RE: LAND AT THE STONEGATE HOUSING ESTATE, WILLENHALL, WALSALL, WEST MIDLANDS (THE FORMER WILLENHALL TOWN GAS WORKS SITE)

ENVIRONMENTAL PROTECTION ACT 1990, SECTION 78L(1)

CONTAMINATED LAND (ENGLAND) REGULATIONS 2006, REGULATION 8

GROUNDS OF APPEAL

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1. The appeal is made on the grounds identified in paragraphs (a)(i) and (ii), (b)(i) and (ii), (c), (d), (e), (m), (n)(i) and (ii) and (p) of Regulation 7(1) Contaminated Land (England) Regulations 2006 ("the 2006 Regulations").

2. These grounds adopt the abbreviations used in the Notice of Appeal dated 2 April 2015.

Ground (a)(i) and (ii)

3. In determining whether the Land to which the Notice relates appears to be contaminated land, the Council (i) failed to act in accordance with DEFRA Circular 01/2006 ("Circular 01/2006") and the Environmental Protection Act 1990 Part 2A, Contaminated Land Statutory Guidance ("the 2012 Guidance") published by DEFRA in April 2012, and (ii) unreasonably identified the Land, or any part of it, as contaminated land.

4. The Council is required to act in accordance with this guidance by virtue of section 78A(2) Environmental Protection Act 1990 ("the 1990 Act").[1]

5. On 27 March 2012, the Council purported to determine that the Land was contaminated land for the purposes of s78A(2) of the 1990 Act. At that date, the statutory guidance for the purposes of s78(A)(2) was contained in Annex 3 of Circular 01/2006.

6. Circular 01/2006 contained detailed guidance as to the circumstances in which land should be treated as "Contaminated Land" for the purposes of s78A(2). In accordance with this guidance, the Council was required to satisfy itself that:
    a. A "contaminant", a "pathway" and a "receptor" have been identified with respect of the land; and
    b. A "pollutant linkage" between those elements exists; and
    c. The "pollutant linkage":
        i. is resulting in significant harm being caused to the receptor in the pollutant linkage; or
        ii. 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 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.*"

7. 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,

[1] Section 78A(2) provides as follows: " "Contaminated land" is 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;
and, 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… with respect to the manner in which that determination is to be made."

appropriate, authoritative and scientifically based guidance on undertaking risk assessments.[2]

8. Contrary to the requirements of Circular 01/2006 (and the 2012 Guidance), the Council failed to undertake any, or any adequate, risk assessment and failed to satisfy itself that the pollutant linkage presents a SPOSH to potential receptors. For example:

    a. The Council has failed to undertake a toxicological risk assessment in order to examine the toxicological effects of the concentrations and exposure routes identified on the Land. Instead, the determination was based on the assessment that, in 51% of soil samples, concentrations of B(a)P exceeded an initial screening value or Health Criteria Value (HCV) of 1.02mg/kg. However this low initial screening value should only have been used to determine a value below which it was highly unlikely that health effects would occur, in order to eliminate any risk that the Land might be capable of being determined as contaminated land. In order to determine whether the Land was contaminated land for the purposes of s78A(2), the Council was required to assess the concentration of B(a)P above which there would be a SPOSH, having regard to all relevant circumstances and site-specific considerations. The Council has failed to undertake this assessment.

    b. Furthermore, there is significant uncertainty as to the pathways considered by the Council, in deriving the initial screening value of 1.02mg/kg. Schedule 2 to the Record of Determination appended to the Notice identifies the relevant pathways as direct soil/ dust ingestion, outdoor dermal uptake from soil contact and outdoor dust inhalation. By contrast, the technical reports relied upon by the Council have included additional pathways, namely indoor dust inhalation and vapour inhalation. The accuracy of the initial screening value of 1.02mg/kg is therefore uncertain.

