

Investigation Report

Asbestos Safety Management Plan

1. Background

- 1.1. Following a number of FOI requests about the Council's asbestos safety management at the Town Hall the Council has requested assurance from me in my capacity as the statutory Monitoring Officer that the Council did have a statutory compliant asbestos management regime in place, with particular regard to the Council's Asbestos Safety Procedure Plan dated 2013 (AMP)
- 1.2. I appointed Clyde and Co and Richard Matthews KC to advise on the technical legal elements of this report. In their selection I consider they have the required level of expertise in asbestos related health and safety issues and historical knowledge of asbestos management in the Town Hall.

2. Key Findings

- 2.1. On the basis of the timelines and the investigation report undertaken, I have concluded that a contravention of Regulation 4(7) of the Control of Asbestos Regulations 2012 (the Regulations) cannot be established as:
 - a suitable and sufficient assessment of asbestos containing materials in the Town Hall was undertaken
 - where required, such assessment was reviewed (and in fact undertaken afresh by way of "reinspection"); and that each and every such assessment (re-inspection) was recorded (and undertaken by competent persons).
- 2.2. In regard to the written plan, I have concluded that a contravention of Regulation 4(8), (9) or (10) cannot be established for the reasons set out below:
 - this investigation demonstrates the measures the plan set out for the monitoring, of the condition of asbestos, the proper maintenance of it and removal and the provision of information about its location etc were recorded on the Property Services asset management database 'Concerto', which was accessed by building managers.
 - Concerto had an asbestos folder for the Town Hall with what appears to have been a comprehensive set of entries including 12 asbestos surveys and re-inspections during the relevant period.
- 2.3. If the only failures are to follow the letter and terms of the Asbestos Management Plan with regard to recording within the plan itself an annual review of its terms, and to update the identity of those responsible for effecting the management arrangements set out in the plan, then such failures are neither a contravention of an express provision of the Regulations nor, necessarily, involve a contravention of Reg. 4(10): If the measures taken to

implement the plan were recorded on Concerto, albeit not within the AMP; and the assessment was regularly updated (as it was as a result of frequent re-inspection), then the evidence suggests that measures were reviewed and all significant changes to the premises (with regard to asbestos) were recorded.

- 2.4. The AMP 2013 was reviewed and updated and formally approved by the Council's Health and Safety Committee in November 2022. There is very little change in the 2022 version when compared to the 2013 version save in relation to updating the names of responsible officers. While stylistically different owing to the fact that different contractors prepared them – the AMPs cover the same topics, and the management of asbestos is the same in both.
- 2.5. While the Asbestos Code of Practice (ACOP) states that the written plan “should identify the person(s) responsible for managing asbestos risk”, this is not an express requirement of Regulation 4(9), which does mandate what measures the plan must include. It follows that a failure to record the changing identity of the persons responsible for managing the asbestos risk does not directly equate to a contravention of Regulation 4.
- 2.6. It follows that the essential requirements are to ensure that any work that may expose employees to asbestos is only undertaken by competent employees, (for whom the specific specialist requirements imposed by Reg 10(1)(a)(iv) to (xi) are relevant). Work in areas of the Town Hall involving the potential disturbing of asbestos was undertaken only by licensed specialist external contractors and not by Council employees; similarly, the assessment of the condition of asbestos containing materials in the Town Hall was subject to regular inspection by such specialist external competent persons.

As such, in regard to the risk of employees inadvertently disturbing asbestos or being exposed to disturbed asbestos while at work, the ‘adequate information, instruction and training’ of employees was effected by encapsulating (or removing) the asbestos, warning and information, and by the attendance by building managers etc at asbestos awareness training.

- 2.7. There is a distinction between a failure to follow the promises made in the asbestos management plan or elsewhere and a contravention of Regulation 10. The investigation has not found any evidence of a failure to provide employees of the Council who were ‘liable to be exposed to asbestos’ with ‘adequate information, instruction and training’, sufficient to safeguard themselves from such potential exposure.

3. Managing asbestos

- 3.1. Breathing in asbestos fibres released from disturbed or damaged asbestos containing materials (ACMs) can present a real risk of developing serious diseases, including cancer (mesothelioma and lung cancer) and asbestosis.
- 3.2. The HSE is now primarily concerned with potentially frequent and regular asbestos exposure patterns arising from direct work with ACMs, e.g., during maintenance activities. Everyone is continuously exposed to a low level of

asbestos fibres to some extent because asbestos was such a widely used material within buildings, machinery, vehicle brakes and homes until 1999, when most forms of asbestos were banned. However, working directly with ACMs can give personal exposures to airborne asbestos that are much higher than environmental levels. Repeated exposures of this type will give rise to a substantial cumulative exposure, thereby increasing the risk of developing an asbestos-related disease in the future.

- 3.3. To avoid additional exposure caused by workplace activities, the law requires:
- the prevention or control (where prevention is not reasonably practicable) of exposure from work activities;
 - that certain higher risk asbestos work is carried out by those holding an asbestos licence issued by HSE;
 - that asbestos materials in workplace buildings must be managed to prevent or control exposure to asbestos;
 - the reporting of a significant uncontrolled disturbance of asbestos as a Dangerous Occurrence to the HSE.

