

Committee: Cabinet	Date: 10 September 2008	Classification: Unrestricted	Report No:	Agenda Item:
Report of: Corporate Director Development & Renewal Originating officer(s): Paul Evans Interim Director Development & Renewal		Title: 33-37 The Oval & Bethnal Green Gasholder Site E3 Wards Affected: Bethnal Green North.		

1. **SUMMARY**

- 1.1 This report is concerned with a site (33-37 The Oval E3) where a planning permission for a mixed business/residential use is vulnerable to challenge by the Health & Safety Executive (HSE)/Secretary of State due to an administrative oversight that resulted in a failure to consult the HSE. The options available to the Council are examined.

2. **RECOMMENDATIONS:**

Cabinet is recommended to:

Either

- 2.1 Note the contents of the report including the risk of claims for compensation arising and take no action in relation to the acquisition of the land known as 33-37 The Oval.

OR

- 2.2 That the Corporate Director Development & Renewal be authorised, after consultation with the Lead Member for Resources and Assistant Chief Executive (Legal Services), to enter into a conditional agreement (subject to the revocation) with the Developer to acquire land known as 33-37 The Oval as identified on the plan attached at Appendix A.

3. INTRODUCTION

- 3.1 This report relates to a site in Bethnal Green known as 33-37 The Oval located adjacent to and east of a gas storage installation containing 4 gas holders of various sizes.
- 3.2 The site has a frontage of 22 metres a depth of 25.5 metres and a site area of 0.056 hectares. It used to contain a single storey building that occupied most of the site and was used by a timber furniture manufacturer. The immediate area is generally light industrial in nature however the wider area has a significant residential population.
- 3.3 The gasholder site is identified by the HSE as a notifiable installation and therefore under Article 10 of the General Development Procedure Order (GDPO) the Council as Local Planning Authority have to consult the HSE on certain specified applications within distances prescribed by the HSE. All residential developments have to be referred. Historically the consultation distance for this type of installation was 60 metres, however recently the HSE has revisited their criteria and introduced a new system called PADHI+, which relates to more extensive zones of up to 280 metres.
- 3.4 Under the old system, HSE would look at each case and provide advice in the form of either “advise against” or “do not advise against” within the 21 day period given in legislation for them to reply. The new system seeks to automate the process by having what is known as “standing advice”. However at about the same time as this change in methodology, HSE has also reviewed the risks associated with gas holder sites. This has resulted in much wider consultation zones for these installations. At the centre of the new consultation system is a matrix with distance from hazard against nature of the development resulting in either “advise against” or “don’t advise against” the development. There are 3 zones: inner (about 80m), middle (about 200m) and outer (about 280m), measured from the edge of the gas holder and there are 4 types of development in the PADHI model. The following is just an illustration of them (the PADHI model has a more detailed definition):
- | | |
|--------------------|--|
| Development Type 1 | Low density uses such as warehousing and industry where there are low numbers of people |
| Development Type 2 | Low density housing: < 40 dwellings per hectare (we hardly ever build at this density in Tower Hamlets) |
| Development Type 3 | High density housing: > 40 dwellings per hectare |
| Development Type 4 | very large or sensitive developments – e.g. a sports stadia (high numbers of people) or care home (hard to evacuate) |
- 3.5 The reason for this report is that in relation to the site mentioned in paragraph 3.1, the Planning section failed to properly discharge its duty to consult the HSE and the consequences of this error need to be addressed.

4. BACKGROUND INFORMATION

- 4.1 Planning permission was sought on 17 March 2005 (PA/05/421) for the “demolition of existing building and redevelopment to provide a five storey building comprising 3 Use Class B1 (business) units on the ground floor with 14 flats above (6 one bedroom, 6 two bedroom and 2 three bedroom flats)”. The application was considered and permission was issued on 19 December 2005. A subsequent application was submitted (see paragraph 5.3).
- 4.2 This development site is only a short distance from the National Grid Gas Bethnal Green gasholder site, a notifiable installation. Under Article 10 of the General Development Procedure Order the HSE should have been consulted due to the location of these developments in relation to the notifiable installation. The holder was not identified as such on our safeguarding maps and therefore the HSE were not consulted.
- 4.3 Information about notifiable installations was originally held on paper maps along with other safeguarding information. The transfer of the paper data to an electronic mapping system of records (GIS) was a huge task and had to be carried out in a staged process over several years. The GIS based system was in use in 2002 but the gasholder safeguarding data was not available via the GIS system until 2006 and therefore when the two applications were processed (in 2004 & 2005) reference was not made to paper records and it was not picked up during the planning consultation stage. This was corrected as soon as the problem was discovered in 2006.
- 4.4 However, the fact that the site was close to a gas holder complex should clearly have been evident to the planning case officer from the site visit that is undertaken as part of the processing of the application and there would always have been a duty to consult HSE. Unfortunately there is no evidence that the planning case officer had contacted the HSE from our files when HSE subsequently contacted the Planning Department. The planning officer who dealt with the case had left the Council some years before now.
- 4.5 The Council had granted planning permission for the development without taking into account a material planning consideration; the views of a statutory consultee, the HSE. This renders the permission vulnerable to challenge. This is explained in more detail below.

