appellant's sole debtor[659]. No supporting evidence in this regard has been provided.

8.6.4.3 Against this background, not least that the appellant is a subsidiary company of Taylor Wimpey plc, the Council considers that there is no question whatever of any hardship on its part justifying a reduction or waiver of cost recovery [5.6.18]. I have not been provided with any compelling evidence to the contrary [5.6.12, 19]. Under these circumstances, I consider that even if the appellant was required to cover the full cost of remediation, this would be unlikely to justify a reduction or waiver of cost recovery on the basis of hardship. In addition, I am satisfied that the Council has not failed to have regard to the matter of potential hardship required by section 78P of the Act.

8.6.5 ***Apportionment***

8.6.5.1 Paragraph 8.25 of sub-section 8(c) of the 2012 Guidance indicates that the Council should consider waiving or reducing its costs recovery from a Class A person if that person demonstrates that criteria (a) and (b) are met [6.6.25]. This provision is also reflected in the Council's Draft Cost Recovery and Hardship Policy [5.6.17].

8.6.5.2 Criterion (a) is that another identified person, who cannot now be found, also caused or knowingly permitted the significant contaminant to be in, on or under the land. The Council has confirmed that as a result of Fletcher's prior involvement in the bidding process associated with land at Lodge Farm and the gasworks site, it would have known about the previous gasworks use of land in zones 4 and 7 prior to its purchase of

[659] CD7.3 paras 4.51-52.

part of the land in zone 7 from the appellant. Furthermore, excavation undertaken during construction of dwellings by Fletcher would have revealed the presence of gasworks waste, which it allowed to remain on site. By building and selling dwellings, it introduced receptors, thereby completing the significant pollutant linkage. For these reasons the Council considers Fletcher to be a Class A Appropriate Person in relation to the properties in Kemble Close. However, the company was dissolved, following determination of the land as contaminated and the Council's notification of the company that it was regarded as a potential Appropriate Person. Consequently, the Council regards it as a person who can no longer be found for the purposes of treating it as an appropriate person[660]. I agree with this position and it follows that criterion (a) is met.

8.6.5.3 Criterion (b) (ii) indicates that the proportion of the cost of remediation which the appropriate person has to bear would have been significantly less, by virtue of the guidance on apportionment set out in Section 7. That section indicates that responsibility should be apportioned between parties in proportion to (a) the length of time each controlled the land; (b) the area of land which each person controlled; (c) the extent to which each person had the means and a reasonable opportunity to deal with the presence of the contaminant; or (d) a combination of those factors.

8.6.5.4 In relation to the Fletcher land, it was controlled by Fletcher for longer than by the appellant and as Fletcher developed it, it had more opportunity to deal with the contamination. In my view, it follows that the proportion of the costs which the appellant might have to bear would have been significantly less if Fletcher could still have been found. Therefore, it appears to me that criterion (b)(ii) is met.

8.6.5.5 It follows that the Council should consider waiving or reducing its costs recovery from the appellant. Prior to the dissolution of Fletcher, the Council proposed to apportion 60% of the costs of remediation of the Fletcher land to the appellant and the remaining 40% to Fletcher. This was on the basis that whilst Fletcher was a knowing permitter of the contamination and completed the significant contaminant linkage, the appellant: was a causer as well as a knowing permitter; it saw the original Contract of Sale, in which the warning about parts of the land being unsuitable for building was given, whereas Fletcher did not; and, should have ensured that the gasworks waste was removed before selling part of the land to Fletcher.

8.6.5.6 Following the dissolution of Fletcher, the Council revised its position, determining that the appellant caused or knowingly permitted all of the land to be contaminated, including the land developed by Fletcher, and so it was not considered appropriate to limit costs recovery to reflect the fact that Fletcher could not be 'found'. The Council considers that its

[660] P4 paras 316-319.

discretionary decision in this regard should not be interfered with unless shown to be unreasonable or not in accordance with the statutory guidance [5.6.15, 17, 20]. The Remediation Notice identifies the appellant as 100% liable for the remediation requirements[661].

8.6.5.7 The appellant disagrees with the 100% liability proposed and also the reasons given by the Council for the previously proposed 60/40% split in relation to the Fletcher land [4.4.29]. The appellant initially argued that, in the event that it is found liable, its overall liability for remediation costs should be limited to 60%, as Fletcher developed 40% of the area subject to the Remediation Notice[662]. However, in closing the appellant indicated, in respect of 'the land developed by Fletcher', its support for the Council's contention that, in circumstances where both are appropriate persons and Fletcher cannot be found, the appellant should be liable for 60% of the remediation costs [6.6.27].

8.6.5.8 In relation to this particular matter, I share the appellant's view in certain respects, as set out previously. That is, I consider that the appellant is unlikely to have caused the land to be contaminated. Although it is likely that it was a 'knowing permitter', in the case of the Fletcher land, it did not complete the significant contaminant linkage. In these particular respects the role it played is not dissimilar to that of the Council. Furthermore, the warning given by the Council, when it sold the land, about parts of the land being unsuitable for building was not a clear indication that the land may be contaminated.

8.6.5.9 I have also had regard to the 2012 Guidance, including paragraph 8.5, which indicates, amongst other things, that the Council 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. In addition, I have no reason to doubt that the appellant profited from the sale of that part of zone 7 sold to Fletcher. Paragraph 8.24 indicates that if the Class A person is likely to have profited financially from the activity which led to the land being determined to be contaminated land, the authority should generally be less willing to waive or reduce costs recovery than if no such profits were made [5.6.14].

8.6.5.10 Under the circumstances, I consider the 60/40 apportionment previously suggested by the Council to be reasonable in relation to the Fletcher land. Overall, the appellant's liability would amount to 84%[663] of the

[661] The 100% liability relates to all properties within zones 4 and 7, except No. 6 Kemble Close. Liability for the remediation requirements at No. 6 Kemble Close, which is within zone 7, has not been apportioned by the Remediation Notice. The reason for this is set out on page 5 of CD6.7. It indicates that *No. 6 Kemble Close was sold on the 17 November 2014. The Council is currently in consultation with the new purchasers of the property in order to determine whether the new purchasers had knowledge of the contamination and therefore are a Potential Class A person against whom liability is to be apportioned. For this reason the property has not been included in Schedule 5 of the Remediation Notice as the Council will need to undertake statutory consultation with the new purchasers*.

[662] ID41.

[663] ID41 scenario 1, Council's suggested apportionment/reduction.

total remediation costs for the area subject to the Remediation Notice. In holding the appellant 100% liable, as opposed to 60% liable, for remediation of the Fletcher land, the Council's approach is unreasonable and contrary to the 2012 Guidance as regards taking a fair and equitable approach [5.6.6, 6.6.35]. I conclude that the Council unreasonably determined that it would decide to recover all of the costs from the appellant.