[2] Paragraph B.45 provides as follows "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."

c. The zoning methodology adopted by the Council was flawed.[3] The Council has divided the site into zones based on current land use, instead of identifying soil populations with the same chemical properties. There is no evidence that this approach reflects the soil characteristics of the land in question and, thus, the presence or otherwise of a SPOSH in any given zone. Furthermore, the Council has failed to treat topsoil as a separate soil population in their assessment (see (d) below).

d. The Council has not carried out adequate shallow soil sampling. The Council has not produced any chemical data for topsoil and only very limited data for soils of less than 0.5m depth, although this is the key exposure pathway. Instead, the Council appears to have extrapolated chemical data for shallow soils from samples taken at lower levels. This approach was flawed and gives rise to significant uncertainty as to the levels of contaminant present in near surface soils and, thus, as to the level of risk posed to individual receptors.

e. The data on which the Council based its assessment is incomplete and/ or uncertain. The Council has not produced any evidence to show how B(a)P data has been extrapolated from other data, such as polycyclic aromatic hydrocarbons ("PAH") data, where B(a)P results were not available. Nor has it produced any evidence to show how datasets have been constructed. Furthermore key data, such as logs of trial pits and chemical data, have not been presented within the technical reports produced by the Council.

9. As a result of the Council's failure to undertake any adequate assessment of the risk posed by the presence of B(a)P on the Land, as required by Circular 01/2006 and the 2012 Guidance, the Council unreasonably determined that the land was contaminated land.

10. Further or alternatively, the Council's identification of the land (or any part of it) as Contaminated Land is unreasonable, for all or any of the following reasons:

[3] See plan entitled "Indication of Zone Locations" at Appendix 1 to the Remediation Notice.

a. The Council failed to review its determination, following publication of the 2012 Guidance.[4] The 2012 Guidance confirms that the Council's determination of the land as Contaminated Land was flawed and unsound. In particular:

   i. The Council's approach to determining whether the land was contaminated was directly contrary to paragraph 3.39 of the 2012 Guidance, which states that General Assessment Criteria ("GAC") such as the HCV:

      > "should not be used as direct indicators of whether a significant possibility of significant harm to human health may exist. Also, the local authority should not view the degree by which GACs are exceeded (in itself) as being particularly relevant to this consideration, given that the degree of risk posed by land would normally depend on many factors other than simply the amount of contaminants in soil."

   ii. The Council's determination, based on levels of B(a)P exceeding identified GAC, is also clearly contrary to the category-based approach prescribed by paragraphs 4.19-4.29 of the 2012 Guidance.

b. Further to (a), the Council has failed to undertake any, or any adequate, assessment of the impact of new technical guidance on soil contamination, in determining whether the land, or any part of it, is Contaminated Land. In March 2014, DEFRA published revised technical guidance on soil contamination, which advises that a value of 5mg/kg of B(a)P consists of an estimate of B(a)P concentration in soils that is considered to represent an 'acceptable' level of risk within the context of Part 2A of the 1990 Act. Consequently, land where values below 5mg/kg are identified must be treated as falling within Category 4 of the 2012 Guidance ("the Category 4 Screening Level" or "C4SL"). Identification of values above 5mg/kg means that further, detailed and scientifically robust assessment of the risk posed by these values

[4] The 2012 Guidance was published on 10 April 2012. Paragraph 4 advises that "the previous statutory guidance… and the Circular of which it was a part are obsolete from the date on which this Guidance is issued."

must be undertaken to determine whether the land falls within category 1, 2 or 3. The Council has failed to undertake this assessment.

c. By failing to conduct any, or any adequate, review of the determination following publication of the 2012 Guidance and the technical guidance, the Council has failed to comply with paragraph 5.20 of the 2012 Guidance, which states that an enforcing authority should reconsider any determination that land is contaminated, if it becomes aware of further information which it considers significantly alters the basis for its original decision.

d. The Council accepts that the mean soil concentration levels of B(a)P in zone 5 fall below the C4SL threshold of 5mg/kg, based on the revised technical guidance. The Council's determination that those properties within Zone 5 should be treated as contaminated land is therefore clearly unreasonable and contrary to the presumption in paragraph 5.3 of the 2012 Guidance that land is not contaminated, unless there is reason to consider otherwise.

e. The Council has also failed to provide any justification for treating zones 4 and 7 as one averaging area, in order to derive a mean concentration of B(a)P for these two zones, although the levels of B(a)P identified in zone 4 are significantly lower than the levels in zone 7. There is no sound technical basis for the Council's approach.

