

IN THE MATTER OF THE TOWN & COUNTRY PLANNING ACT 1990

INSTRUCTIONS TO COUNSEL

FOR A WRITTEN OPINION

1. ENCLOSURES

Tab Number	Document
1	Committee report for planning application 11/01191/FL
2	Planning permission reference 11/01191/FL for development of 171 dwellings &c at Isles Quarry West
3	Report to Area 2 Planning Committee of 5 th March 2014
4	Decision notice – application reference 13/02358/RD
5	URS Remediation Strategy July 2013
6	Core Strategy Policy CP18
7	Development Land Allocations DPD Policy H2
8	Letter to Chief Planning Officers of 30 May 2008
9	Model Procedures for the Management of Land Contamination
10	Planning Practice Guidance: “Land Affected by Contamination”

2. BACKGROUND

- 2.1 The Council granted planning permission (the “Permission”) (see **Tab 2**) for development of 171 dwellings, with public open space, new vehicular accesses and access roads, footpaths, landscaping and associated infrastructure and removal of a bridge deck at a site known as Isles Quarry West on 20th June 2013, subject to 30 conditions.
- 2.2 The site is a former quarry and since quarrying operations ceased, a number of commercial activities had taken place on site including a skip manufacturing business. The land was, however predominantly open scrubland with remains of derelict buildings. A full description of the site can be found at section 3 of the Committee Report (**Tab 1**). The site is identified as a strategic housing location in the Council’s Core Strategy (Policy CP18) and Development Land Allocations DPD (Policy H2). The relevant policies are included with these instructions (**Tabs 6 and 7**).

- 2.3 On 5 March 2014, following a request from one of the Borough Councillors, an urgent information item (**Tab 3**) was submitted to the Area 2 Planning Committee, being the relevant Area Planning Committee for the site. In response to concerns raised by the Councillor, this report set out details of the arrangements in place for the investigation of contamination and information from the developer as to how it was approaching the requirements of the Permission.
- 2.4 That report concluded that it would be *“important to continue to carefully monitor the site (in respect of the matters that are for the LPA to address), be in dialogue with the developer and on-site contractors and respond to queries put to us about the onward progression of the site from local contacts”*. There was, however *“no reason for more formal intervention”* in relation to the issues raised.
- 2.5 Since that committee meeting, the councillor has raised a number of follow-up concerns relating to the monitoring of compliance with (in particular) the site contamination condition. Specific concern was raised over the approach being taken to remediation of hydrocarbon contaminated soils and whether such remediation should be on-site or off-site.
- 2.6 The broad thrust of this concern appears to be that the LPA should be taking a “hands on” approach to monitoring compliance with the relevant condition, rather than relying upon the developer’s validation reports.
- 2.7 In order to confirm officers’ understanding regarding the role of the LPA in monitoring the progress of a development and, in particular, the approach to site contamination and remediation, Counsel’s advice is sought on the approach being taken by the LPA and whether that approach is appropriate in the present circumstances.

3. THE PLANNING PERMISSION

The Relevant Condition

- 3.1 Condition 25 of the Permission sets out the requirements with regard to ground contamination. It states:

“25. *No development shall commence until :*

- (a) Further investigations into the existence of soil and groundwater contamination on and beneath the site have been carried out, in accordance with a scheme first submitted to and approved in writing by the local planning authority, to supplement the information contained in the Scott Wilson Report Geo-environmental and Geotechnical Ground Conditions Report 2010 dated April 2010; and*
- (b) A scheme of proposed remedial and engineering measures to render the site suitable for permitted end use and to prevent contamination of groundwater and air and water pollution of adjoining land has been drawn up and approved by an appropriately qualified environmental specialist and submitted to and approved in writing by the local planning authority. The scheme shall include a detailed risk assessment for identified components and sensitive receptors, plus suggested remedial targets. It shall also include*

details of arrangements for responding to any discovery of unforeseen contamination during the undertaking of the development (including arrangements for notifying the local planning authority of the presence of any such unforeseen contamination) and also validating imported soils as being fit for purpose.

Thereafter:

- (c) The approved scheme of remedial and engineering measures shall be implemented and completed fully in accordance with the approved details, unless otherwise agreed in writing by the local planning authority. On completion of the works, a completion report and certificate shall be provided to the local planning authority, certifying that the land is suitable for its permitted end use. The certificate shall be issued by the person responsible for the development and shall be endorsed by the environmental specialist who designed and specified the scheme of remedial works or another appropriately qualified environmental specialist. No dwelling shall be occupied unless and until the completion report has been submitted to and approved in writing by the local planning authority and the certificate has been provided insofar as it relates to that part of the development which will be occupied.*
- (d) No works shall take place within the site such as to prejudice the effectiveness of the approved scheme of remediation.”*