4. HSE prosecution in 2014

- 4.1. Following a prosecution in 2014 by the HSE, relating to historical events since 2002, the Council pleaded guilty to two offences being breaches of Section 2 (1) and 3 (1) of the Health and Safety at Work Etc Act 1974. This concerned its failure to ensure the health, safety and welfare of its employees and persons not in their employment, so far as was reasonably practicable. The offences concerned how both employees of the Council and contractors worked in the basement of the Town Hall where asbestos debris was found and therefore were exposed to asbestos. Both employees and contractors had been using the basement area of the Town Hall regularly since 2002; and that areas containing asbestos debris identified in a 2002 survey did not appear to have been remedied and that contractors were not always supplied with adequate information regarding asbestos in the basement.
- 4.2. The Council also accepted that it did not have a suitable or sufficient plan in place for managing asbestos in the Town Hall, and, as a result an Improvement Notice was issued which resulted in the Council creating a site-specific asbestos management plan for the Town Hall.
- 4.3. The Council provided a statement to the Court as part of its mitigation the relevant paragraphs of which state:

“Paragraph 43 - The Asset Management department are responsible for ensuring the Asbestos Management Plan is up to date. Facilities Management will be responsible for implementing the plan in relation to contractors and inspections. The building manager has responsibility for ensuring the Town Hall's asbestos management is monitored

Paragraph 44 - The plan will be reviewed on an annual basis by AMT”

- 4.4. Although not defined in the mitigation statement the reference to AMT is the Asset Management Team/Department. It is accepted that the AMP itself was not updated, nevertheless significant planning was undertaken on an annual basis by the AMT in terms of planned annual asbestos surveys and contracting with specialists to remove any asbestos identified safely and in full compliance with the statutory requirements set out in the Regulations.

5. Summary of High-Level Activity Since 2013

- 5.1. Prior to the action taken by the HSE in 2014, regular activity had been taking place to actively manage any risks associated with the presence of asbestos in the Town Hall using the 2013 AMP. These actions were recorded on Concerto the management database rather than on the paper-based AMP.

March 2013

- Full asbestos survey for main Town Hall building issued showing a number of areas requiring asbestos removal in the basement
- Asbestos Management Plan implemented for main Town Hall building

November 2014 – June 2015

- Permit to work – 09 Dec 2014
- Hazardous Waste Cert – 11 Dec 2014

February 2015

- Re-inspection – further damaged ACMs identified (undisturbed) in basement marked for repair and restricted access – the works continued until June 2015

March / June 2015

- 15 March 2015 – certificate of reoccupation – 4 stage clearance carried out to first floor riser
- Hazardous Waste Cert – 11 Jun 2015
- Hazardous Waste Cert – 12 Jun 2015
- Various air monitoring certificates March-June 2015 – all ok

May 2016

- Asbestos reinspection- Mostly low risk with 5 areas around pipework showing medium risk but all asbestos in good condition

September 2017

- Asbestos reinspection - All asbestos identified marked as “monitor”

February 2018

- Asbestos reinspection survey showed no immediate need for asbestos remedial works unless physical building works are undertaken

June 2018

- Asbestos removal works undertaken in Town Hall basement

May 2019

- Asbestos reinspection survey showed no immediate need for asbestos remedial works unless physical building works are undertaken

June 2020

- ISG (Council's contractors) take vacant possession of the Town Hall building for the major refurbishment works

September 2020

- Asbestos Refurbishment Survey – as per HSE requirement ahead of building/ demolition works to basement and for external areas of building. This was an intrusive survey involving asbestos disturbance to ensure safety of the works and of those on site.

December 2021 – onwards

- Work commenced on the new AMP, draft version produced by Environtec in May 2022 and approved by the Council's Health and Safety Committee in November 2022
- This summary of high-level activity indicates that work was being undertaken to monitor and mitigate risks posed by the presence of asbestos throughout the period 2013 to present day.

6. Recent FOI requests

- 6.1. The Council has received several FOI requests for documents relating to the management of asbestos at the Council's Town Hall complex.

7. Records provided in response to the FOI

- 7.1. In order to comply with the FOI requests the Council's Property Services team undertook a review of Town Hall asbestos records between 2013-2020. The records show:

- The Council had a good record of asbestos inspections and re-inspections in relation to the Town Hall building during the period in question. Between 2015 - 2020 the Council was able to produce robust records of annual inspections and re-inspections demonstrating that asbestos was well managed.
- In 2013 the Council implemented the AMP and undertook a detailed asbestos survey which identified asbestos that required removal in the Town Hall basement. Subsequently works were undertaken by a

specialist asbestos contractor between Dec 2014 – June 2015 to safely deal with the asbestos.

- The Council records of internal communications to staff during this period advising of the works and closing areas of the Town Hall off to staff access.

8. Formal request to Monitoring Officer

- 8.1. Following the receipt of his FOI response, the requestor wrote to me on the 1st September 2022 in the following terms: -

“To be clear, I am writing to you in your role as monitoring officer (and particularly your duties under the Local Government and Housing Act 1989, para. 5(2)).

I note that the document entitled ‘Asbestos Management Procedure For Main Building Walthamstow Town Hall Complex’ (see attached) is not filled in properly, see pp.5, 6, 8, 11, 89, 92 and 97.

Moreover, though it is said to be a live document, current at least to 2020, on p.5 it lists ... ‘The Environment & Regeneration Statutory Duty Holder’, though by his own account he left LBWF in February 2015 (see attached).