11. As a result of all or any of the above errors and/or for any other reason not identified above, the Council has unreasonably determined that the land is contaminated land for the purposes of s78A(2). The Appellant will demonstrate that the Land should be treated as falling within Category 3 for the purposes of the 2012 Guidance; and that the concentration of B(a)P present on the Land does not give rise to a SPOSH.

Ground (b)(i) and (ii)

12. In determining the remediation requirements as set out in the Notice, the Council failed to have regard to the 2012 Guidance as required by s. 78E(5). Furthermore, the

steps which the Appellant is required to undertake by way of remediation ("the Remediation Requirements") are unreasonable.

13. The Council was required to have regard to the 2012 Guidance when deciding what remediation action to specify in the remediation notice: see paragraph 6.3 and s78E(5).

14. The enforcing authority may only require actions in a remediation notice which are reasonable with regard to the cost and the seriousness of the pollution or harm: see para 6.16 and s78E(4). The Council was required to 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 (d) the benefits of remediation with regard to the seriousness of the harm in question.

15. A remediation action is reasonable if the authority is satisfied that the benefits of remediation are likely to outweigh the costs of remediation, having regard to the factors identified above and the guidance set out at paragraphs 6.23-6.36 of the 2012 Guidance. Where there is more than one potential approach to remediation, the authority is required to choose what it considers to be the "best practicable approach", having regard to these factors.

16. The Council has failed to undertake the assessment required by the 2012 Guidance:

    a. As set out at Ground (a) above, the Council has failed to assess whether harm arises as a result of the B(a)P levels identified on site, let alone the seriousness of that harm. Consequently, the Council has failed to determine the reasonableness of any measures required to remediate any unidentified harm.

    b. The Council has failed to take into account the factors identified in the 2012 Guidance in determining the Remediation Requirements, including the financial cost likely to be involved in undertaking these remediation works.

c. The Council has failed to balance the benefits of remediation against the disbenefits/risks associated with the proposed works. These risks/disbenefits include, for example, the impact on residents of excavation works being undertaken in gardens areas.

d. The Council has failed to undertake any appraisal of remediation options, in order to identify the "best practicable technique" as required by the 2012 Guidance.

17. As a result of the Council's failure to comply with the Guidance, the Remediation Requirements are unreasonable.

18. Further or alternatively, the Remediation Requirements are unreasonable for all or any of the following reasons:

a. The Council has failed to have any regard to the costs of the remediation works identified in the Remediation Notice. The Appellant has provisionally estimated that the cost of these works (excluding any associated costs involving removal, temporary storage and replacement of sheds or other garden equipment, temporary accommodation or compensation for the residents) is in excess of £2million. This cost imposes an unreasonable burden on the Appellant: see, further, ground (n) below.

b. The Council has failed to justify the Remediation Requirements in its Reasons for its Decision as to Remediation Requirements ("the Reasons")[5]. For example, the Reasons state that "in order to install an appropriate thickness of cover materials [over any remaining contaminated soils] it may be necessary to remove and dispose of up to 600 millimetres of contaminated material from soft landscaped areas of identified premises", whereas the Remediation Requirements at Schedule 2 state that "it is anticipated that installation of clean cover over any remaining contaminated soils will need to be a minimum

[5] Schedule 4 of the Notice

of 600mm thickness and may be up to 1000mm depending on conditions at each individual address." No explanation is given for this discrepancy.

c. The Remediation Requirements do not distinguish between front and rear gardens, although different levels of use and exposure are likely to arise in these locations and, consequently, different standards of remediation may be appropriate.

d. The remediation notice includes a small area of Public Open Space adjacent to Brookthorpe Drive. The Council has failed to assess whether a different standard of remediation should be required in this location for the reasons set out in ground (c) above.

e. For the reasons set out in relation to ground (a) above, the Council has failed to justify its decision to base its remediation requirements on a mean concentration of B(a)P taken from zones 4 and 7. As a result of this error, the Council has failed to assess whether a different standard of remediation should be required in these two locations.