The Remediation Scheme

- 3.2 Details of the site investigation and the proposed remediation scheme were submitted to the Council (application reference 13/02358/RD) and approved on 20 November 2013. A copy of the decision notice is enclosed at **tab 4**. The application was validated on 8th August 2013.
- 3.3 The remediation strategy includes details of remediation of those parts of the site that could not properly be surveyed before the removal of buildings and hard surfaces, the existence of which prevented at that time any further below ground invasive investigation. That part of the site, Area 5, was to be kept under a watching brief by a suitably qualified contaminated land specialist (see **tab 5**, paragraph 5.9.2 at page 25).
- 3.4 Paragraph 5.10 of the remediation strategy (**tab 5**, page 25) notes that:
- “The groundworks contractor will responsible for determining whether hydrocarbon impacted soils from Area 1 and Area 5 are to be remediated for reuse onsite, offsite reuse, disposal offsite, or a combination of both, although the earthworks design does not allow for the on-site remediation of soils.”*

4 . GUIDANCE ON CONTAMINATED LAND

Model Conditions

- 4.1 Model contaminated land conditions were set out in the letter to Chief Planning Officers of 30th May 2008 (**Tab 8**), replacing the previous model condition at paragraphs 56-59 of Circular 11/95. Counsel will be aware, however, that the letter was subsequently repealed by the National Planning Policy Framework. The provisions of the NPPF and recently published Planning Practice Guidance in relation to contaminated land conditions are discussed below.
- 4.2 In summary, the model conditions suggested the following approach:
- (a) carrying out an investigation and risk assessment. The findings of that investigation to be submitted in a written report for the approval of the LPA;
 - (b) submission of a remediation scheme setting out *how* the site will be made suitable for the proposed use. Again, that scheme is to be submitted for the approval of the LPA;
 - (c) implementing that scheme, with provision for variations to the scheme to be agreed in writing with the LPA;
 - (d) reporting of any unexpected contamination to the LPA, and the preparation and execution of any necessary remediation scheme at that time; and
 - (e) a developer's monitoring scheme and provision of reports to the LPA

Model Procedures for the Management of Land Contamination –Contaminated Land Report 11 (“CLR11”)

- 4.3 This set of model procedures was published by the Environment Agency in September 2004 (**tab 9**). It states that the procedures provide *“the technical framework for structured decision making about land contamination... [they are] intended to assist all those involved... in risk management of land affected by contamination.”*
- 4.4 This document sets out a detailed analysis of model procedures for risk management of contamination, but, broadly, it proposes a 3 stage process of (i) risk assessment; (ii) options appraisal and (iii) implementation of the remediation strategy.

National Planning Policy Framework (“NPPF”)

- 4.5 Paragraph 109 of the NPPF states:
- “The planning system should contribute to and enhance the natural and local environment by... preventing both new and existing development from contributing to or being put at unacceptable risk from, or being adversely affected by unacceptable levels of soil, air, water or noise pollution or land instability; and remediating and mitigating...contaminated...land where appropriate.”*

4.6 Paragraph 120 states:

“To prevent unacceptable risks from pollution and land instability, planning policies and decisions should ensure that new development is appropriate for its location. The effects... of pollution... should be taken into account. Where a site is affected by contamination or land stability issues, responsibility for securing a safe development rests with the developer and/or landowner.”

4.7 Paragraph 121 states that:

“Planning policies and decisions should also ensure that:

- *The site is suitable for its new use taking account of...any proposals for mitigation including land remediation...;*
- *After remediation, as a minimum, land should not be capable of being determined as contaminated land under Part IIA of the Environmental Protection Act 1990; and*
- *Adequate site investigation information, prepared by a competent person, is presented.”*

Planning Practice Guidance (“PPG”)

4.8 Part 33 of the Planning Practice Guidance (“Land Affected by Contamination”, see **Tab 10**) recognises that in relation to contamination, *“planning works alongside a number of other regimes including:*

- *The system for identifying and remediating statutorily defined contaminated land under Part 2A of the Environmental Protection Act 1990. The government has published statutory guidance on Part 2A which concentrates on addressing contaminated land that meets the legal definition and cannot be dealt with through any other means, including through planning.*
- *Building regulations which require reasonable precautions to be taken to avoid danger to health and safety caused by contaminants in ground to be covered by buildings and associated ground*
- *Environmental Permitting Regulations, under which an Environmental Permit from the Environment Agency is normally required to cover the treatment and/or redeposit of contaminated soils if the soils are ‘waste’.”*

4.9 The contribution of planning to the management of contaminated land is addressed at paragraph 003 (ID33-003-20140306):

“The contaminated land regime under Part 2A of the Environmental Protection Act 1990... does not take into account future uses which could need a specific grant of planning permission. To ensure a site is suitable for its new use and to prevent unacceptable risk from

pollution, the implications of contamination for a new development would be considered by the local planning authority to the extent that it is not addressed by other regimes.”

- 4.10 At paragraph 007 it sets out the “starting point for an applicant” as being early engagement with the local planning and environmental health departments and the carrying out by the developer of a risk assessment. It also notes that remediation or site investigation activities themselves may require planning permission.
- 4.11 Paragraph 009 sets out the general approach to appropriate conditions, which is broadly the same as discussed above in relation to the Letter to Chief Planning Officers.
- 4.12 Paragraph 010 sets out a flowchart of the decision making process where contamination is an issue. It indicates that where the developer’s site investigation/ risk assessment report “demonstrates that the risks are acceptable **or the remediation proposed will make the risks acceptable**” the LPA may “proceed to a decision, subject to appropriate conditions”.