5. SUBSEQUENT DISCUSSIONS

- 5.1 Both HSE and National Grid raised concerns about the 2005 decision on 33-37 The Oval in Spring 2006 but were past the time-limit when they could challenge it in the courts.

- 5.2 Officers had a number of meetings with the HSE, National Grid and the developers to negotiate a way forward on 33-37 The Oval as clearly there are other residential buildings built many years ago within the HSE's new zones.
- 5.3 On 1 August 2006 the developer submitted a fresh planning application (PA/06/1393) for 33-37 The Oval for "demolition of existing building and redevelopment to provide a five storey building for use as 2 Class B1 (business) units on the ground floor with 14 flats above (6 one bedroom, 6 two bedroom and 2 three bedroom flats)". This was an amendment to the permitted scheme (PA/05/421) being a more efficient design, albeit essentially the same development.
- 5.4 The opportunity was taken by officers to negotiate improvements to the design to address the gasholder safety issue. It was possible to achieve an 18 metre separation distance, which was within the limits set out by National Grid. The HSE however, maintained their objection in principle as they wanted a minimum of separation 80 metres from the gasholders. On 16 November 2006, the Council's Strategic Development Committee resolved to grant planning permission for the amended scheme upon advice from officers balancing the risk with the need for housing. Where a Council is proposing to go against the advice of the HSE, they are required to give them the opportunity to ask the Secretary of State to call in the application for her own determination. The Secretary of State did call it in and the application was set to be examined at a public inquiry. The Developer withdrew the application, which meant the inquiry fell away.
- 5.5 The developer decided to implement the original 2005 planning permission (PA/05/421). As this permission is flawed in its processing because the HSE had not been consulted the Council as a responsible Local Planning Authority is obliged to consider whether it should take action by serving an Order to revoke the Planning Application. Officers believe, that, based on the previous 'call in' on this site, it is very likely that if the Council does nothing, the HSE would seek to persuade the Secretary of State to require that the Council makes the Order although it is a power that is rarely exercised by the Secretary of State.
- 5.6 Although there are potentially three different types of Order that could be served: a revocation or modification order under section 97 of the Town & Country Act 1990 or a discontinuance order under section 102. Our advice from Counsel is that revocation order is most appropriate.
- 5.7 Where any such order comes into effect, compensation would be payable by the Council to the developer under the Act. The compensation would cover all cost and expense incurred in carrying out the building work which is rendered abortive. The Council would not acquire the land under a compensation order.
- 5.8 Before the Strategic Development Committee could take any decision to serve a revocation order Council as Local Planning Authority must decide whether it was expedient to do so and this is a decision that must be based on planning grounds only. The possibility of compensation is not material to that decision. As a separate matter Cabinet must consider the financial implications of such a decision taken by the Strategic Development committee.

- 5.9 The nature of the risk at the heart of HSE's objection is key to the Strategic Development Committee decision. In order to fully understand this, the Council commissioned independent advice from experts (Atkins Oil and Gas). This advice formed the basis of the report that was put to the Council's Strategic Development Committee on 8 November. The HSE, National Grid, Government Office for London (on behalf of the Secretary of State) and the developer were fully consulted on the report. The officer recommendation to Strategic Development Committee was that after considering the risks against the planning benefits that accrue from the development, it was not necessary to revoke the planning permission. However the HSE did not accept the conclusions of the report and maintain their position that no development should be built within the radius they have specified.
- 5.10 The Strategic Development Committee on 8 November 2007, did not support the officer's recommendation, but before they voted to serve a notice of revocation the Service Head Development Decisions asked the committee to defer any further consideration to enable officers to prepare more details on the alternative approaches.