8.6.6 ***Conclusion***

8.6.6.1 In relation to ground of appeal (n), I conclude overall that the appeal should be allowed.

8.7 **Ground (m) – Council Remediation** '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'

8.7.1 I refer to my conclusion on ground of appeal (n), to the effect that less than 100% of the cost of remediation should be recovered from the appellant. I consider it then follows, with reference to section 78N(3)(e) of the Act[664], that the Council would have the power to do what is appropriate by way of remediation under section 78N(1) of the Act and to recover the reasonable costs so incurred from the Appropriate Person under section 78P of the Act through the mechanism of a charging notice [6.6.32-36][665].

8.7.2 On that basis, I conclude, in relation to ground of appeal (m), that the appeal should be allowed.

8.7.3 The Council and appellant indicated at the Inquiry that, in circumstances where the percentage of costs to be recovered is less than 100%, the notice could stand in a modified form to reflect the revised rate of recovery. Furthermore, it would be for the Council to do the work and then recover the costs at the revised rate from those who remain liable. However, section 78H(5)(d) of the Act indicates that in circumstances where the powers conferred on the Council by section 78N, to do what is appropriate by way of remediation, are exercisable, the enforcing authority shall not serve a remediation notice [6.3.12][666]. That appears to me to be grounds for quashing the Remediation Notice.

8.8 **Grounds (b) and (p): Remediation requirements** – **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

[664] CD1.1 page 88.
[665] CD6.7 page 238 para 2 and 3.
[666] CD1.1 page 55-56.

remediation' and **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'

8.8.1 I turn now to consider the provisions for remediation set out in the Remediation Notice, which would remain relevant in the event that the Secretary of State determines: that the land was reasonably determined to be contaminated (ground of appeal (a)), contrary to my conclusion; the appellant is the only appropriate person in relation to any thing required by the notice to be done by way of remediation (grounds of appeal (c), (d) and (e)); 100% of the costs should be recovered from the appellant (ground of appeal (n)), contrary to my conclusion, and so the Council does not have the power to do what is appropriate (ground of appeal m), contrary to my conclusion. I have considered remediation requirements in that context.

8.8.2 Section 78E(4) of the Act indicates that the only things by way of remediation which the enforcing authority may do, or require to be done, under or by virtue of this Part are things which it considers reasonable, having regard to: (a) the cost which is likely to be involved; and (b) the seriousness of the harm [6.3.10]. The relevant Guidance, which came into effect shortly after the Council's determination of land as contaminated and remains extant, is the 2012 Guidance. Paragraph 6.5 of the 2012 Guidance indicates that the broad aim of remediation should be to remove identified significant contamination linkages, or permanently disrupt them to ensure that they are no longer significant and that risks are reduced to below an unacceptable level[667]. Paragraph 6.17 of the 2012 Guidance indicates that the enforcing authority should aim to ensure that remediation achieves a standard sufficient to ensure that land no longer poses sufficient risk to qualify as contaminated land. The authority should not require a higher standard.

8.8.3 Contrary to the view of the appellant, the Council had regard to a number of remediation options before settling the proposed remediation requirements. The Council considered that it would not be reasonable to remove the receptors, as the primary use of the land within zones 4 and 7 is residential property. As to breaking or removing the pathway, it also took the view that there is no practical way to manage or control disturbance of garden soils by residents and so this was discounted. The remaining option was to remove the contaminated soils. In relation to this option, the Council had regard to issues of cost, practicality, disturbance of residents and the possibility of exposing receptors to contamination during the remediation works. Other factors take into account included the need to reassure current and potential future residents that the risks associated with contamination had been adequately addressed through remediation, thereby addressing, amongst

[667] CD1.5 para 6.5.

other things, the risk of property blight[668].

8.8.4 Against this background the Council determined that the only practical approach would be to remove the upper layer of contaminated soils from gardens, 600 mm, and replace it with suitably clean material to provide a capping layer [5.3.3-4][669]. As to what can be regarded as 'suitably clean material', SP1010 indicates that, with regard to remediation the principle of 'as low as reasonably practicable' applies[670]. Furthermore, the British Geological Survey identified what it considered to be the upper limit of normal urban background concentrations of B(a)P in urban areas of 3.6 mg/kg[671], although there is some uncertainty associated with this estimate as it was based on only 32 samples[672]. Under the circumstances, I consider that it would be reasonable to use the C4SL of 5 mg/kg as the criteria for suitably clean materials, as advocated by the Council at the Inquiry[673]. In any event, the Remediation Notice confirms that the criteria for establishing the suitability of clean soils or other material to be used in remediation is to be agreed with the Council prior to the installation of the new layer[674]. I agree with the Council that, as residents may wish to cultivate both, it would be inappropriate to treat front and rear gardens differently[675]. Furthermore, I am satisfied that the Council has given adequate consideration to alternatives.

8.8.5 The appellant has suggested that, following testing, it may be possible to re-use some of the material within the layer identified for removal[676]. Whilst this would be a matter for agreement by the Council under the terms of the Remediation Notice, in my view such an approach would be unlikely to provide current and potential future residents with a reasonable degree of assurance that the risk had been adequately mitigated. I have had regard to the view of the appellant that consideration should be given to separately remediating the land developed by the appellant and Fletcher [6.7.1]. However, as some of the properties on Kemble Close share garden boundaries with a number of others on Brookthorpe Drive, I consider it unlikely that that would be practical. Nonetheless, the Remediation Notice makes provision for consideration to be given to alternative remediation methods, should they be put forward[677].

8.8.6 I consider overall that the means of remediation proposed in the remediation requirements of the notice are reasonable for the purposes of breaking the significant contaminant linkage identified by the Council

[668] P4 paras 174-183 and 298-306.
[669] P4 paras 167-183.
[670] CD16.2.6 page 3388 para 4.4.
[671] CD7.3 para 6.11.2 page 159, CD16.1.11 page 1844-45.
[672] CD16.2.6 page 3388 para 4.4.
[673] Oral evidence during the 'notice modifications session' day 7.
[674] ID51 (a, b and c) Schedule 2 page 2 para 7.
[675] P4 para 176.
[676] ID22.
[677] ID51(a, b and c) Schedule 2 page 3 para 2, ID22 and ID37.

[5.3.1-7, 6.7.1]▪

8.8.7 At the Inquiry[678], the appellant and the Council agreed that the remediation requirements should include, as a Pre-remediation stage (Pre-Stage 1), for stakeholder engagement. Furthermore, in light of factors such as the need to survey property features as a basis for agreeing reinstatement details with property owners and the likely need to phase remediation works, the timescales for remediation set out in the original notice would need to be extended. The Inquiry was adjourned to allow the parties an opportunity to comment in writing on those matters and any other minor modifications required before the close of the Inquiry. In order to address these matters, suggested extensions to the timings of the following stages set out in Schedule 2 of the Remediation Notice were agreed between the Council and the appellant during the course of the adjournment: Stages 1, 2 and 4. Whilst at the Inquiry the appellant suggested that the timescale for the provision of a validation report at stage 5 should be extended from 1 to 2 months, I agree with the Council that 1 month is reasonable. Before the close of the Inquiry, the Council provided a revised version of Schedules 2 and 4 of the Remediation Notice, which has been agreed with the appellant, ID57. I agree that those modifications are reasonable and necessary and that the programme set out in the original notice was unreasonable.