I believe that these various flaws may constitute breaches of the Asbestos Regulations 2012, particularly the paragraphs relating to recording and training, e.g. 4 (7), 4(10)(a), 4(10)(c), and 10.

Please will you investigate and advise?”

- 8.2. Section 5 of the Local Government and Housing Act 1989 places a duty on the Monitoring Officer to formally report to Council where there has been an illegal decision or omission on the part of the Authority that contravenes any enactment or rule of law.
- 8.3. The Regulations came into force on 6th April 2013 and contain explicit duties to manage asbestos.
- 8.4. The following list outlines some of the requirements under the duty to manage asbestos in non-domestic premises: -
- Take reasonable steps to determine the location and condition of materials likely to contain asbestos.
 - Presume that materials contain asbestos unless there is strong evidence that they do not.
 - Assess the risk of the likelihood of anyone being exposed to asbestos from these materials.
 - Make a written record of the location and the condition of the ACM's and presumed ACMs and keep it up to date.

- Repair or remove any material that contains or is presumed to contain asbestos, if necessary, because of the likelihood of disturbance, and its location or condition.
- Prepare a plan to manage that risk and put it into effect to ensure that information on the location and condition of ACM's is given to people who may disturb them during work activities. Any material known or presumed to contain asbestos is kept in a good state of repair.
- Monitor the condition of ACM's and presumed ACM's.
- Review and monitor the action plan and the arrangements made to put it in place.
- Ensure that mandatory training is given to anyone liable to be exposed to asbestos fibres at work. This includes maintenance workers and others who may come into contact with or disturb asbestos containing materials.

8.5. The requestor cited the following specific paragraphs of the Regulations: -

4(7) The duty holder must ensure that the conclusions of the assessment and every review are recorded.

4(10)(a) The duty holder must ensure that—

- (a) the plan is reviewed and revised at regular intervals, and without delay if—*
 - (i) there is reason to suspect that the plan is no longer valid, or*
 - (ii) there has been a significant change in the premises to which the plan relates;*

4(10)(c) The measures taken to implement the plan are recorded.

10. Information, instruction and training

(1) Every employer must ensure that any employee employed by that employer is given adequate information, instruction and training where that employee—

- (a) is or is liable to be exposed to asbestos, or if that employee supervises such employees, so that those employees are aware of—*
 - (i) the properties of asbestos and its effects on health, including its interaction with smoking,*
 - (ii) the types of products or materials likely to contain asbestos,*
 - (iii) the operations which could result in asbestos exposure and the importance of preventive controls to minimise exposure,*
 - (iv) safe work practices, control measures, and protective equipment,*

- (v) *the purpose, choice, limitations, proper use and maintenance of respiratory protective equipment,*
- (vi) *emergency procedures,*
- (vii) *hygiene requirements,*
- (viii) *decontamination procedures,*
- (ix) *waste handling procedures,*
- (x) *medical examination requirements, and*
- (xi) *the control limit and the need for air monitoring,*

in order to safeguard themselves and other employees; and

- (b) *carries out work in connection with the employer's duties under these Regulations, so that the employee can carry out that work effectively.*
- (2) *The information, instruction and training required by paragraph (1) must be—*
- (a) *given at regular intervals;*
 - (b) *adapted to take account of significant changes in the type of work carried out or methods of work used by the employer; and*
 - (c) *provided in a manner appropriate to the nature and degree of exposure identified by the risk assessment, and so that the employees are aware of—*
 - (i) *the significant findings of the risk assessment, and*
 - (ii) *the results of any air monitoring carried out with an explanation of the findings.*

Section 4 of the Regulations state as follows—

- (1) *In this regulation "the dutyholder" means—*
- (a) *every person who has, by virtue of a contract or tenancy, an obligation of any extent in relation to the maintenance or repair of non-domestic premises or any means of access or egress to or from those premises; or*
 - (b) *in relation to any part of non-domestic premises where there is no such contract or tenancy, every person who has, to any extent, control of that part of those non-domestic premises or any means of access or egress to or from those premises,*
- and where there is more than one such dutyholder, the relative contribution to be made by each such person in complying with the requirements of this regulation will be determined by the nature and extent of the maintenance and repair obligation owed by that person.*

(2) *Every person must cooperate with the dutyholder so far as is necessary to enable the dutyholder to comply with the duties set out under this regulation.*

9. The Asbestos Management Plan 2013

9.1. The requestor was supplied with the AMP 2013 version as part of his July 2022 FOI request. A review had commenced of the 2013 document in December 2021 but had not been completed and finalised at the time of the FOI request. The current version of the AMP was completed in draft in May 2022 and approved by the Health and Safety Committee in November 2022.

9.2. The AMP 2013, was uploaded onto Concerto for building managers to use, so was very much an active and live document providing guidance on the management of asbestos and how to minimise and mitigate risks. The fact that the AMP was not updated did not mean that asbestos was not being pro-actively managed at the Town Hall but certain information such as staff names was out of date and records stored elsewhere on the Concerto database.

9.3. The AMP is split into 8 sections:

9.3.1. Section 1 Roles and responsibilities

The AMP specifies roles and responsibilities but carried some staff names that had subsequently left the Council. Their responsibilities, however had been transferred to their successors but are not updated in the document.