19. As a result of all or any of the above errors and/or for any other reason not identified above, the Remediation Requirements are unreasonable.

Ground (c)

20. 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.

21. An appropriate person is any person 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": see s78F(2).

22. There is no evidence that the Appellant caused the presence of B(a)P on the Land by spreading materials during the redevelopment of the site and the Council's assumption to that effect is unreasonable.

23. The Council has previously accepted that the presence of B(a)P was caused by the activities carried out by the Willenhall Gas Works Company and the West Midlands Gas Board.

24. Insofar as the Council contends that the Appellant also caused the B(a)P to be present on the land, the Appellant will demonstrate that the presence of the B(a)P was caused by other means, including but not limited to the following:

    a. The creation of stockpiles as part of the operation of the gasworks, which were regularly spread around the site.

    b. Site levels being raised periodically during the 20th century to the east of the main process and production area. This would have led to ash and other solid wastes being deposited in this area.

    c. The demolition of the gasworks, which would have occurred periodically throughout the lifetime of the works, as well as changes to the layout of retort houses, purifiers and other subsidiary buildings.

    d. Leaks in pipework and tanks, through which gasworks by-products such as tar and liquor containing B(a)P would have escaped.

25. There is also no evidence that the Appellant knowingly permitted the presence of B(a)P on the Land, as required by s78F(2).

26. The Council has not demonstrated that the Appellant had actual knowledge of the presence of B(a)P on the Land.[6] Instead the Council has assumed that "Jim 2 Limited

[6] See *Circular Facilities (London) Ltd v Sevenoaks DC* [2005] EWHC 65 where the High Court clarified that a local authority must establish that the alleged appropriate person has actual knowledge of the contaminating substance on the land.

would be aware of the potential for gas works to cause land contamination and for waste materials to be potentially harmful." The Council's determination that the Appellant was a knowing permitter for the purposes of s78E is unreasonable for all or any of the following reasons:

a. Actual knowledge of the contaminating substance is required, not merely knowledge of the presence of waste materials on site or even of the "potential for gas works to cause land contamination". The Council does not suggest that the Appellant had actual knowledge of the presence of B(a)P on the Land.

b. There is no evidence that the Appellant was provided with any site investigation or other reports or information prior to purchase of the site from the Council and/ or its redevelopment, which identified the presence of B(a)P on the land.

c. The Particulars of Sale provided by the Council to the Appellant do not identify any risk of the presence of B(a)P or other contaminants on the Land, although the Land was sold by the Council for housing purposes and the Council obtained planning permission for this residential use. Had a risk of contamination been identified, this would have been highlighted in the Particulars of Sale and planning documentation.

d. Notwithstanding that constructive knowledge is insufficient for the purposes of establishing liability under s78E, the presence of B(a)P associated with the redevelopment of gas works was not identified in any industry documents or guidance at the relevant time.

27. As the Appellant is a limited company, the Council was also required to identify (i) the person within the company who is said to possess this knowledge and (ii) the basis on which that person's knowledge is to be imputed to the Company.[7] The Council has failed to identify any such person or any basis on which that (unidentified) person's knowledge is to be imputed to the Appellant.

[7] *Circular Facilities (London) Ltd v Sevenoaks DC* [2005] EWHC 65

28. Further or alternatively, as a result of the Council's unreasonable failure to determine that other persons should be appropriate persons for the purposes of s78E, the Council has failed to consider whether the Appellant is excluded from the group of appropriate persons by virtue of exclusion test 6 of the 2012 Guidance: see grounds (d) and (e) below.

29. The Appellant denies that it caused or knowingly permitted the presence of B(a)P to be in, on or under the land. For all or any of the above reasons, the Council has acted unreasonably in identifying the Appellant as an appropriate person for the purposes of s78E.

Ground (d)

30. Without prejudice to the Appellant's contention that it is not an appropriate person (see ground (c)), 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.