8.8.8 In addition, the Council has provided updated versions of the following documents, which include minor modifications[679]. In my view, the minor modifications are necessary in the interests of clarity and precision, and it would not prejudice the interests of anyone to take them into account:

1) A corrected version of the plan included in Part 3 of Appendix 1 of the Remediation Notice, showing the correct division of properties between zones 4 and 7.
2) An amended Schedule 5 of the Remediation Notice, amended to reflect the transfer of freehold from George Road Securities Limited to Lazy Lizard Securities Limited.

8.8.9 Therefore, in relation to grounds of appeal (b) and (p), I conclude that the appeal should be allowed. In the event that the Secretary of State supports, with reference to the other grounds of appeal, the Remediation Notice, I consider that the notice should be revised in accordance with the suggested modifications contained within ID57[680].

[678] Oral evidence during the 'notice modifications session' day 7.
[679] ID57.
[680] No. 6 Kemble Close, which was included in Schedule 1 of the original notice, has been omitted from Schedule 1 of the revised draft by mistake. It should be added back in.

9 INSPECTOR'S RECOMMENDATIONS

9.1 I recommend that in relation to ground of appeal (a), the appeal be allowed and the Remediation Notice quashed.

9.2 I recommend that in relation to grounds of appeal (c), (d) and (e) the appeal be dismissed.

9.3 I recommend that in relation to grounds of appeal (n) and (m) the appeal be allowed and the Remediation Notice quashed.

9.4 In the event that the Secretary of State determines that the appeal should be dismissed in relation to the grounds of appeal (a), (c), (d), (e), (n) and (m), I recommend that in relation to grounds of appeal (b) and (p) the appeal be allowed and the Remediation Notice modified in accordance with the suggested modifications contained within ID57[681].

I Jenkins
INSPECTOR

[681] No. 6 Kemble Close, which was included in Schedule 1 of the original notice, has been omitted from Schedule 1 of the revised draft by mistake. It should be added back in.

10 APPENDICES

APPENDIX 1 - APPEARANCES

FOR APPELLANT:

Mr S Tromans QC and Miss V Hutton Of Counsel	Instructed by D Gordon, Squire Paton Boggs (UK) LLP.
He called	
Mr S Wielebski CEnv Peng MSc(Dist) C Build E FCABE FCIOB MSPE ACIArb FRSA	-
Dr R Thomas BSc(Hons) PhD CBIOL MRSB MIENVSc CEnv MSCI MIGEM Eng Tech	Technical Director, Parsons Brinckerhoff Ltd.
Mr A Morton BSc MSc CGeol FGS SiLC	Associate Director, RSK Environment Ltd.
Mr P Witherington BSc CEng MICE SiLC	Director, RSK Environment Ltd.

FOR WALSALL METROPOLITAN BOROUGH COUNCIL:

Mr J Maurici QC and Mr M Fraser Of Counsel	Instructed by S Bennett-Mathews, Planning Solicitor, Walsall Metropolitan Borough Council.
He called	
Mr P Smart BSc MSc CGeol FGS	Technical Director, AECOM.
Dr S Cole BEng PhD MCIWEM CWEM CEnv	Technical Director and practice leader for quantitative risk assessment for UK & Ireland Remediation Services team, AECOM.
Mr I Jarrett HNC MIOSH AMIOA	Principal Pollution Control Officer, Walsall Metropolitan Borough Council.

FOR OTHER PARTIES:

Mrs B Fullwood	Local resident.

APPENDIX 2 – CORE DOCUMENTS (CD)

CORE DOCUMENTS	
1. Legislation and guidance	
1.1	Part IIA Environmental Protection Act 1990
1.2	Contaminated Land (England) Regulations 2006
1.3	Circular 01/2006 'Contaminated Land'
1.4	blank
1.5	Contaminated Land Statutory Guidance (2012)
1.6	Gas Act 1948, s.17
1.7	Housing Act 1957, Part V
1.8	Local Authorities (England) (Property etc.) Order 1973 (No 1861)
1.9	Water Resources Act 1991, s. 85 (repealed in April 2010)
1.10	Defra Guidance on the Legal Definition of Contaminated Land (July 2008)
2. Appeal decisions and case law	
2.1	Environment Agency v Empress Car Co [1999] 2 AC 22
2.2	R v North & East Devon HA, ex p Coughlan [2001] QB 213
2.3	Circular Facilities (London) Ltd v Sevenoaks DC [2005] EWHC 865; [2005] Env LR 35
2.4	R (National Grid Gas plc (formerly Transco plc)) v. Environment Agency [2007] 1 W.L.R. 1780
2.5	Corby Group Litigation v Corby DC [2009] EWHC 1944 (TCC)
2.6	Inspector's Report and Secretary of State's Decision letter: St Leonard's Court, Sandridge, Hertfordshire (APP/CL/05/01 and APP/CL/05/02)
3. Historical documents	
3.1	Copy of conveyance dated 7 October 1965 between the West Midland Gas Board and the Urban District Council of Willenhall.
3.2	Letter from the Town Clerk dated 4 May 1971.
3.3	Letter from the Town Clerk dated 13 July 1971.
3.4	Particulars of Sale dated July 1971.
3.5	Contract for Sale between the Mayor Aldermen and Burgesses of the County Borough of Walsall and McLean Homes Midland Ltd dated 14 January 1972.
3.5A	Transfer of Part from McLean to E Fletcher Builders Limited, dated 6 June 1972, with attached plan.
3.6	Agreement between McLean Homes Midland Limited and the Midlands Electricity Board, dated 4 August 1972 to permit the Board to lay underground electric lines on the 'Housing Estate', with attached plan.
3.7	Specimen freehold transfer of 7 Oakridge Drive dated 11 October 1972.
3.8	Specimen 99-year lease of 25 Oakridge Drive dated 1 January 1973.
3.9	NHBRC Certificate for Plot 84 dated May 1973.
3.10	Specimen freehold transfer of 9 Oakridge Drive dated 11 June 1973.
3.11	Specimen lease of 1 Oakridge Drive granted by McLean dated 13 April 1973.
3.12	Specimen lease of 2 Brookthorpe Drive granted by McLean dated 5 June 1973.