9.3.2. Section 2

This section relates to Appointed Persons Training Needs and Records. This section again had not been updated but the annual asbestos works in the Town Hall have been undertaken by suitably qualified contractors and this requirement would form part of a procurement process in selecting a suitably qualified and experienced contractor.

9.3.3. Section 3

This is the Asbestos Management Plan itself.

It identifies and describes the roles, responsibilities, and lines of authority for managing asbestos.

It outlines procedures and systems for the effective management of asbestos-containing materials to minimise health risks associated with the presence of asbestos.

It outlines the arrangements to be implemented to meet the requirements of Regulation 4, approved code of practice and guidance in identifying, assessing and controlling the risks associated with the presence of asbestos.

It specifically states that it will be reviewed annually (subject to agreement). It is not clear who's agreement would be necessary not to review it annually but, in any event, the latter commitment given by the Council to the Court makes it

clear that the plan would be reviewed annually. This was not conditional but unequivocal.

It states that its aims and objectives are to: _

- Provide a safe working environment.
- Ensure the risk of users, contractors and staff being exposed to asbestos are minimised by controlling works being carried out.
- The provision of information and advice to users, contractors and staff on the common locations of asbestos containing materials within their properties and buildings managed or occupied by LBWF.
- Projects not delayed by discovery of asbestos during refurbishment, potentially saving both time and money.
- Improved perception from employees and other personnel of commitment to manage safety.
- Achieve statutory compliance with current legislation
- Co-ordinated approach with planned maintenance.

It also summarises the legislative provision and the statutory duties imposed on the Council in managing asbestos.

The plan sets out the roles and responsibilities of various stakeholders and specifically states that:

“LBWF have arranged for NPS London Ltd their joint venture service partner to:

- *Develop and maintain the Asbestos Management Plan.*
- *Audit the Asbestos Management arrangements to ensure compliance with legal requirements.*
- *The delivery of the Asbestos Management Plan.*
- *Monitor and review of the processes and procedures.*
- *Production of annual reports relating to the implementation and progress of the Asbestos Management Plan”*

This would suggest that the responsibility for reviewing and updating the plan sat with NPS London Ltd, but they were never subsequently commissioned or contracted to undertake the work, so the responsibility remained with the Council. NPS were only commissioned to produce the original AMP. However, NPS were subsequently periodically commissioned to undertake management surveys and re-inspections after 2013.

The Plan sets out a training plan which consists of three elements: -

- training for all operatives and others likely to come into contact with asbestos as part of their work and for those specifying or commissioning work likely to involve contact with asbestos;
- training for those staff with direct responsibilities for building management;
- general awareness training for all staff (emphasising the need to report damaged material)

Training would typically focus on:

- the duties of individuals with regards to Asbestos Management and Safe Working
- an over-view of relevant legislation
- information on the presence of asbestos in LBWF premises
- information on the health risks associated with asbestos
- highlighting the need to avoid disturbing in-situ asbestos materials
- procedures to be followed in the event that damaged or disturbed asbestos materials are identified, or unknown materials or materials suspected of containing asbestos are encountered.

The training would be provided by an appropriate training body.

The individual site managers and responsible persons were required to update the training records under the AMP although no records had been located for the purposes of responding to the FOI. However, the Council has evidenced attendance by building managers on a Health and Safety course, which did cover Asbestos and their duties which took place in 2013/14 and 22 delegates attended.

Asbestos Awareness training was also provided in 2018, but only schools attended.

Since 2019 the Asbestos Awareness Training has been made available along with Asbestos Duty Holder and Building Manager safety training, however the training is voluntary and (in part) due to the pandemic, the Council cannot evidence which staff attended the course.

Section 13 of the Plan sets out the monitoring and review requirements. It states that the Asbestos Management Plan will be reviewed on a regular basis and that:

“It must be remembered that the main objective of an asbestos management plan is to reduce the risk of exposure to asbestos fibres. Only if it can be demonstrated that potential exposure is controlled can the asbestos management plan be regarded as successful.”

There is no doubt that from that perspective the plan should be regarded as successful in that there has been a properly controlled environment that has reduced the risk of exposure to asbestos as evidenced by the annual surveys and procurement of specialist contractors to either remove or safely isolate and contain asbestos when it has been identified.

9.3.4. Section 4

This is the asbestos register following a re-inspection in 2014 by Spectra Analysis Services Ltd

9.3.5. Section 5

Inspection records which stipulate whether asbestos identified and located must be labelled, labelled and managed, or removed.

9.3.6. Section 6

This section provides a template for monitoring and reviewing asbestos remedial works. This would have been part of the effective clienting of any contractor engaged to undertake such work and formed part of the specification and contract when a contractor was procured.

The annual re-inspection records have not been included in the original AMP. Notwithstanding that, it is clear that regular re-inspections took place. The records themselves have been produced, being stored elsewhere.

9.3.7. Section 7

Audit records including pro forma templates for permit to work records.

9.3.8. Section 8

Appendices including the Asbestos Policy Statement dated 16th October 2013

9.4. Property Services confirmed that at the time of the response to the requestor's FOI the AMP dated 2013 had not been updated. However, the primary purpose of the AMP was to set out how asbestos should be managed, and risks minimised, and it is evident that in that regard the AMP has been complied with in the way the Council has dealt with managing asbestos on the Town Hall site.

