

# TONBRIDGE & MALLING BOROUGH COUNCIL

## STREET SCENE and ENVIRONMENT SERVICES ADVISORY BOARD

07 November 2016

### Report of the Director of Street Scene, Leisure and Technical Services

#### Part 1- Public

#### Matters for Information

## 1 CONTAMINATED LAND

### Summary

Following discussion on the Council's Contaminated Land Strategy at a last meeting of the Board, this report provides detailed overview of the way in which the Council delivers its contaminated land function in line with both legislative requirements and statutory guidance.

### 1.1 Background

- 1.1.1 Land can be affected by contamination in the form of substances in the soil and/or water, buildings, or other material on a site. Such sites are more likely to be those which have been previously developed for commercial or industrial use, although sites where there has been a history of mining or agricultural uses can also present a potential risk of contamination. It is also possible for contamination to migrate onto previously uncontaminated land in certain circumstances.
- 1.1.2 Additionally, some areas may be affected by the natural or background occurrence of potentially hazardous substances, such as radon, methane or elevated concentrations of certain metallic elements.
- 1.1.3 As many developments are proposed on land that fall into one of the above categories, it is essential to ensure that any such contamination is adequately dealt with upon a change of land use, thereby ensuring the land is made suitable for its new use and presents no danger to the health and safety of people who come into contact with it.
- 1.1.4 District Councils are responsible for addressing contaminated land issues within two separate regimes:
- the Contaminated Land Regime (under Part IIA of the Environment Protection Act 1990); and,
  - the Planning Regime (through the grant of planning permissions and the imposition of planning conditions thereon, under the Town & Country Planning Act 1990).

It is through the Planning Regime that the officer activity is most regularly focussed.

## **1.2 The Contaminated Land Regime**

- 1.2.1 This is defined in the Environmental Protection Act (Part IIA), which is reproduced in **[Annex 1]**, together with a relevant section of the Statutory Guidance published by DEFRA in April 2012. It is generally proactive work, which involves inspection and research into historical land use of sites across the Borough. This includes the use of site prioritisation software as the primary tool to collate, view, explore, query, analyse and evaluate the various data sets such as historical mapping. These data sets are continually updated when new information becomes available. In addition new data sets can be added in order to assess potentially contaminated sites
- 1.2.2 It is under this regime that the Council develops its Contaminated Land Strategy, as was presented to and endorsed by Members at the July Advisory Board meeting.
- 1.2.3 Only land where unacceptable risks in relation to its current usage are clearly identified after a detailed risk assessment has been undertaken (in accordance with the Statutory Guidance), should be considered as meeting the test for the Part IIA definition of contaminated land. Current strategic inspection has not identified any site within the Borough likely to meet the Part IIA definition.

## **1.3 The Planning Regime**

- 1.3.1 Contaminated Land is also a material consideration in the Planning process although in this regime risks have to be assessed in relation to the proposed future use of land rather than its existing use, which is the criterion of Part IIA.
- 1.3.2 To avoid confusion with the statutory definition of contaminated land under Part IIA, the Planning regime uses the term “land affected by contamination” which is intended to cover cases where the actual or suspected presence of substances in, on or under the land may cause risks to people, human activities, or the environment regardless of whether or not the land meets the statutory definition of Part IIA.
- 1.3.3 The role of the planning system is to manage future development and land use. Potential or actual known contamination is a material planning consideration which the authority must take into account in its decision making process. The development phase is generally the most practical time to deal with such issues. Planning guidance places the responsibility on owners and developers to establish the extent of any potentially harmful materials on their sites.
- 1.3.4 The ultimate responsibility for securing a safe development rests with the developer and/or landowner.