31. The Appellant will demonstrate that there are other persons whom the Council ought to have identified as Appropriate Persons within Class A, namely:
    a. The Council itself.
    b. The original leaseholders of building leases originally granted out of freehold title number SF82384 (but now noted in the schedule of notices of leases under title numbers SF109779 and WM405733), as identified in Annex A appended to these Grounds of Appeal.
    c. Triton Investments Ltd.
    d. Shenstone Properties Ltd.
    e. E Fletcher Builders Limited ("E Fletcher").

The Council

32. The Council acquired the site from the West Midlands Gas Board in 1965 and held the site for seven years. As the Council contends that the sales and planning

documentation provided to the Appellant identified the risk of contamination on the Land, the Council must also have been aware of the presence of this contamination. It must also, therefore, have caused or knowingly permitted the presence of B(a)P on the Site.

33. However the Council has excluded itself from the group of Class A Appropriate Persons in reliance upon exclusion test 6 of the 2012 Guidance (introduction of pathways or receptors)[8]. This was unreasonable, for the following reasons:

    a. The Council took a relevant action and/ or made a relevant omission which would have ensured that the contaminant linkage did not come into force, namely (i) bringing about a material change of use of the Land to residential use and (ii) failing to carry out any investigations or remediation or to undertake or ensure a clean up of the Land, which would have ensured that a significant contaminant linkage was not brought into existence as a result of a material change of use in the land to residential use.

    b. 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 Land 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 the Guidance.

Leaseholders identified at Annex A

34. The Council has unreasonably failed to determine that leaseholders under leases granted out of freehold title SF82384 are Appropriate Class A Persons.

[8] 2012 Guidance, para 7.57-7.61

35. The Council acquired the freehold interest in the site under title number SF82384. The earliest leasehold interest granted out of title SF82384 was for a term of 99 years, dated 25th May 1972. The leasehold interests originally granted out of freehold title numbers SF82384 (but now noted in the schedule of notices of leases under freehold title numbers SF109779 and WM405733) are listed at Annex A.

36. The leases granted out of title SF82384 were in standard form ("the Lease"). Paragraph 4(c) of the Lease contained a covenant on the part of the Lessee in the following terms:

> "at his own cost within a period of twelve months hereof (unless at the date hereof a house (hereinafter referred to as "The House") in all respects fit for habitation has been built on the Property) to build or cause to be built on the Property and to complete in good and proper workmanlike manner to the full satisfaction of the Lessor a house with sewers and drains in accordance with the plans elevations and specifications thereof which have been approved by the Lessor and in the erection of the House and the laying of the sewers and drains not without the written consent of the Lessor to employ any builder other than the Lessor."

37. The other terms of the Lease clearly envisage that the land in question is to be developed by the Lessee and not by the Appellant.

38. The Council has unreasonably failed to determine that the Lessees identified in Annex A are appropriate persons, on the basis that the Land was developed by the Lessees and not by the Appellant.

Triton Investments Ltd/ Shenstone Properties Ltd

39. The Council has failed to determine that Triton Investments Ltd ("Triton") is an appropriate person. Triton acquired the freehold interest in part of the site formerly owned by McLean Homes (Midland) Limited ("McLean")[9] on 20th November 1973 under freehold title SF109779.

40. Triton is an active company, established in 1973, to undertake development and building projects. There is no evidence that the part of the site acquired by Triton was

[9] Mclean Homes (Midland) Limited changed its name to Jim 2 Limited in 1993

developed by the Appellant and not by Triton. The failure to identify Triton as an appropriate person was, therefore, unreasonable.

41. Further or alternatively, the Council has failed to determine that Shenstone Properties Ltd ("Shenstone") is an appropriate person. Shenstone acquired the freehold interest in part of the site formerly owned by McLean on 20th May 1987, under freehold title WM40573. There is no evidence that the part of the site acquired by Shenstone was developed by the Appellant and not by Shenstone. The failure to identify Shenstone Properties Ltd as an appropriate person was, therefore, unreasonable.

E Fletcher

42. The Council has unreasonably failed to treat E Fletcher as an appropriate person, on the basis that E Fletcher can no longer be "found".