9.5. Property Services also confirmed that the management of documents such as the AMP had been logged on the Property Services asset management database 'Concerto'. Concerto is a cloud-based data base for property asset management. The Town Hall is specifically identified (which includes the Town Hall and War Memorial and other buildings that are part of Fellowship Square) and there are over 2500 documents recorded in the system against Fellowship Square.

9.6. There are then a number of subfolders where documents can be electronically deposited, and Asbestos is identified

- 9.7. The subfolder on asbestos re-inspections clearly satisfies the Regulations – section 4(7) The duty holder must ensure that the conclusions of the assessment and every review are recorded.
- 9.8. Furthermore, the system has records of all the remedial action taken following any new asbestos being identified including air quality monitoring, records of asbestos removal and compliance with all actions arising from an inspection.
- 9.9. There is an asbestos remedial works folder that contains 16 consignment notes evidencing the proper removal of asbestos from the town Hall.
- 9.10. Concerto also has a Redbox facility which identifies which documents need to be reviewed with a date. The system actually flags up the actions needed to be taken as a 'red box' in the spreadsheet. It appears that no one was using this element of Concerto to identify that the AMP 2013 had not been reviewed and updated
- 9.11. This has now been corrected and the Red Box review dates have now been looked at and individual building managers are being trained in how to properly use Red Box – accordingly the current governance arrangements by way of providing assurance on the timely review of documents on Concerto has been significantly improved.
- 9.12. As part of this process the AMP was reviewed and updated and formally approved by the Council's Health and Safety Committee in November 2022. There is very little change in the 2022 version when compared to the 2013 version save in relation to updating the names of responsible officers. While stylistically different owing to the fact that different contractors prepared them – the AMPs cover the same topics, and the management of asbestos is the same in both.
- The new AMP covers the entire borough while the old one is site specific – asbestos management however is undertaken in accordance with statutory requirements
 - The old AMP has a named statutory duty holder and a number of responsible officers – the new AMP only has one of each, namely the Chief Executive and the Head of FM
 - The 2013 AMP required an annual review whereas the new AMP requires a review every three years
- 9.13. Notwithstanding that the AMP had not been updated until 2022, it was uploaded onto Concerto for building managers to use, so was very much an active and live document providing guidance on the management of asbestos and how to minimise and mitigate risks. The fact that the AMP was not updated did not mean that asbestos was not being pro-actively managed at the Town Hall.
- 9.14. Remedial works were commissioned and a permit to work was issued on 9 December 2014 to put into place all of the necessary actions recommended

by the reinspection. A certificate of reoccupation indicating the end of the works was issued on 15 March 2015. The Council has a consignment note for 8 bags of asbestos insulation demonstrating the asbestos was removed from site.

- 9.15. Following removal works, a cyclical reinspection was completed in May 2016 which showed no asbestos related concerns.
- 9.16. In 2018, a determination was made that the Town Hall boiler required replacement. As this was a significant piece of work which would disturb resident asbestos, as required by the AMP, a refurbishment survey was commissioned and completed. As part of the boiler replacement, asbestos that would be disturbed during the works was removed by an approved specialist asbestos contractor.
- 9.17. Following this, the cyclical re-inspections continued, commissioned by NPS who ceased being the contracted provider on 31 December 2020. Additionally, between June - Oct 2020 a refurbishment survey was completed by Environtec Ltd for all interior floors and the exterior of the Town Hall with ISG being contracted to undertake the necessary refurbishment works.
- 9.18. During this period significant works were undertaken to remove asbestos from the Town Hall in 2014, 2015 and 2018 in full compliance with the AMP. The Health and Safety Team had not identified any asbestos safety issues during this period and all of the identified asbestos had been removed safely and in compliance with all health and safety requirements.
- 9.19. The reinspection in 2019 found no asbestos being found in the basement with the exception of two areas marked as “asbestos presumed/identified”. Where a contractor is unable to determine the presence of asbestos in an item, they will, in every instance mark it as “presumed asbestos” and rate it accordingly on the inspection.
- 9.20. In the case of the two remaining items in the basement, these are both doors where, unless the contractor drilled into them, there was no way of knowing what is inside it – if it were to be asbestos, it would be encased. There are two actions to remediate such asbestos issues – encasing it or removing it. As such, it has been marked up as “presumed/identified” even though were it to be there, it would be encased. It is clear from the inspection that a sample was not taken, and the risk rating was low.

10. Responsibility of designated officers

- 10.1. The Chief Executive as the Council’s Statutory Duty Holder has ultimate responsibility for Health and Safety matters. This responsibility is then delegated along with a whole wide range of other statutory duties to appropriate persons in the organisation. It is not practicable for a Chief Executive with the post’s wide range of responsibilities to manage and practically implement health and safety matters in the Council’s various workplaces. The Chief Executive would rely on those delegated to undertake

this on his behalf. In the case of asbestos management and particularly the AMP this responsibility was discharged to specific persons in the Property Services Team.