6. WHAT ARE THE OPTIONS AVAILABLE TO THE COUNCIL?

- 6.1 Whilst the HSE are concerned about the planning permission, their priority is to prevent the development from being implemented in accordance with their policy guidance. From the Council's point of view it is important to stop the developer spending further money by continuing to complete the development as this would increase the level of any possible compensation payable. The developer was well advanced with the site infrastructure and the structural frame towards the end of 2007 but agreed to stop building pending discussions with Corporate Property Services and the due diligence on the developers build costs to date.
- 6.2 Before looking at what options are available to the Council, it is necessary to understand 3 issues:
- What are the consequences of the developer stopping construction activity on site?
 - What is the possibility of removing the source of the risk: the above ground gas storage?
 - What uses could the land in question currently be put to (i.e. without the above ground gas storage being removed)?

Stopping activity on site

- 6.3 The cessation of activity on site, although welcome, must be seen as temporary as the developer has ongoing debt financing costs and pre-sales agreements with purchasers.
- 6.4 Currently the land is blighted by the uncertainty. An obvious way forward is to remove the risk that is the source of HSE's concern – i.e. the gasholders – and thereby free up this site, and others, for development. This suggestion came from HSE as it is technically possible to store gas underground in pressured pipes and provided the

pressure does not exceed 15Bar, it is understood that the HSE/PADHI+ development constraints would largely be removed in response to this change in storage methodology however this solution would be a long-term project to regenerate this low grade industrial site which would very much improve the environment for residents in the area and result in a large number of new homes to support housing policy. It would require partnership with the National Grid and other public sector partners such as the new Homes and Communities Agency and would be a long term project of at least 10 years. However a pilot project could have national significance to improve amenity and provide housing nationwide.

- 6.5 The removal of the gas holders would create increased land values for a number of sites in the area and therefore could create the funding to finance an undergrounding project. Very early estimates suggest that the cost of undergrounding this gas storage facility would be around £10M. There is strong development interest in a number of sites around this installation, so there is good reason to be confident that a partnership package could be negotiated to secure delivery..
- 6.6 The larger extent of land potentially blighted by HSE's position is effectively a 200 metre zone around the gas holders within which they will "advise against" most residential development. Experience to date suggests that they will only press this position in the inner 80 metre zone. This inner zone comprises an area of land of some 2 hectares around the gasholder site. The gasholder site itself is about 2.25 hectares. If the gasholders were decommissioned and say about half of the gasholder site was then capable of development, the total land available could produce between 750 and 1400 dwellings, given the Public Transport Accessibility Level of the area (PTAL 5) and development plan density policies (i.e. between 240 and 435 dwellings per hectare). Given recent trends in development densities, this is likely to be at the upper end of this range or even exceed it. Accordingly the cost of facilitating this project (i.e. undergrounding the gasholders) represents just over £7,000 per dwelling on the basis of around 1,400 dwellings being brought forward.
- 6.7 As the undergrounding of the gasholders is clearly a longer term project that is likely to take a number of years to secure the current use of the land within the policy must be explored. The land in question could serve a number of purposes in the intervening period.
- 6.8 The HSE PADHI+ model does indicate that there are a range of development types and thresholds that under the notification system they will not routinely advise against. The criteria are detailed, but the following provides a reasonably comprehensive flavour of the range of developments that fall within this category and the reasons why the HSE would not object to them.

Development Type	Threshold	Reason
Indoor use by public (generally use classes A1, A2, A3, D1 & D2)	Development with less than 250 m2 total floor space	Minimal increase in numbers at risk
Workplaces - offices,	Workplaces	Places where the

factories, warehouses, haulage depots, farm buildings, non-retail markets, builder's yards (generally use classes B1, B2 & B8)	(predominantly non-retail), providing for less than 100 occupants in each building and less than 3 occupied storeys	occupants will be fit and healthy, and could be organised easily for emergency action. Members of the public will not be present or will be present in very small numbers and for a short time
Housing – Infill or backland development (use class C3)	Developments of 1 or 2 dwelling units	Minimal increase in numbers at risk
Smaller guest houses, hostels, youth hostels, holiday homes, halls of residence, dormitories, holiday caravan sites, camping sites (includes use class C1)	Accommodation of less than 10 beds or 3 caravan / tent pitches	Minimal increase in numbers at risk
Parking areas - car parks, truck parks, lock-up garages	Parking areas with no other associated facilities (other than toilets)	Minimal increase in numbers at risk

6.9 Therefore it would appear that the land in question could be used for the following purposes:

- A transport depot
- A store or maintenance yard
- A civic amenity site
- A car park

6.10 Detailed discussions would be needed with HSE to confirm that any particular use comes within the parameters outlined above and that they would not resist it through the planning system. However, if the land was acquired by the Council and used for purposes such as a depot its possible the Council could free more valuable sites for sale for housing to support the cost of the acquisition of the site.