CORE DOCUMENTS	
3.13	Specimen lease of 7 Kemble Close granted by Fletcher dated 6 April 1973.
4. Planning permissions	
4.1	Outline planning permission P34619 dated 27 May 1971 granted to the Town Clerk, Walsall for residential development at Lodge Farm and Clarkes Lane Gasworks Willenhall with attached plan.
4.2	Detailed planning permission P35556 dated 2 February 1972 granted to Mclean Homes (Midland) Limited for development comprising of 51 dwellings at the Former Gasworks Site, Clarkes Lane, Willenhall with attached plan.
4.2A	Blank
4.3	Detailed planning permission P36210 granted to E. Fletcher Builders for the erection of 59 houses (plots 50-108) on land off Sandy Lane, Willenhall (Trent Park) and attached amended plan.
4.4	Detailed planning permission P36898 granted to Mclean Homes (Midland) Limited dated 8 November 1972 relating to plots 90-118 at the Old Gasworks Site Clarkes Lane (plan missing).
4.5	Detailed Planning Permission P36102 granted to Mclean Homes (Midland) Limited dated 14 June 1972 in relation to plots 52-89 at the Old Gasworks Site Clarkes Lane (plan missing), together with Notice of Approval of Plans dated 3 July 1972.
5. Plans and maps	
5.1	Map 1 extract from SF 82384 identifying the areas of the Former Willenhall Gasworks site which was developed by McLean Homes (Midland) Ltd and E Fletcher Builders
5.2	Map 2 Plan showing the extent of the land developed by E Fletcher Builders under the planning permission implemented by them.
5.3	Map 3 showing the areas of land developed by Mclean Homes (Midland) Limited and E Fletcher in accordance with the various planning permissions
5.4	Map 4 showing the extent of the land developed by Mclean Homes (Midland) Limited and E Fletcher Builders
6. Documents relating to identification and remediation notices	
6.1	Walsall Borough Council Contaminated Land Inspection Strategy June 2001
6.2	Cabinet report 3 February 2010 and draft cost recovery and hardship policy
6.3	Notice of Identification of Contaminated Land dated 28 March 2012 for E Fletcher Builders Ltd, with the Record of Determination at Appendix 1 and the Liability Considerations for all Notified Persons at Appendix 2
6.3A	Example of covering letter to Class B persons, dated 28 March 2012, with attached Notice of Identification, Written Record of Determination and document entitled 'Questions and Key Facts'.
6.3B	Letter to Environment Agency dated 28 March 2012, with attached Notice of Identification, Questions and Key Facts, Record of Determination and Liability Considerations for all Notified Persons
6.4	6.4. 'Check List' re compliance with Statutory and Non Statutory Guidance (undated but thought to have been prepared on 6 April 2011)

CORE DOCUMENTS	
6.5	Memorandum to Jamie Morris from Ian Jarrett dated 3 August 2012 with all attachments including delegated authority authorising service of the Notice of identification of Contaminated Land and record of determination dated 27 March 2012
6.5A	Letter dated 7 August 2012 to Jim 2 Limited, together with Explanatory Notes, Notice of Identification of Contaminated Land (addressed to McLean Homes (Midlands) Limited), Key Questions and Facts, Record of Determination and Liability Considerations for all Notified Persons
6.5B	Letter to the Chief Executive of Walsall Council with Notice of Identification dated 7 August 2012, Record of Determination, Liability Considerations, and Key Questions and Facts (Note: every even page missing)
6.5C	Letter dated 10 August 2012 from the Chief Executive of Walsall Council to Mr Ian Jarrett
6.6	Letter to Jim 2 Ltd dated 11 March 2013 enclosing Preliminary Assessment of Liability and Proposed Outline of Likely Remediation Requirements
6.7	Memorandum dated 16 March 2015 to Jamie Morris, Executive Director Neighbourhood Services, from Sharon Bennett-Matthews, and authorisation dated 17 March 2015 by Executive Director to serve Remediation Notice on Jim 2.
6.8	Remediation Notice served by the Council on Jim 2 Ltd dated 17 March 2015 and accompanying documents
7. Appeal documents	
7.1	Jim 2's Notice of Appeal and Grounds of Appeal served 7 April 2015.
7.2	Amended Notice of Appeal and Grounds of Appeal dated 7 May 2015.
7.3	Jim 2's Statement of Case dated 29 July 2015, including report from RSK dated July 2015 and appendices.
7.4	Council's Statement of Case dated July 2015.
7.5	Jim 2's comments on the Council's Statement of Case, dated 18 September 2015, and annexes (Fletcher solvency statement and RSK comments on Council's Statement of Case).
7.6	Council's comments on Jim 2's Statement of Case, dated 21 September 2015.
8. Selected correspondence to/from the Planning Inspectorate	
8.1	Email dated 13 October 2015 from the Planning Inspectorate notifying parties that the appeal has been recovered by the Secretary of State.
9. Documents relating to land ownership	
9.1	Office copy entry and plan for title no. SF82384 relating to Jim 2's original title for land acquired from Walsall.
9.2	Office copy entry for title no. SF86128 relating to land transferred from McLean to Fletcher in June 1972 and then on to St Giles Properties Ltd in September 1975.
9.3	Office copy entries and file plans etc for title nos. WM339545 (1 Oakridge Drive); SF92162 (7 Oakridge Drive); SF101499 (1 Oakridge Drive – leasehold title); WM788267 (Land adjoining 1 Oakridge Drive); SF105822 (9 Oakridge Drive).
9.4	Office copy entries and file plans for title no WM926095 relating to Cyril Freedman Limited.

CORE DOCUMENTS	
9.5	Office copy entry relating to freehold title of land transferred by McLean to Shenstone Properties Limited, registered on 20 May 1987 with title no WM405733.
9.6	Office copy entries and file plan for title no WM40898 (issued on 31 October 2012 and 7 April 2015) relating to land retained by E Fletcher Builders Ltd after transfer of land to St Giles Properties Ltd, and subsequently transferred to Aggregate Industries UK Limited.
9.7	Office copy entry for title no SF109779 relating to land sold by McLean to Triton Investments Ltd on 20 November 1973.
9.8	Office copy entry for title no WM505034 relating to leasehold title of 6 Kemble Close.
9.9	Office copy entry and plan for title no WM216657 relating to freehold title of 1 Kemble Close.
9.10	Office copy entry for title no WM1445 relating to leasehold title of 1 Kemble Close.
9.11	Office copy entry for title no WM542968 relating to freehold title of 2 Kemble Close.
9.12	Office copy entry for title no SF102083 relating to leasehold title of 2 Kemble Close.
9.13	Office copy entry for title no WM542606 relating to freehold title of land adjoining 2 Kemble Close.
10. Correspondence Council/E Fletcher Builders	
10.1	Letter dated 28 March 2012 sent by Council to E Fletcher Builders Ltd (attachments at CD6.3).
10.2	Letter from Aggregate Industries dated 9 May 2012 together with plan.
10.3	Letter from the Council to Aggregate Industries Ltd dated 25 June 2012.
10.4	Letter from the Council to E Fletcher Builders enclosing Preliminary Assessment of Liability (see CD 6.6 for the enclosures).
10.5	Letter from DLA Piper, on behalf of E Fletcher Builders, to the Council dated 26 April 2013.
10.6	Letter dated 30 April 2013 from the Council to DLA Piper.
10.7	Letter to the Council from DLA Piper dated 3 May 2013.
10.8	Letter to the Council from DLA Piper dated 14 May 2013.
10.9	Letter from the Council to DLA Piper dated 23 January 2014 enclosing tables with Council's response to issues raised in consultation.
10.10	E-mail from the Council to DLA Piper dated 3 February 2014.
10.11	Letter from DLA Piper to the Council dated 10 March 2014.
10.12	BLANK
10.13	Letter from DLA Piper to the Council dated 6 March 2015.
10.14	Letter from DLA Piper to the Planning Inspectorate dated 29 October 2015 attaching representations on behalf of Aggregate Industries Ltd.