- 10.2. As might be appreciated over a period of 10 years the persons delegated with this responsibility have changed, with staff leaving and new staff being appointed. It is clear that in the case of property services there has been significant churn in staff with difficulties in recruitment leading to interims being appointed. Most staff that undertook responsibilities with regards to Asbestos management and the AMP are no longer working for the Council and so gathering information on handovers etc has been difficult. Also, with this type of churn there is a loss of continuity of knowledge and organisational memory. So, although there is clear evidence of asbestos management throughout the period, the need to review the AMP annually was not undertaken during the period until the review in November 2022. However, the Property Team has seen a much greater stability in staffing since 2019 and has seen investment in key posts which has resulted in the AMP being reviewed and updated in 2022 with minor changes. However the administrative failure in not reviewing the AMP on an annual basis is at worst a minor administrative failure as asbestos management was being proactively managed during this period as evidenced by the annual inspections and any changes to the AMP would have simply reflected staff changes rather than any more fundamental change around the way the Council managed asbestos. There is very little change in the 2022 version when compared to the 2013 version save in relation to updating the names of responsible officers. While stylistically different owing to the fact that different contractors prepared them – the AMPs cover the same topics, and the management of asbestos is the same in both.

11. Remedial Actions

- 11.1. A number of specific actions have been taken by the Head of FM to ensure current compliance:
- Two full time equivalent staff now dedicated to compliance assurance including health and safety compliance relating to asbestos
 - There is now one Asbestos Management Plan covering all Council buildings
 - The Concerto electronic asset management system has now been properly implemented and the Council's AMP loaded into every site's record. This means that every building manager with asbestos in their building (currently 59 officers) will be alerted via the Red Box in Concerto should the AMP go out of date
 - Building managers attend quarterly/bi-annual meetings with FM to discuss issues and the Red Box is a standing item
 - Fortnightly compliance meetings with the lead FM contractor, Astons to discuss all outstanding matters

- AMP is now on the quarterly Corporate Health and Safety compliance report

11.2. For general day-to-day assurance relating to asbestos:

- All building managers have been briefed on the need for staff who work in sites with asbestos to have Asbestos Awareness training (conducted by the Health and Safety Work team)
- When contractors are issued jobs at a site, there is an alert, in bold, on the job advising them to check the AMP and asbestos register prior to commencing any works
- We now have an Electronic Asbestos Management System hosted by Environtec which allows us to check whether contractors have recently viewed the AMP and asbestos register before attending
- All new surveys/information/paperwork is loaded into Concerto monthly.

11.3. The timeline below sets out the actions taken and clearly evidences that the AMP had been identified in need of review in December 2021 which culminated in the first draft AMP being produced in May 2022 some two months before the FOI request from the requestor.

Date / Period	Action
Mid December 2021 – Mid January 2022	Head of FM identified the need to update the AMP to create an overarching plan for the borough
7 February 2022	Head of FM approved the budget and appointed the contractor Environtec for creation of borough wide AMP
Mid-Late February 2022	Discussions between the Head of FM and the Head of Health and Safety about details of a single AMP for the borough and provision of post holders for the AMP
9 March 2022	Meeting between the Head of FM and the Town Hall refurbishment project manager to discuss new AMP
3 May 2022	First draft of borough wide AMP received from Environtec
22 July 2022	FOI received from requestor for a copy of Town Hall AMP
19 August 2022	FOI closed off.
27 & 28 September 2022	Final asbestos survey of town hall (end of refurbishment project)

Date / Period	Action
26 October 2022	<ul style="list-style-type: none"> • Additions made with Environtec to incorporate new sign off process • Final AMP review with Director of Property and Delivery and sent to Strategic Director, Place for review
27 October 2022	Final AMP sent to Head of Health and Safety incorporating all comments/feedback
3 November 2022	Corporate Health and Safety Committee endorsement of borough wide AMP
10 November 2022	Chief Executive signs AMP
10 November-22 November 2022	New borough wide AMP uploaded to Concerto into each corporate site it encompasses

11.4. Since 2013 there has been no review of asbestos safety management by the Council's internal audit team. However, as a result of the historic oversight to update the AMP between 2013 and 2022 the Head of Internal Audit has included in the 2023/24 Internal Audit Programme a review of asbestos health and safety management in Council buildings in order to assess the design and test the operating effectiveness of the key controls around Health and Safety procedures in relation to asbestos in Corporate Buildings.

12. The Law – The Control of Asbestos Regulations 2012

12.1. The Control of Asbestos Regulations 2012 ('CAR 2012') are the subject of an approved code of practice (hereafter 'ACOP') and guidance ('Guidance') issued, together with the Regulations, in a publication entitled Managing and working with asbestos that is known as L143. The current edition is the second that was published in 2013.

12.2. CAR 2012 are health and safety regulations issued pursuant to the Health and Safety at Work etc. Act 1974 (hereafter 'HSWA 1974') and, as such, a contravention of a provision of the Regulations is made an offence by s 33(1) HSWA 1974.

12.3. While neither those parts of the publication L143 that are issued as an ACOP nor the passages that are Guidance form part of the Regulations, they each have a status provided for by HSWA 1974. L143, states:

"This Code has been approved by the Health and Safety Executive, with the consent of the Secretary of State. It gives practical advice on how to comply with the law. If you follow the advice, you will be doing enough to comply with the law in respect of those specific matters on which the Code gives advice. You may use alternative methods to those set out in the Code in order to comply with the law."

However, the Code has a special legal status. If you are prosecuted for breach of health and safety law, and it is proved that you did not follow the relevant provisions of the Code, you will need to show that you have complied with the law in some other way or a Court will find you at fault.”

12.4. In respect of Guidance, L143 provides:

“This guidance is issued by the Health and Safety Executive. Following the guidance is not compulsory, unless specifically stated, and you are free to take other action. But if you do follow the guidance, you will normally be doing enough to comply with the law. Health and safety inspectors seek to secure compliance with the law and may refer to this guidance.”