43. The Appellant sold a large part of the site to E Fletcher in a Transfer dated 6 June 1972 (title number SF86128). E Fletcher obtained detailed planning permission for the erection of 59 houses (plots 50-108) off Sandy Lane, Willenhall. These plots included the properties on Kemble Close (nos 1-27), which are the subject of this remediation notice.

44. E Fletcher subsequently developed its part of the Land and sold its interest to St Giles Properties Ltd, by transfer dated 12th September 1975. St Giles Properties Ltd sold the leasehold interests in the properties to the purchasers of the individual properties and retained the freehold.

45. The Council served a Notice of Identification of Contaminated Land on E Fletcher in August 2012, as a potential Class A person. E Fletcher was subsequently dissolved on 21 October 2014.

46. There is power under s1029 Companies Act 2006 to apply to the Court to restore to the register a company which has been dissolved. An application under s1029 can be made by any person with a potential legal claim against the company. As E Fletcher

was dissolved after the date of the determination, it was unreasonable of the Council to exclude it from the group of Appropriate Persons, without first making an application to the Court.

47. Furthermore, the Appellant denies that it caused or knowingly permitted the presence of B(a)P on the part of the Land which was developed by E Fletcher. If, notwithstanding the power under s1029 Companies Act 2006, E Fletcher cannot be "found", the owner or occupier of the land developed by E Fletcher must therefore be treated as the appropriate person: see s74F(4).

Ground (e)

48. The Council failed to act in accordance with the statutory guidance issued under s78(6): see section 7 of the 2012 Guidance.

49. For the reasons set out at ground (d) above, the Council failed properly to apply the exclusion tests established by the 2012 Guidance, in concluding that the Council is excluded from inclusion in the liability group.

50. Furthermore, as a result of the Council's failure to determine that the leaseholders identified at Annex A and/ or Triton and/ or Shenstone are appropriate persons, the Council has failed to act in accordance with the 2012 guidance by failing to determine that the Appellant is excluded from liability by virtue of exclusion test 6, on the basis that the later actions of the aforementioned persons (by constructing houses on the Land) introduced the receptor which forms part of the contaminant linkage in question: see, further, ground (c) above.

Ground (m)

51. The Council has the power to do anything which may be appropriate by way of remediation to the Land by virtue of s78N(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.

52. As the Council has power to undertake the remediation works, the Council had no power to serve the Notice on the Appellant: see s78H(5)(d).

53. The Appellant is a dormant, non-trading company. It has no financial resources or assets to meet the substantial cost of the remediation works identified in the Notice. Its only asset is an unsecured, non-interest bearing debt of approximately £25,199,992 owed by its parent company, Wimpey Dormant Investments Limited ("WDIL"). However WDIL does not hold any tangible assets.

54. Any attempt to recover the cost of the remediation works from the Appellant would therefore inevitably result in the Appellant being made insolvent. This hardship would be wholly disproportionate to any sum which might, notionally, be recoverable from the Appellant's sole debtor.

55. Furthermore, and without prejudice to the Appellant's contention that it is not an appropriate person, there are other causers/ knowing permitters who cannot be found, including Willenhall Town Gas Company ("WTGC"), West Midlands Gas Board ("WMGB") and E Fletcher[10]:

    a. The Council accepts that WTGC is the original causer/ knowing permitter: see ground (c) above.

    b. The Council has wrongly concluded that WMGB cannot be treated as a causer/ knowing permitter, having regard to *Regina (National Grid Gas plc) v Environment Agency* [2007] UKHL 30 ("the Transco case"). However the WMGB's liability as a causer/ knowing permitter would have accrued directly as a result of its activities on the site and not by virtue of the transfer of assets and liabilities from WTGC. Consequently the *Transco* case is distinguishable.[11]

[10] Subject to ground (d) above.
[11] See, by analogy, *Regina (National Grid Gas plc) v Environment Agency* [2007] UKHL 30 per Lord Scott at §19.

c. The Council also accepts that E Fletcher is a causer/ knowing permitter. Without prejudice to the Appellant's contention that the Council has power to apply for E Fletcher to be reinstated to the Company register, E Fletcher is currently a dissolved company, which cannot be "found" for the purposes of paragraph 8.25 of the 2012 Guidance.