CORE DOCUMENTS	
11. Correspondence Council/Jim 2 Ltd/ McLean	
11.1	Letters dated 28 March 2012 sent by Council to McLean Homes (Midlands) Ltd (minus attachments, attachments are in CD6.3)
11.2	Letter from McLean Homes Ltd to the Council dated 12 November 2012
11.3	Letter from McLean Homes Ltd to the Council dated 2 May 2012
11.4	Letter from the Council to McLean Homes Ltd dated 28 May 2012
11.5	Letter from McLean Homes Ltd to the Council dated 29 May 2012
11.6	Letter from McLean Homes Ltd to the Council dated 12 July 2012
11.7	Letter from the Council to Squire Sanders dated 11 March 2013 enclosing Preliminary Assessment of Liability
11.8	Letter to the Council from Squire Sanders dated 11 April 2013
11.9	Letter to the Council from Squire Sanders dated 26 April 2013
11.10	BLANK
11.11	Emails between the Council and Squire Sanders dated 31 July 2013; 30 July 2013 and 2 August 2013
11.12	Letter from Squire Sanders to the Council dated 9 August 2013
11.13	Letter from the Council to Squire Sanders dated 23 January 2014 (enclosure of tables at CD 10.9)
11.14	Letter from Squire Sanders to the Council dated 29 January 2014
11.15	E-mail from the Council to Squire Sanders dated 31 January 2014
11.16	Letter from Squire Sanders to the Council dated 10 March 2014
11.17	Letter from the Council to Squire Sanders dated 7 April 2014
11.18	Letter from Squire Sanders to the Council dated 17 April 2014
11.19	Letter from the Council to Squire Sanders dated 18 June 2014 enclosing NHBRC certificate for Plot 84 dated May 1973: see CD 3.9.
11.20	Letter from Squire Patton Boggs to the Council dated 25 June 2014
11.21	E-mail from Council to Squire Patton Boggs dated 3 July 2014
11.22	Letter from the Council to Squire Sanders dated 23 February 2015
11.23	Email from Squire Patton Boggs dated 8 May 2015 to Planning Inspectorate raising queries in relation to Schedule 5 of the Remediation Notice dated 17 March 2015
11.24	Council's e-mail response to Squire Patton Boggs dated 26 June 2015, (attachments elsewhere in CDs)
11.25	Council's response to the Planning Inspectorate and Squire Patton Boggs dated 21 July 2015
11.26	E-mail Squire Patton Boggs to Council dated 8 September 2015 requesting certain documents
11.27	Response of the Council dated 9 September 2015 to e-mail dated 8 September 2015
11.28	Letter from the Council to McLean Homes Limited dated 11 March 2013
12. Correspondence with the Council as a potential Class A person	
12.1	Letter dated 23 January 2014 from Sharon Bennett-Matthews to the Chief Executive of the Council (enclosure of tables at CD 10.9)
12.2	Letter dated 11 March 2013 from Sharon Bennett-Matthews to the Chief Executive of the Council

CORE DOCUMENTS	
13. Resident correspondence and minutes of STAG meetings	
13.1	Example resident consultation/update letters (some with attachments) dated.
13.1.1	14 January 2011.
13.1.2	3 June 2011.
13.1.3	22 June 2012.
13.1.4	10 August 2012.
13.1.5	8 March 2013.
13.1.6	12 August 2013.
13.1.7	4 April 2014.
13.1.8	30 June 2014.
13.2	Letter dated 21 May 2012 from the Chair of residents' group Stonegate, Trentpark Action Group (STAG).
13.3	Update letters to Class A and Bs dated 17 October 2014 to residents.
13.4	Agreed Minutes of Meeting between the Council and STAG dated 19 November.
13.5	Letter from Irwin Mitchell dated 25 February 2015 – Group Class Action Claim.
13.6	Letter from Irwin Mitchell Solicitors dated 19 January 2015 Environmental Information Regulation Request Residents.
13.7	Blank.
14. Other correspondence	
14.1	Letter from the Council to Lazy Lizard Securities Ltd dated 10 June 2015 (attachments located elsewhere in CDs)
14.2	Letter from the Council to St Giles Properties Ltd re: 6 Kemble Close dated 15 June 2015
14.3	Letter from the Council to Miss Brdova re: 6 Kemble Close dated 16 June 2015
14.4	Letter from the Council to Mr and Mrs Tank re: 6 Kemble Close dated 17 June 2015 (attachments located elsewhere in CDs)
14.5	Letter from the Council to Aggregate Industries re: Land adjoining nos. 1 and 2 Kemble Close dated 19 June 2015, with plan and photographs (other attachments located elsewhere in CDs)
14.6	E-mails dated 19 June 2015 between the Council and DLA Piper
14.7	Blank
14.8	Letter from the Council to Mr and Mrs Pullar re: Land adjoining 1 Kemble Close dated 19 June 2015, with plan and photograph (other attachments located elsewhere in CDs)
14.9	Letter from the Council to Ms Fullwood re: Land adjoining 2 Kemble Close dated 19 June 2015, with plan and photograph (other attachments located elsewhere in CDs)
15. Company information	
15.1	Email from Valente Kelly to Sharon Bennett-Matthews dated 29 January 2015 and full set of attachments related to Jim2 and E Fletcher Builders company information (including company searches, Equifax reports, and reports on E Fletcher Builders and Jim 2).
15.2	Email dated 6 March 2015 assessment of company reports for Taylor Wimpey Plc and Wimpey Dormant Investments Ltd (attached).