12.5. Regulation 4 CAR 2012

Regulation 4 CAR 2012 is the duty to manage asbestos in non-domestic premises. Reg 4(3) provides:

(3) In order to manage the risk from asbestos in non-domestic premises, the dutyholder must ensure that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present in the premises.

Regulation 4(7) provides:

(7) The dutyholder must ensure that the conclusions of the assessment and every review are recorded.

The assessment required by Regulation 4(7) is, as the Guidance suggests, an assessment (usually including by way of comprehensive survey) to identify the presence of and potential risk from asbestos containing materials. This is separate to, and distinct from, the duties provided for in regard to a written plan.

In this latter regard, Regulation 4(8) to (10) provides:

(8) Where the assessment shows that asbestos is or is liable to be present in any part of the premises the dutyholder must ensure that—

- (a) a determination of the risk from that asbestos is made;*
- (b) a written plan identifying those parts of the premises concerned is prepared; and*
- (c) the measures which are to be taken for managing the risk are specified in the written plan.*

(9) The measures to be specified in the plan for managing the risk must include adequate measures for—

- (a) monitoring the condition of any asbestos or any substance containing or suspected of containing asbestos;*

- (b) *ensuring any asbestos or any such substance is properly maintained or where necessary safely removed*
 - (c) *ensuring that information about the location and condition of any asbestos or any such substance is—*
 - (i) *provided to every person liable to disturb it, and*
 - (ii) *made available to the emergency services.*
- (10) *The duty holder must ensure that—*
- (a) *the plan is reviewed and revised at regular intervals, and without delay if—*
 - (i) *there is reason to suspect that the plan is no longer valid, or*
 - (ii) *there has been a significant change in the premises to which the plan relates;*
 - (b) *the measures specified in the plan are implemented and*
 - (c) *the measures taken to implement the plan are recorded.*

At paragraph 129, L143 contains the following as part of the ACOP:

A written (electronic or paper) management plan should be prepared. The management plan should set out how the risks identified from asbestos will be managed. Details should include:

- *identifying the person(s) responsible for managing the asbestos risk;*
- *a copy of the asbestos record or register and how to access it if it is kept electronically;*
- *instructions that any work on the fabric of the building cannot start without the relevant parts of the record/register being checked.*

The plan should include details for how this will be achieved. In particular, the plan should identify the procedures and arrangements to make sure:

- *the record/register is checked in good time before the work starts;*
- *checks will be made that the information on the presence of asbestos has been understood and will be taken into account;*
- *checks will be made that the correct controls will be used and that competent asbestos-trained contractors will carry out the work;*

It is important to note that the terms of the regulation only require that the “written plan” that is prepared identifies, “those parts of the premises concerned ...; and the measures which are to be taken for managing the risk are specified in the written plan.”

The ACOP provides that the plan may be paper based or electronic and nowhere do either the Regulations or the ACOP and Guidance prescribe that the recording of matters or recording of the review of matters must be incorporated within the same copy of the written plan.

The position is akin to that with regard to risk assessment: an assessment or review of an assessment of risk may be recorded in a variety of documents some or all of which may or may not be entitled "risk assessment".

12.6. Regulation 10 CAR 2012

The terms of Regulation 10 that provides the specific requirements in respect of the written asbestos management plan required and training in this regard:

- (1) *Every employer must ensure that any employee employed by that employer is given adequate information, instruction and training where that employee—*
 - (a) *is or is liable to be exposed to asbestos, or if that employee supervises such employees, so that those employees are aware of—*
 - (i) *the properties of asbestos and its effects on health, including its interaction with smoking,*
 - (ii) *the types of products or materials likely to contain asbestos,*
 - (iii) *the operations which could result in asbestos exposure and the importance of preventive controls to minimise exposure,*
 - (iv) *safe work practices, control measures, and protective equipment,*
 - (v) *the purpose, choice, limitations, proper use and maintenance of respiratory protective equipment,*
 - (vi) *emergency procedures,*
 - (vii) *hygiene requirements,*
 - (viii) *decontamination procedures,*
 - (ix) *waste handling procedures,*
 - (x) *medical examination requirements, and*
 - (xi) *the control limit and the need for air monitoring,*

in order to safeguard themselves and other employees; and
 - (b) *carries out work in connection with the employer's duties under these Regulations, so that the employee can carry out that work effectively.*
- (2) *The information, instruction and training required by paragraph (1) must be—*

- (a) given at regular intervals;
- (b) adapted to take account of significant changes in the type of work carried out or methods of work used by the employer; and
- (c) provided in a manner appropriate to the nature and degree of exposure identified by the risk assessment, and so that the employees are aware of—
 - (i) the significant findings of the risk assessment, and
 - (ii) the results of any air monitoring carried out with an explanation of the findings.