- 1.3.5 A failure by them to adequately address land contamination could cause harm to human health, property and the wider environment. It could also:
- limit or prevent subsequent development;
  - result in difficulties with the conveyancing process; and
  - result in future liabilities for remediation by the landowner under the Environmental Protection Act 1990.
- 1.3.6 The NPPF published in March 2012 replaced previous national planning policy (including Planning Policy Statement 23: Planning and Pollution Control (PPS23)). The NPPF does not form part of the statutory development plan, but it is an important material consideration in planning decision making. It has a primary focus of helping to achieve “sustainable development”. In this context, “sustainable development” means development which is in accordance with the Policies of the NPPF.
- 1.3.7 Section 11 of the NPPF sets out the Government’s policy on conserving and enhancing the natural environment and makes a number of statements in connection with land contamination. The key paragraphs are reproduced in **[Annex 1]**.
- 1.3.8 It is an important point here that the NPPF places an emphasis on encouraging the effective use of land by re-using land that has been previously developed (brownfield land), provided that it is not of high environmental value and firmly places the responsibility for ensuring a safe development on the developer or landowner.
- 1.3.9 National Planning Practice Guidance (NPPG) is now available online for land contamination issues. Planning policy guidance states that contamination is more likely to arise in former industrial areas but cannot be ruled out in other locations including in the countryside (e.g. by inappropriate spreading of materials such as sludges, or as a result of contamination being moved from its original source). In addition, some areas may be affected by the natural or background occurrence of potentially hazardous substances, such as radon, methane or elevated concentrations of metallic elements.
- 1.3.10 The NPPF states that a specific investigation can establish whether there is contamination at a particular site, but the possibility should always be considered particularly when the development proposed involves a sensitive use such as housing with gardens, schools or nurseries.
- 1.3.11 It is through the application of the principles of the NPPF and NPPG that the Council requires landowners or developers to carry out preliminary investigations into the extent of contamination on sites proposed for sensitive developments also some employment and leisure use land as a basis for an initial risk assessment, which will determine whether a remediation strategy is required.

## 1.4 Overall Roles and Responsibilities under the Planning regime

- 1.4.1 **The Local Planning Authority (LPA):** It is the responsibility of the LPA to regulate and manage new development throughout the Borough. Planning applications can be made by the submission of an outline application followed by reserved matters or in one step as a full application. As discussed, this role is carried out with close liaison with the Environmental Protection Team to ensure relevant matters including potentially contaminated land are addressed.
- 1.4.2 As an integral part of the planning process the Environmental Protection Team will consider the potential implications of any land contamination on the health of those who will occupy or use the land after it has been developed. For example, in the case of a housing development, this will be the future residents. In situations where land is potentially contaminated this will include the recommendation to impose planning conditions which place the onus on developers to investigate potential contamination and provide mitigation where contamination is positively identified. Should the risk be deemed high or uncertain at the planning application stage, the relevant risk assessments will be requested upfront if not already provided.
- 1.4.3 The imposition of conditions will take into account and be largely informed by the information submitted at the application stage and information held on the Council's database of potentially contaminated land sites. Officers have developed a series of sequential planning conditions intended to appropriately deal with contaminated land matters. The tranche of conditions is reproduced at **[Annex 2]** for Members' information. They effectively adopt a sequential approach to ensure:
- all potential contaminants are identified via desktop studies which should then inform whether any intrusive site investigation works are required;
  - the results of any necessary site investigation works undertaken (including all intrusive investigations) are submitted to the LPA;
  - a proposed scheme of remediation is developed and approved, this must include details of how the developer intends to deal with any unsuspected/unforeseen contamination;
  - a verification report that scientifically and technically demonstrates the effectiveness and completion of the remediation scheme at above and below ground level is submitted to the LPA for its own records and
  - Suitable monitoring and maintenance is developed to include monitoring the long term effectiveness of the approved remediation strategy where applicable.
- 1.4.4 Where conditions are imposed, the developer is required to submit to the LPA, for formal approval, details at each stage of the process before that part of the

condition can be discharged. This is done in close liaison with the Environmental Protection Team and the Environment Agency (where applicable) to ensure the details are suitable/appropriate.