CORE DOCUMENTS	
15.3	Taylor Wimpey Plc Annual Report and Accounts 2013.
15.4	Equifax full report – Wimpey Dormant Investments Limited 6 March 2015.
15.5	Equifax full report – Taylor Wimpey Plc 6 March 2015.
15.6	Email from Squire Patton Boggs to Council dated 30 July 2015 and attachments (Solvency Statement under Section 643 of the Companies Act dated 20 May 2014; Resolution passed dated 20 May 2014; Strike Off Application dated 18 June 2014).
16. Technical reports/studies	
16.1. Council reports (all with full sets of appendices)	
16.1.1	Faber Maunsell Limited/AECOM (April 2007), 'Walsall MBC Phase 1 Desk Study, Oakridge Drive, Walsall', report 52095icvg
16.1.2	Faber Maunsell Limited/AECOM (June 2008) 'A Contamination Assessment for the Former Willenhall Gasworks, Oakridge Drive, Willenhall, Walsall Final report 60037620
16.1.3	Faber Maunsell Limited/AECOM (May 2009), 'Phase II Contaminated Land Risk Assessment Former Willenhall Gasworks, Oakridge Drive', report 60037610
16.1.4	AECOM (April 2010), 'Contaminated Land Assessment – Former Willenhall Gasworks, Oakridge Drive, Walsall', report 60037610.
16.1.5	AECOM (March 2011), 'Revised Contaminated Land Assessment – Former Willenhall Gasworks, Oakridge Drive, Walsall', report 60212124,
16.1.6	AECOM (May 2011), 'Revised Contaminated Land Assessment – Former Willenhall Gasworks, Oakridge Drive, Walsall', report 60212124
16.1.7	AECOM (July 2011), 'Consolidated Contaminated Land Risk Assessment – Former Willenhall Gasworks, Oakridge Drive, Walsall', report 60212124.
16.1.8	AECOM 'Data Review and Summary Oakridge Drive Part IIa, Determination Review' (April 2009)
16.1.9	Meeting notes meeting AECOM and RSK 15 May 2013
16.1.10	AECOM 'Former Willenhall, Gasworks, Oakridge Drive Status of Investigation Findings' 27 April 2011
16.1.11	AECOM 'Sensitivity Analysis and Supporting Data - Oakridge Drive, Part IIa Determination', 4 March 2013.
16.1.12	GIP 'Factual report for a ground investigation at the Former Willenhall Town Gasworks, Oakridge Drive, Willenhall, Walsall' (18 December 2014)
16.1.13	ENVIRON letter dated 20 June 2014 'CONFIDENTIAL: Final response re: A review of the Human Health Risk Assessment for the former gasworks site now Oakridge Drive, Walsall considering the impact of the C4SL for benzo[a]pyrene (B[a]P)'
16.2 Other technical documents/guidance	
16.2.1	British Geological Survey (no date http://mapapps.bgs.ac.uk/geologyofbritain/home.html
16.2.2	British Standards Institution (1999), 'BS 5930:1999. Code of practice for site investigations'.
16.2.3	British Standards Institution (2011), 'BS 10175:2013. Investigation of potentially contaminated sites: Code of practice'.
16.2.4	Chartered Institute of Environmental Health (CIEH) and CL:AIRE (2008), Guidance on Comparing Soil Contamination Data with a Critical Concentration (London: CIEH).

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16.2.5	Contaminated Land: Applications in Real Environment (CL:AIRE)) 'Development of Category 4 Screening Levels for Assessment of Land Affected by Contamination', Revision 2, DEFRA research project SP1010.
16.2.6	Contaminated Land: Applications in Real Environment (CL:AIRE) (2014b). Appendix E – benzo(a)pyrene. DEFRA research project SP1010', Appendix I and the Policy Companion Document
16.2.7	Defra (2011), 'Defra 1133. Impact Assessment (IA). Simplification of the contaminated land regime'.
16.2.8	Defra (2012), 'Impact Assessment of Revised Contaminated Land Statutory Guidance'.
16.2.9	Department of the Environment, Transport and the Regions (DETR), (1987), Problems Arising from the Redevelopment of Gasworks and Similar Sites, 2nd edition. (London: Defra Publications).
16.2.9A	Blank
16.2.10	Department of the Environment (DoE) (1987), 'Circular 21/87 Development of Contaminated Land', August.
16.2.11	Environment Agency (2002), 'Contaminants in soil: collation of toxicological data and intake values for humans. Benzo(a)pyrene'.
16.2.12	Environment Agency (2004a), Model Procedures for the Management of Contaminated Land. Contaminated Land Report Number 11 (CLR11), September (Bristol: Environment Agency).
16.2.13	Blank
16.2.14	Environment Agency (2009), 'Using Soil Guideline Values', Science report: SC050021/SGV introduction.
16.2.15	Environment Agency (2009a), Contaminated Land Exposure Assessment (CLEA) software, version 1.06.
16.2.16	Blank.
16.2.17	Health Protection Agency (2008), 'Contaminated Land Clarification Note Series Note 1. Benzo(a)pyrene: Use of Excess Lifetime Cancer Risk Estimates'.
16.2.18	Health Protection Agency (2010), 'Risk Assessment Approaches for Polycyclic Aromatic Hydrocarbons (PAH)', General Toxicology Unit, Health Protection Agency.
16.2.19	ICRCL (2987), 'Guidance on the assessment and redevelopment of contaminated land', ICRCL 59/83, 2nd edition, July.
16.2.20	BLANK
16.2.20.1	B2 Site investigation and material problem
16.2.20.2	BLANK
16.2.20.3	Problems posed by the need to reclaim land formerly used for coal carbonisation plants
16.2.20.4	H2 Legislation to control development on contaminated land.
16.2.21	Society of Brownfield Risk Assessment (SoBRA) (2011), 'Human Health Risk Assessment and Polycyclic Aromatic Hydrocarbons', Summer 2010 Workshop Report, February.
16.2.22	Blank.
16.2.22B	Blank.

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16.2.23	Environment Agency (2009) - Human health toxicological assessment of contaminants in soil, SC050021/SR2
16.2.23B	Blank.
16.2.24	Blank.
16.2.24B	Blank.
16.2.25	Blank.
16.2.25B	Blank.
16.2.26	CIEH (2009) Professional Practice Note: Reviewing human health risk assessment reports invoking contaminant oral bioavailability measurements or estimates, June 2009
16.2.26B	BLANK
16.2.27	CL:AIRE (2011) Generic Human-Health Assessment Criteria for Benzo[a]Pyrene at Former Coking Works Sites, Research Bulletin 15, September 2011
16.2.27B	Contaminated Land Advisory Note CLAN 2/05
16.2.28	COC (2012) A strategy for the risk assessment of chemical carcinogens, COC/G1 v.4, Committee on carcinogenicity of chemicals in food, consumer products and the environment (COC), 2012
16.2.28B	ILGRA (2002) The precautionary principle: policy and application, Interdepartmental liaison group on risk assessment, 2002
16.2.28C	CLAN 6/06 'Soil Guideline Values: the Way Forward', Defra 2006
16.2.29	BLANK
16.2.30	COC (2010) Statement on the risk assessment of the effects of combined exposures to chemical carcinogens, Committee on carcinogenicity of chemicals in food, consumer products and the environment (COC), 2010
16.2.31	Abstract of EFSA (2008) Polycyclic aromatic hydrocarbons in food – scientific opinion of the panel on contaminants in the food chain, European Food Safety Authority, 10.2903/j.efsa.2008.724, 4 August 2008
16.2.32	Abstract of EFSA (2015) Scientific opinion on acrylamide in food, EFSA panel on contaminants in the food chain, EFSA Journal 2015; 13(6):4104
16.2.33	Barnes et al (2010)
16.2.34	Turkhall et al (2009) Turkhall R.M, Skowronski G.A, Abdel-Rahmann M.S, Effects of soil matrix and aging on the dermal bioavailability of polycyclic aromatic hydrocarbons in the soil, International Journal of Soil, Sediment and Water, Volume 2, Issue 4, October 2009
16.2.35	Cave et al (2010) Cave M.R, Wragg J., Harrison I., Vane C.H, A comparison of batch mode and dynamic physiologically based bioaccessibility tests for PAHs in soil samples, Environmental Science and Technology, 2010 44(7) pp.2654-2660
16.2.36	Blank
16.2.37	British Geological Survey (BGS) 1:50,000 scale map, Sheet 154, Lichfield and 1:10,000 scale map SO99NE
16.2.38	Blank.