L143 provides the following by way of ACOP in regard to Regulation 10:

Information, instruction and training for all work with asbestos

225 *Employers have a duty to ensure that the information, instruction and training given to their employees is adequate to allow them to safeguard themselves and other employees and to carry out their work with asbestos effectively.*

Competence

226 *Any reference to competence, competent persons or competent employees in relation to working with asbestos is a reference to a person or employee who has received adequate information, instruction and training for the task being done and can demonstrate an adequate and up-to-date understanding of the work, required control measures and appropriate law. They must also have enough experience to apply this knowledge effectively.*

13. Has there been a breach of the CAR 2012?

- 13.1. This investigation reports seeks to ascertain whether a contravention of Regulation 4 or 10 could be established.
- 13.2. On the basis of the timelines and the investigation report, it is concluded that a contravention of Regulation 4(7) cannot be established as follows:
 - there appears evidence that the suitable and sufficient assessment of asbestos containing materials in the Town Hall was undertaken
 - where required, such assessment was reviewed (and in fact undertaken afresh by way of “reinspection”); and that each and every such assessment (reinspection) was recorded (and undertaken by competent persons).

As identified above, the duties in respect of Regulation 4(7) are distinct from those in regard to a written plan for the management of asbestos.

In regard to the written plan, it is concluded that a contravention of Regulation 4(8), (9) or (10) cannot be established for the reasons set out below:

- this investigation demonstrates the measures the plan set out for the monitoring of the condition of asbestos, the proper maintenance of it and its removal. Furthermore, the provision of information about its location were recorded on the Property Services asset management database 'Concerto', which was accessed by building managers.
 - Concerto system had an asbestos folder for the Town Hall with what appears to have been a comprehensive set of entries including 12 asbestos surveys and re-inspections.
- 13.3. If the only failures are to follow the letter and terms of the asbestos management plan with regard to recording within the plan itself an annual review of its terms, and to update the identity of those responsible for effecting the management arrangements set out in the plan, then such failures are neither a contravention of an express provision of CAR 2012 nor, necessarily, involve a contravention of Reg. 4(10): if the measures taken to implement the plan were recorded on Concerto, albeit not within the document entitled 'plan'; and the assessment was regularly updated (as it was as a result of frequent re-inspection), then the evidence suggests that measures were reviewed and all significant changes to the premises (with regard to asbestos) were recorded.
- 13.4. While the ACOP states that the written plan "should identify the person(s) responsible for managing asbestos risk", this is not an express requirement of Regulation 4(9), which does mandate what measures the plan must include. It follows that a failure to record the changing identity of the persons responsible for managing the asbestos risk does not directly equate to a contravention of Regulation 4.
- 13.5. It follows that the essential requirements are to ensure that any work that may expose employees to asbestos is only undertaken by competent employees, (for whom the specific specialist requirements imposed by Reg 10(1)(a)(iv) to (xi) are relevant). Work in areas of the Town Hall involving the potential disturbing of asbestos was undertaken only by licensed specialist external contractors and not by Council employees; similarly, the assessment of the condition of asbestos containing materials in the Town Hall was subject to regular inspection by such specialist external competent persons.
- 13.6. As such, in regard to the risk of employees inadvertently disturbing asbestos or being exposed to disturbed asbestos while at work, the 'adequate information, instruction and training' of employees was effected by encapsulating (or removing) the asbestos, warning and information, and by the attendance by building managers etc at asbestos awareness training.
- 13.7. There is a distinction between a failure to follow the promises made in the asbestos management plan or elsewhere and a contravention of Regulation 10 CAR 2012. The investigation has not found any evidence of a failure to provide employees of the Council who were 'liable to be exposed to asbestos'

with 'adequate information, instruction and training', sufficient to safeguard themselves from such potential exposure.

14. Reporting to the HSE and enforcement action by the HSE

- 14.1. The Reporting of Injuries Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR) dictate the circumstances in which an employer (or other person) must report an incident (or potential contravention of the health and safety provisions) to the HSE (or other enforcing authority).
- 14.2. Even were the circumstances such that the evidence established a contravention of CAR 2012 Regulation 4 and or Regulation 10, then it does not appear that such contravention also amounted to a reportable incident under RIDDOR.
- 14.3. While the HSE's criteria for investigation or inspection are different to their criteria for enforcement action, it does not appear that the circumstances of the present matter necessarily amount to a material breach of CAR 2012. This is particularly so, bearing in mind the changes made to the plan and recording of responsibility since 2022.
- 14.4. In respect of 'material breach', the HSE's Fee for Intervention criteria describe that, 'A material breach is something which an inspector considers serious enough that they need to formally write to the business requiring action to be taken to deal with the material breach'. However serious it is that there has been an apparent failure to make good on undertakings made to the sentencing court, such failures appear to pose greater risk of reputational harm than of leading to enforcement action in respect of contraventions of health and safety provisions.

15. Consideration of S5 duty – Local Government and Housing Act 1989

If the Monitoring Officer were to take their S5 duties literally, they would be required to report on a whole range of detailed matters, so some selectivity is required. In practice, the Monitoring Officer would not normally make a statutory report, despite the fact that the duty may strictly apply, in the following circumstances:

- **where the authority has already set up a system for dealing with such breaches** – Such assurance has now been provided with the updating of the AMP in November 2022 and the new compliance regime established by the Head of Facilities Management
- where no further action is required to remedy the breach – This is now the case
- where the matter is already being reported to Council (or to Cabinet, a committee or sub-committee)
- where the matter can more readily be resolved by a report to an appropriate committee or sub-committee

- where the legality of the decision or proposal is in the process of being tested in the courts.

In light of the above, it is concluded that there has not been a breach of the law and as such the duty as not been triggered.

Mark Hynes

Director of Governance and Law