56. There are, therefore, no fewer than three causers/ knowing permitters who cannot be "found" (if by this it is meant they have ceased to exist). If those other persons had been found, the proportion of the cost of remediation which the Appellant would have to bear would be significantly less. Consequently, section 8(c) of the 2012 Guidance required the Council to consider waiving or reducing the cost recovery from the Appellant.

57. Having regard to the general principles set out at paragraph 8.5 and 8.6 of the 2012 Guidance, as well as the specific considerations set out at section 8(c), it would not be fair and equitable for the Council to seek to recover from the Appellants all of the reasonable costs it would incur if it carried out the remediation itself.

58. For all or any of these reasons, the Council has the power to carry out the remediation work itself by virtue of s78N(e).

Ground (n)

59. 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 s78 N(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 s78P(2) and; (ii) unreasonably determined that it would seek to recover all of the cost from the Appellant.

60. Paragraph 8.6 of the 2012 Guidance states that an enforcing authority should waive or reduce the recovery of costs to the extent that it considers appropriate or reasonable to avoid any undue hardship which recovery may cause to an appropriate person or to

reflect one or more of the specific considerations set out in sub-sections 8(b), 8(c) or 8(d) below. Those considerations include whether there were other causers/ knowing permitters who cannot now be found.

61. The Council has failed to have any regard to the hardship which the recovery of costs would cause to the Appellant. In addition, the Council has failed to have regard to the 2012 guidance: see, in particular, paragraphs 8.5, 8.6, and 8.23-8.26.

62. Whether by reason of this failure to have regard to the 2012 Guidance and the hardship caused to the Appellant or otherwise, it would clearly have been unreasonable of the Council to determine that it would seek to recover all of the cost from the Appellant: see ground (m) above.

Ground (p)

63. Without prejudice to the Appellant's contention that it is not liable to undertake the works identified in the Notice, the time limits prescribed in Schedule 2 of the Notice are not reasonably sufficient to enable the works to be carried out. In particular:

    a. The Council has allowed just two months for stage 2 of the works i.e. the inspection and survey of properties affected by the remediation works, including consulting with the numerous occupiers and owners of identified properties, agreeing access arrangements and agreeing the condition and construction of features to be removed as well as the standard of reinstatement before any works commence. This is clearly not reasonably sufficient, given the contentious nature of these works and the need to negotiate with landowners who may or may not be co-operative . The Appellant contends that at least six months should be allowed to complete this stage.

    b. The Council has allowed just three months to undertake the agreed remediation works (stage 4). This is clearly insufficient to enable the contractor to mobilise equipment, locate any services onsite, remove and store garden furniture and other structures and undertake the remediation

works. The Appellant considers that at least six months should be allowed to complete this stage i.e. 1.5 days per plot, with 2 weeks to mobilise and demobilise equipment.

64. The Appellant will submit that the appeal should be allowed on all or any of the grounds set out above.

ANNEX A

Property	**Date of lease and term**	**Current Superior Freehold Title**	**Original Leaseholder**
3 Oakridge Close, Willenhall, WV12 4EN	8 September 1972 99 years from 25 March 1972	SF109779	John William Whitehouse and Jacqueline Anne Whitehouse
32 Brookthorpe Drive, Willenhall, WV12 4TX	19 June 1973 99 years from 25 March 1972	WM405733	Colin Peter Pickering and Marie McCourt
38 Brookthorpe Drive, Willenhall, WV13 3TX	18 June 1973 99 years from 25 March 1972	WM405733	Brian Frederick Carter and Dorothy Joyce Carter
11 Brookthorpe Drive, Willenhall, WV12 4TX	1 August 1973 99 years from 25 March 1972	WM405733	Graham Thomas Fowler and Irene Joyce Fowler
15 Brookthorpe Drive, Willenhall, WV12 4TX	15 March 1973 99 years from 25 March 1972	WM405733	Richard Warwick and Rosalind Mary Warwick