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17. Blank.	
18. Web searches	
18.1	http://www.britainfromabove.org.uk/image/eaw008389?x=398294&y=298427&extent=1000&order=2&ref+32
18.2	http://www.disused-stations.org.uk/s/short_heath/
18.3	http://www.expressandstar.com/latest/2009/12/12/warning-as-chemicals-found-in-garden-soil/
18.4	http://www.localhistory.scit.wlv.ac.uk/articles/Willenhall/19thcentury.htm
18.5	http://www.disused-stations.org.uk/s/short_heath/
18.6	http://www.timbrotherton.co.uk/stonegate/information.html

APPENDIX 3 – PROOFS OF EVIDENCE

P1	Proof of evidence of Mr P Smart.
P2	Rebuttal proof of evidence of Mr P Smart.
P3	Proof of evidence of Dr S Cole.
P4	Proof of evidence of Mr I Jarrett.
P5	Proof of evidence of Mr S Wielebski.
P6	Proof of evidence of Dr R Thomas.
P7	Proof of evidence of Mr A Morton.
P8	Proof of evidence of Mr P Witherington.
P9	Rebuttal proof of evidence of Mr P Witherington.
P10	Proof of evidence of Mr C Pole.

APPENDIX 4 – LEGAL AND OTHER AUTHORITIES

The Council's original authorities bundle (CAB)[682]	
1	Extracts from Tromans & Turrall-Clarke, Contaminated Land (2nd edition): sections 5.45; 6.28; 6.33; 6.57 and cover page only.
2	Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774
3	United Kingdom v Commission of the European Communities (C180/96) [1998] 2 C.M.L.R. 1125
4	R v Rochdale MBC, ex p Milne [2001] Env. L.R. 22
5	Extract (paras. 162 – 165 only) Cummins v Camden LBC [2001] EWHC Admin 1116
6	National Grid Gas v Environment Agency [2006] 1 WLR 3041 (first instance only, House of Lords decision is at CD2.4)
7	Secretary of State for Employment v. ASLEF (No. 2) [1972] 2 Q.B. 455
8	R. v Bolton MBC Ex p. Kirkman (1998) 76 P. & C.R. 548
9	R. (Crest Nicholson Residential Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2011] Env. L.R. 1

[682] ID10.

10	R. (Redland Minerals Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2011] Env. L.R. 2
11	Schulmans Incorporated Limited v. National Rivers Authority [1993] Env. LR D1
12	Ferris v Secretary of State for the Environment [1988] JPL 777
13	Hansard, HL Vol.562, col.209
14	S. 1029 of the Companies Act 2006
15	S. 91 and 56 of the Town and Country Planning Act 1990
16	Welwyn Hatfield BC v SSCLG and Beesley [2011] 2 AC 304
17	Rukat v Rukat [1975] 1 All ER 343
18	Kent CC v Brockman [1996] 1 P.L.R. 1
The appellant's original authorities bundle (AAB)[683]	
1	Meridian Global Funds Management Asia Ltd. v. Securities Commission [1995] 3 WLR 413.
2	Saddleworth UDC v. Aggregate and Sand [1970] 114 SJ 931
3	Kent CC v. Brockman [1996] 1 PLR 1
4	R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government [2011] EWCA Civ 639; [2011] 2 E.G.L.R.75
5	Palmer's Company Law, Vol 4, para. 15.764
6	Tromans & Turrall-Clarke, Contaminated Land (2nd edition) paras. 5.12 – 5.37

APPENDIX 5 – INQUIRY DOCUMENTS (ID)

1	Correspondence notifying interested parties of the appeal and Inquiry arrangements.
2	Drawing no. Figure 2A revision 02.
3	Appellant's legal submissions.
4	CD3.5A-Replacement plan.
5	CD6.6-Requirements of the remediation.
6	Schedule of recipients of appeal notice and grounds.
7	Opening statement of behalf of the appellant.
8	Opening statement on behalf of Walsall Metropolitan Borough Council.
9	Detailed chronology (on behalf of the Council).
10	Council's legal submissions.
11	Statement of Common Ground.
12	Photographs of the appeal site taken in 1968.
13	Red line/green line plan- from Appendices 5 and 8 of Mr I Jarrett's proof of evidence.

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14	Request to appear/withdrawal of request to appear-Mr J Ash.
15	Statement of agreement and clarification on data used in the assessments for Willenhall Gasworks (SOA).
16a	Statement-Mrs B Fullwood.
16b	Statement-a local resident.
17	Conland Expert Panel case study.
18	Extract from the Public Health Act, 1936.
19	RSK Technical report in support of grounds of appeal-figures 1-8 and Appendix F-aerial photos.
20	Proof of evidence of Mr P Witherington- missing figure from paragraph 5.28.
21	CL:AIRE Contaminated Land-Conland Expert Panel web page extract.
22	Appellant's outline suggestions for a modified approach to remediation.
23	Defra press release, dated 24 October 2012, 'National panel of experts, CL:AIRE Contaminated Land-Conland Expert Panel web page extract, Harrison Grant Solicitors web page extract-Andrew Wiseman, CIWEM web page extract-Professional ethics, Government web page extract-the 7 principles of public life.
24	Appellant's reply to the Council's legal submissions.
25	Erratum to FaberMuansell/AECOM reports.
26	Proof of evidence of Mr S Cole-corrections as tracked changes based on jointly agreed datasets on 10/12/15.
27	Application for costs by the appellant.
28	Rebuttal proof of evidence of Mr P Witherington- corrections as tracked changes.
29	Council's 'Note on contact between the Council and Mr Wiseman.
30	Erratum to the SOA tables 2 and 4.
31	Appellant's proposed apportionment/reduction of liability-without prejudice.
32	Severn Trent test reports-part set.
33	Proof of evidence of Mr S Cole-corrections as tracked changes based on jointly agreed datasets on 10/12/15, update.
34	Proof of evidence of Mr S Cole, Appendix I-Statistical Analysis-corrections to LCL (lower confidence limit on mean concentration) as noted in paragraph 66 of the proof of evidence.
35	Council's note-laboratory certificates of analysis.