5. THE APPROACH TAKEN BY THE COUNCIL

- 5.1 The planning permission was granted *post-* NPPF, but *pre-*PPG. As the NPPF cancelled the 30th May letter to Chief Planning Officers, which itself cancelled the model conditions on contaminated land in circular 11/95, it would appear that at the time the permission was granted there were no “model conditions” to be found in the relevant guidance, only the general statements, and overall objective as set out in paragraph 121 of the NPPF that “*after remediation, as a minimum land should not be capable of being determined as contaminated land under Part IIA of the Environmental Protection Act 1990*”. Arguably, therefore the Council would have had a free hand to draft the conditions in any way it saw fit, within the parameters of the NPPF.
- 5.2 However, it can be seen that the broad objectives of the 2008 model conditions (paragraphs 4.2(a) to (d) above) and paragraph 009, Part 33 of the PPG were satisfied by the wording of condition 25. Condition 25 then seeks to go *further* than the model conditions, by requiring (i) certification by a relevant expert that the land is suitable for use; and (ii) that any work carried out on site should not be carried out in a way which might prejudice proper remediation.
- 5.2 As identified in condition 25(a), a preliminary contamination investigation had already been carried out which had identified specific areas of concern. The condition therefore required the submission of further information. This is consistent with the guidance set out at paragraphs 007, 009 and 010 of PPG Part 33.
- 5.3 Condition 25(b) then requires the submission of a remediation scheme for approval. This is again consistent with the relevant guidance. Had that scheme not been acceptable, then it would have been open to the Council to refuse to approve it. Under that remediation scheme, it is made clear that the responsibility for determining whether the remediation and/or reuse of the hydrocarbon contaminated soils takes place on or off site is down to the groundworks contractor. Condition 25(d) includes provision for reporting unexpected contamination, and this is also addressed in the remediation strategy.

- 5.4 The key issue in this case seems to revolve around the officers' actions in relation to Condition 25(c), relating to the implementation of the remediation scheme; the complaint being that officers are not on site and monitoring to ensure all activities are being carried out in compliance with the approved scheme.
- 5.5 The requirements of the condition, however, seem clear. What is required of the *developer* is that:
- (a) The remediation is carried out in accordance with the approved scheme (with approved variations where necessary); and
 - (b) They produce a completion report and certificate (endorsed by an environmental specialist) for approval by the Council;
- 5.6 Whilst the Council can, of course, oversee compliance with the approved scheme the real purpose of the completion report and certificate is that the Developer has to satisfy the Council that it has complied. It is open to the Council to refuse to accept the report if it is not satisfied to that end.
- 5.7 This is also consistent with the NPPF statement that delivering a safe development is the *responsibility of the developer*. The LPA's role, as planning authority, is to oversee compliance.
- 5.8 If the developer fails to provide a safe development, then some action might accrue against them outside of the planning regime. Furthermore, the requirement that completion is certificated and endorsed by a relevant professional engages that person or body's professional rules and insurance. It seems unlikely that they would be prepared to "endorse" a report or certificate unless they were satisfied regarding any risk of action against them or reputational damage. As it stands, the risk assessment and remediation strategy would appear to follow the model procedure as detailed in CLR11.
- 5.9 The site has been inspected from time to time by Council officers, and on one occasion in the company of an officer of the Environment Agency (EA). The Council's scientific officer, whose prime responsibility is to advise on matters related to land contamination, attended with the EA officer. The Council has not been made aware by the EA that it has any concerns, let alone concerns that it feels necessary to pursue under its own powers.
- 5.10 A failure to comply with the condition is, of course, something which the LPA could take action against and whilst it is clear from the wording of the condition that the Council can review compliance with the approved scheme this must be balanced against both the appropriate use of resources and the Council's general duty to act reasonably. In the circumstances, continuous monitoring seems both unnecessary and disproportionate.

6. SUMMARY OF INSTRUCTIONS

Counsel is requested to provide a written opinion as to:

- (i) The responsibilities placed upon the Council under the general contaminated land regime, acting in its capacity as Local Planning Authority;
- (ii) Whether there is any legal requirement upon the Council, whether express or implied, that in the current circumstances it should be carrying out continuous monitoring of the implementation of the remediation strategy;
- (iii) Whether condition 25, and the officers' approach to monitoring compliance is appropriate and commensurate with the Council's role as local planning authority; and
- (iv) What impact, if any, the cancellation of the model conditions contained within the 30th May 2008 letter to Chief Planning Officers has on the general approach to the drafting of contaminated land conditions

7. ADMINISTRATIVE MATTERS

If Counsel has any questions on the matters raised in these instructions, please contact the solicitor with day-to-day conduct of this matter, Kevin Toogood (01732 876031; email: kevin.toogood@tmbc.gov.uk), or the Director of Central Services, Adrian Stanfield (01736 876346; email: adrian.stanfield@tmbc.gov.uk)

25th April 2014