

Advice Note 5 – House sale or purchase on potentially contaminated land

What is Contaminated Land?

The legal definition of Contaminated Land as provided by Section 78A(2) of Part IIA of the Environmental Protection Act 1990 is:

“any land which appears to the Local Authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that:

- a) significant harm is being caused or there is significant possibility of such harm being caused; or
- b) pollution of controlled water is being, or is likely to be, caused”.

As discussed in ‘Advice Note 3 – Environmental Protection Act 1990: Part IIA Contaminated Land Regime’ in order to determine that a site is contaminated, the Local Authority, must establish that there is a significant pollutant linkage. A pollutant linkage consists of three elements, all of which must be present before land can be considered being contaminated. These are:



SOURCE – The contaminating substance or pollutant

PATHWAY – A means for the source to reach a receptor

RECEPTOR – Something that can be harmed by the source

Therefore the mere presence of contamination at a site will not necessarily render it ‘Contaminated Land’.

Why do I need to know about Contaminated Land?

All Local Authorities now have a duty to identify sites within their area that fit the legal definition of contaminated land. Each Local Authority has also drawn up a contaminated land strategy to inspect the local areas in their districts to find the most polluted and serious sites first. In preference to using new land for housing in Buckinghamshire, often old industrial sites are reclaimed for housing and it is important that you know as much as possible about how the site was made suitable for its new use.

In certain cases, if the original polluter of contaminated land cannot be found then the new owner of the land may be liable for cleaning it up. However if the property developer bought the land with knowledge of the pollution and did not clean it up suitably for its new use they could potentially be liable for the clean up.

How does land contamination happen?

Historical land use in the UK includes industrial, mining and waste disposal sites. Various industrial practices have led to substances such as chemicals, oils and tars being present in, on or under the land. Also, in the past, landfilling of waste is known to have taken place without adequate precautions against pollution of surrounding land or above the landfill.

How can I find out about land contamination?

The Council holds a wide range of information on potential sources of contamination. The Environmental Health Department of all Local Authorities in Buckinghamshire can interrogate Council records to obtain information on historic land use, landfill sites both current and historic within a 250 metre radius of a property and any remediation works associated with planning permission(s) for a fee and a written response can be provided.

Information and environmental searches are also available from commercial suppliers and these companies may also give an opinion on the possibility that the land may fit the legal definition of contaminated land.

Why should I carry out an environmental search?

The introduction of Part IIA of the Environmental Protection Act 1990 has resulted in an increased awareness amongst mortgage lenders of possible liabilities associated with contaminated land. In addition in June 2001, the Law Society sent an advice card to make sure that solicitors advise their clients of potential liabilities associated with contaminated land. Consequently, it has become increasingly common for solicitors and conveyancers to undertake a third party environmental search when arranging the transaction of land or property.

Your solicitor may advise you to undertake an independent site history investigation, e.g. obtaining a site report or environmental search from a commercial company.

Environmental Search Companies

Environmental search companies keep a large database of environmental information which deals with various land uses and other environmental issues that could have an effect on the contamination status of a property. If these companies are certain that there are no potential contamination issues they will issue a “certificate” which, according to them, provides a clear and unambiguous statement as to the likelihood of the property being described as contaminated land as defined by section 78A(2) of Part IIA of the Environmental Protection Act 1990.

What happens if I’ve had a search done and they won’t issue a certificate?

You will need to find out more about the land. Although a certificate is not a legal requirement, the certificate or professional opinion is intended to help you interpret the findings of your environmental search. Environmental searches from commercial providers often rely on third party information. If you aren’t issued with a certificate it does not mean that the land is contaminated, just that more detailed information is needed. At this point you may want to formally request some more information from the Council. Your search provider may also advise you on further action to take.

However the decision whether to proceed with or without third party certification is ultimately an issue between you and the mortgage lender.

Is all past industrial land now contaminated?

It is important to note that past industrial use does not always indicate contamination is present and a risk. Firstly, if the industry occurred a long time ago, there is a possibility that any contaminants present then will have changed to such a degree that they may no longer be considered to be harmful. Secondly, many houses are built with the industrial past of the site in mind and appropriate remediation work is often carried out when the houses are built.

Is it safe to live on land affected by past use?

In most cases the risk from living on previously used land is low. Quite often there is more effect on the value of a property from perceived risk and blight rather than the actual effects to the health of occupiers or the wider environment. For health effects to take place you would usually need to have regular prolonged contact with the source of contamination or the dust or vapours produced by it. When sites are redeveloped, careful consideration is normally given to future occupants and what they would potentially be exposed to, especially those receptors most vulnerable such as children.

What can be done to about Contaminated Land?

House builders have to routinely consider the past industrial use of the site they propose to build houses on, and to carry out appropriate remediation works at the site if necessary. ‘Remediation’ incorporates a wide range of techniques to deal with contaminated land such as removing any contamination off site, ~~treating it so that it is safe or creating a barrier so that there is no~~ possible linkage between contamination and the receptor e.g. future site users. This work is closely regulated by the Local Authority and in some cases the Environment Agency.

In addition when planning applications are submitted to each council the Environmental Health teams are automatically consulted for comments. Therefore if any development is due to take place on land that is potentially contaminated, a series of conditions can be placed on the application. Conditions put on the planning approval will not be discharged until the relevant statutory bodies are satisfied that all works have been carried out necessary.

What do I need from a developer if I am buying a new house on a development which has had contaminated land conditions attached as part of its planning approval?

You should try and obtain a remediation certificate produced by the consultant or expert on behalf of the developer stating how the site has been remediated to a "suitable for use" standard. Where this is not available, copies of the remediation and validation reports could be requested and supplied from the developer. A copy of the letter/memo from the Environmental Health or Planning Department stating that the site has been successfully remediated and that the contaminated land conditions have been met and signed off could also be requested from the developer.

In addition you may also wish to contact the Planning or Environmental Health Department for confirmation that the contaminated land conditions have been fully complied with and therefore signed off, and that there is no outstanding issues.

Finally the National House Building Council (NHBC) or other building control inspector may also be able to provide information about the development.

Will I be able to sell my house?

When a standard land search is made, questions are automatically asked as to whether the land has had legal action taken as a result of and past pollution incidences. If land is contaminated and has been remediated then the site will have been made suitable for its current use. If there is no evidence of harm as a result of contamination or there is no identifiable pollutant linkage it is unlikely that the Local Authority would take legal action as the land would not fit the statutory definition of contaminated land. If you have made enquiries about the status of the property and received an opinion that it is not located on contaminated land then you have important document that will assist in selling your house in the future.

Conclusions

The final decision to purchase a property rests with the potential buyer and mortgage lender who needs to be satisfied with the level of risk associated with the transaction. All the Local Authority can do is provide factual information about a property so that a prospective purchaser can make an informed decision as to whether to proceed.

A certificate issued by an environmental search company does not constitute a guarantee that the site or property in question does not meet the statutory definition of contaminated land. It also does not mean that property is excluded from the possibility of being inspected by the local authority at a later date. Instead it is a statement from the company undertaking the search that a review of the data examined in the search did not identify an obvious potential source of contamination at the land or property in question.

Equally an environmental search which indicated the potential for contamination on the site does not necessarily prove there is actually present. It is merely an interpretation based upon map and other paper records. The key information informing that decision is actual good quality site investigation data that confirms the presence or absence of significant contamination.

Please also note that the Local Authorities in Buckinghamshire can never guarantee that a site will never be classified as Contaminated Land, as amongst other things, additional information may come to light, the environmental information may change and standards may tighten in the future.