- 1.4.5 **The Developer:** The developer is responsible for ensuring that any proposed development is safe and suitable for its intended use. If there is a reason to believe land contamination could be present on site, the developer should ensure that they carry out adequate investigations and risk assessments to ensure that any associated risks are fully understood and can be remediated to an acceptable level.
- 1.4.6 In order to fulfil this obligation the developer may be required to undertake an adequate investigation of the site to determine:
- whether the proposed site is already affected by contamination, through the source-pathway-receptor pollutant linkage;
  - whether the development proposed will create new linkages; and
  - what action is needed to break these linkages and avoid new ones, deal with any unacceptable risks and enable the safe development and future occupancy of the site and neighbouring land.
- 1.4.7 Once a site has been investigated and unacceptable risks have been identified it is the developer's responsibility to undertake the necessary remediation.
- 1.4.8 The developer is liable if, due to their actions or omissions, on completion of the development the land is capable of being classified as "Contaminated" under Part IIA.
- 1.4.9 **The Environment Agency (EA):** The EA will consider the potential implications of land contamination on controlled waters (groundwater or surface water bodies).
- 1.4.10 The EA is also statutory consultee in the planning process. The LPA will consult with the EA when considering proposals for a development on land that may be affected by contamination and falls within ground water vulnerability areas. This may result in the EA:
- making recommendations for site investigation, risk assessment or remedial works;
  - giving advice on work required before discharging a planning condition; and
  - advising the LPA on flooding, ecological assessment and groundwater vulnerability issues.
- 1.4.11 The EA also has a role under Part IIA, which is to provide the LPA with advice and guidance. It acts as the enforcing authority for any contaminated land subsequently designated as a Special Site under Part IIA Section 78B (1).

1.4.12 The EA also carries out a regulatory role, issuing consents and licences for various activities that may have an impact on the environment (this may apply to certain remediation works). It is the developer's responsibility to apply to the EA and secure consent before carrying out potentially environmentally sensitive activities on site.

1.4.13 The EA may advise the LPA on specific sites, such as those where the risk to watercourses is significant. However the responsibility for granting planning permission and ensuring compliance with planning conditions and obligations remains with the LPA.

## **1.5 Verification of the Councils approach to the Planning regime**

1.5.1 On occasion some issues have been raised about the potential weaknesses of the planning regime outlined within this report. These concerns have been focussed on whether or not the Council should (or could) take a more active and proactive role in ensuring planning conditions relating to contaminated land are properly observed.

1.5.2 In this respect the practice employed by the Council is common with many other authorities and reflects the proper duty and responsibility imposed by National Planning Policy and Guidance. In particular the approach through planning conditions holds the developer to account in a staged way to properly identify the extent of any contamination, propose a method of treatment and mitigation and verify that such a method has been followed. Of course if at any stage in the compliance with planning conditions the analysis of the developer's actions or proposed way forward is considered to be inappropriate or unsatisfactory the Council may seek enforcement action as a remedy.

1.5.3 This approach in the context of the planning process may sometimes be characterised as the Council working at arms-length rather than at close quarters with developers. However, that is how the regime is required to be delivered. The Council has had occasion to seek Counsel's opinion on this way of working and concluded that the general approach adopted by the Council in that case was sound.

1.5.4 The most current example of the planning process addressing Contaminated Land is at the Peter's Village development near Wouldham, where the planning conditions that have been applied are providing a good platform for the phased approach to determining the extent of Contamination, mitigation works and verification. That is involving close working of our officers with the developers agents, which of course is helpful in all parties achieving a good outcome.

**1.6 Legal Implications**

1.6.1 Failure to comply with this duty may result in court proceedings being brought against the Council.

**1.7 Financial and Value for Money Considerations**

1.7.1 Not applicable.

**1.8 Risk Assessment**

1.8.1 Through both the Part IIA Contaminated Land Strategy and the Planning regime sites are evaluated following the principles of risk assessment.

Background papers:

Nil

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