6.11 There are essentially two options open to the Council when the matter goes back to Strategic Development Committee if they decide upon a revocation Order:

- (a) To allow the matter to continue through the statutory compensation route;
- or
- (b) To enter into an agreement with the developer to acquire the land

6.12 There are variations of detail with each option and these are dealt with below. It is important to point out that any decision to revoke the Planning Application is one for the Council as Local Planning Authority to make (i.e. Strategic Development Committee) on its planning merits alone. The financial implications for the Council are

not material in making a decision whether to revoke or not. However in Cabinet deciding whether to chose between (a) and (b) above the financial considerations are relevant

Revocation considerations

Option A: Revocation

- 6.13 It has to be noted that even if the Strategic Development Committee had accepted the recommendation not to take any action and allow the development to continue, that is unlikely to have been the end of the matter. The HSE's position is strongly held; that this development should not proceed. It is thought to be very likely that the HSE will approach the Secretary of State and ask her to consider using her powers to revoke the planning permission (almost identical powers to the Council's, however the Council would have to pay any compensation). The Secretary of State will choose whether to intervene or not, but if her own safety adviser was saying a situation was not safe, then she would have been under pressure to act. She did this when requested to call in PA/06/1393 by the HSE, so it is likely that she will do so again. She would probably order a public inquiry (along the lines of a planning inquiry) so that she could receive a report from a planning inspector to enable her to make a decision. The decision would have turned on the balance between the health and safety considerations (as advocated by the HSE) and the other material planning considerations, particularly the regeneration of the area and the provision of housing and jobs. This would mean significant delay and uncertainty for the developer and his purchasers.
- 6.14 It is difficult to speculate on the likely outcome of such an unusual inquiry. Clearly the planning inspector and the Secretary of State would be heavily influenced by the views of the government's safety adviser. However they would also have to consider all the other material planning considerations and balance them against the safety objection. It is likely that we would have the support of the GLA. They have publicly stated that they consider the HSE's position on these matters as too cautious and unjustified by the empirical evidence about risk. Whilst it is possible to see how such an inquiry could be won, the more likely outcome is that the Secretary of State would support the HSE.

Revocation and acquisition considerations

Option B: acquiring the site from the developer by agreement

- 6.15 Open book discussions between the developer and the Council have established the costs incurred by the developer to date (including land acquisition, finance charges and the like). These costs have been verified by Council appointed building surveyor experts in a due diligence exercise over the last 6 months. The developer will not enter into an agreement without selling the land. Contract Terms have been agreed on a without prejudice basis subject to the revocation order.
- 6.16 Such an acquisition will place LBTH in an unfettered position. In the short term the Council could use the land for a suitable use to release other more valuable sites. In the long term it would enable the Council to lead on a significant regeneration project

that could be a model nationwide to regenerate Gasholder sites and create additional housing.

7. CONCURRENT REPORT OF THE ASSISTANT CHIEF EXECUTIVE (LEGAL)

- 7.1 The legal implications are set out in the report. Terms of an agreement conditional upon the revocation have been negotiated and agreed on a without prejudice basis with the developer subject to revocation in the event that Cabinet endorses option B.

8. COMMENTS OF THE CHIEF FINANCIAL OFFICER

- 8.1 The financial comments are dealt with in the exempt addendum report.

9. CONCLUSIONS

- 9.1 Members are asked to consider in the event that Strategic Planning Committee decides to revoke the planning consent whether to allow the statutory compensation process to proceed option A or to agree to option B to enter into an agreement with the developer to acquire the site.

10. EQUAL OPPORTUNITIES IMPLICATIONS

- 10.1 No specific issues are raised.

11. ANTI-POVERTY IMPLICATIONS

- 11.1 No specific issues are raised.

12. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT

- 12.1 No specific issues are raised.

13. EFFICIENCY STATEMENT

- 13.1 No specific issues are raised.

14. RISK MANAGEMENT IMPLICATIONS

- 14.1 The report deals with risks to society from a hazardous installation and financial and reputational risks to the council.

APPENDICES

- Appendix A Site Plan 33-37 The Oval & Bethnal Green Gasholder Site E3
- Exempt Confidential Appendix circulated in the confidential part of the agenda

LOCAL GOVERNMENT ACT 1972 (AS AMENDED) SECTION 100D

LIST OF "BACKGROUND PAPERS" USED IN THE PREPARATION OF THIS REPORT

Brief description of "background paper"

Name and telephone number of holder
And address where open to inspection

Nov 8 2007 Strategic Development Committee and
Strategic Development Committee and Planning File
for public inspection

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