36	Council's proposed apportionment/reduction of liability-without prejudice.
37	Council's response on remediation requirements.
38	Appellant's note following review of laboratory certificates passed to RSK on 15 December 2015.
39	Costs submissions on behalf of Walsall Metropolitan Borough Council.
40	Council's proposed apportionment/reduction of liability-without prejudice-update.
41	Appellant's proposed apportionment/reduction of liability-without prejudice-update.
42	Council's response to note on laboratory certificates and Inspector's questions.
43	Extract from Judicial Review Handbook sixth edition by Michael Fordham QC.
44	Extract from Contaminated Land 2nd edition 2008-S Tromans & R Turrall-Clarke
45	Costs submissions response on behalf of the appellant.
46	Proposed apportionment/reduction of liability-without prejudice.
47	Extract from Senior Courts Act 1981 c.54, 31.-Application for judicial review.
48	Associated Provincial Picture Houses Limited v Wednesbury Corporation, 1947.
49	Closing statement on behalf of Walsall Metropolitan Borough Council.
50	Letter notifying interested parties of amendments to schedule 5, dated 19 March 2015.
51a	Council's suggested Remediation Notice modifications-(notice relates to zones 4 and 7).
51b	Council's suggested Remediation Notice modifications-(notice relates to zone 4).
51c	Council's suggested Remediation Notice modifications-(notice relates to zone 7).
52	Closing submissions on behalf of the appellant.
53	Email from the appellant, dated 21 December 2015 (appellant's suggested amendments to Schedules 2 and 4 of the Remediation Notice).
54	Email from the Planning Inspectorate to Mrs Fullwood, dated 23 December 2015 (enclosing ID53 and inviting comments by 6 January 2016).
55	Email from the Council, dated 6 January 2016 (Council's comments on the suggested amendments).
56	Email from the appellant, dated 13 January 2016 (confirmation that the revised versio of Schedules 2 and 4 attached to the Council's email dated 11 January 2016 (attached) is agreed by both the Council and the appellant, without prejudice to the arguments raised at the Inquiry).
57	Finalised version of Schedules 2 and 4 of the Remediation Notice (as agreed by the Council and the appellant, included as part of ID55 above). Corrected version of the plan included in Part 3 of Appendix 1 of the Remediation Notice (showing the correct

	division of properties between zones 4 and 7). Amended Schedule 5 of the Remediation Notice (amended to reflect the transfer of freehold from George Road Securities Limited to Lazy Lizard Securities Limited).
58	Email from Mrs Fullwood to the Planning Inspectorate, dated 14 January 2016 (comments in relation to ID53).
59	Email from the appellant to the Planning Inspectorate, dated 15 January 2016 (response to ID58).
60	Email from the Council to the Planning Inspectorate, dated 15 January 2016 (response to ID58).
61	Email from the appellant to the Planning Inspectorate, dated 18 January 2016 (no other matters to raise).
62	Email from the Council to the Planning Inspectorate, dated 18 January 2016 (no other matters to raise).
63	Email from the Planning Inspectorate to the parties, dated 18 January 2016 (closing the Inquiry at the Inspector's request).

APPENDIX 6 – ABBREVIATIONS

AAB	Appellant's original authorities bundle.
The Act	The Environmental Protection Act 1990.
AECOM	Faber Maunsell AECOM (now AECOM).
ALARP	As low as reasonably practical.
Appellant (or Jim 2)	Jim 2 Limited - Mclean Homes (Midlands) Limited (McLeans) changed its name to Jim 2 Limited in 1993. Where the appellant is referred to it denotes both McLeans and Jim 2 Limited.
B(a)P	Benzo(a)pyrene.
CAB	Council's original authorities bundle.
CD	Core Document.
CIEH Guidance	CD16.2.4 – The Chartered Institute of Environmental Health/CL:AIRE Guidance on comparing soil contamination data with a critical concentration.
CLEA model v1.04	Contaminated Land Exposure Assessment Model Version 1.04 – used to derive Soil Guideline Values.
Council	Walsall Metropolitan Borough Council.
C4SL	Category 4 screening level-a soil screening value defined by Defra research project SP1010 to inform decisions made under the 2012 Guidance.
DQRA	Detailed Quantitative Risk Assessment- the third stage in risk assessment. The most detailed stage of quantitative risk assessment that follows on from stage 1-qualitative preliminary risk assessment(sometimes referred to as a conceptual model) and stage 2-generic quantitative risk assessment (typically entails the comparison of analytical data against GACs)
EA	Environment Agency.
GAC	Generic assessment criteria or Soil Guideline Value (SGV) – a soil concentration derived using a risk assessment methodology such as CLEA that defines a level that is acceptable. These values are used to screen out soil contaminants that are not of concern and do not warrant further consideration[684].
2006 Guidance	Defra Circular 01/2006 Environmental Protection Act 1990: Part 2A Contaminated Land, September 2006 (Statutory Guidance-CD1.3).
2008 Guidance	Defra Guidance on the Legal Definition of Contaminated Land, July 2008 (Non-Statutory Guidance-CD1.10).
2012 Guidance	Defra Environmental Protection Act 1990: Part 2A Contaminated Land Statutory Guidance, April 2012 (Statutory Guidance-CD1.5).
HCV	Health criteria value-a dose expressed as a chemical intake per unit body weight per day that poses, in relation to non-threshold substances, no appreciable or a minimal risk to human health.
ID	Inquiry Document.
LLTC	Low level of toxicological concern.
NBC	National Background Concentration – the value defines a soil concentration for which it is expected that 95% of all soil concentrations in the domain (urban, rural or mineralisation) will fall below.
PAH	Polycyclic Aromatic Hydrocarbons.
PoE	Proof of evidence.
2006 Regulations	The Contaminated Land (England) Regulations 2006.

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RoD	Record of Determination.
SGV	Soil Guideline Value – see GAC.
SMW2	Also referred to in a number of Inquiry documents as SWM2. A sample taken from the rear garden of No. 3 Brookthorpe Drive by Walsall Metropolitan Borough Council in January 2009.
SoC	Statement of Case.
SOM	Soil Organic Matter.
SP1010	SP1010-Development of Category 4 Screening Levels for Assessment of Land Affected by Contamination Final Project Report, September 2014 (CD16.2.6).
SPOSH	Significant Possibility of Significant Harm.
SSAC	Site specific assessment criteria – a GAC which has been adjusted using a risk based methodology such as CLEA to better reflect site specific conditions.
TCPA	The Town and Country Planning Act 1990.
WGC	Willenhall Gas Company.
WMBC	Walsall Metropolitan Borough Council
WMGB	West Midlands Gas Board.