

ENVIRONMENTAL CONSIDERATIONS FOR PURCHASERS OF PROPERTY IN ENGLAND AND WALES

In this briefing we give a concise overview of the environmental issues that may arise during the acquisition, ownership and development of property in England and Wales.

THE BACKGROUND: CONTAMINATED LAND

The regulatory regime relating to contaminated land in the UK is mixed in nature. Liability may be either civil or criminal, depending upon the issues involved.

- The **common law** provides a variety of potential causes of action in relation to contamination including nuisance, negligence and trespass, and the remedies available to private persons (for example, damages) should not be overlooked.
- There are detailed **statutory provisions**, contained in numerous statutes which regulate a variety of matters including water pollution, industrial pollution, waste control, the keeping and use of hazardous substances and the protection of certain species and eco-systems. Breach of such provisions may give rise to criminal liability or liability to bear the costs of remedial works.
- The statutory regime relating to contaminated land under **Part IIA of the Environmental Protection Act 1990** was introduced in 2000 to operate alongside the pre-existing common law and statutory regimes. The regime focuses on the remediation of land which has been contaminated in the past rather than the prevention of new contamination. Primary responsibility for identification of contaminated sites lies with the local authorities. The regime looks to bring land back into beneficial use and aims to ensure, where possible, that liability should be imposed on those causing or knowingly permitting pollution rather than innocent owners or occupiers.

It is important to note that the contaminated land regime interacts closely with the planning system. Where new development is taking place, it will be the responsibility of the developer to carry out the necessary remediation. For the most part, the enforcement of any remediation requirements will be by way of planning conditions and building control rather than via a remediation notice served under Part IIA. This is consistent with the aim of the Government that contamination is to be dealt with, wherever possible, either on a voluntarily basis and/or in conjunction with new development.

THE BACKGROUND: SUSTAINABILITY

Sustainability is currently high on the agenda for the property industry in the UK, despite the recent economic downturn. Regulation is on the rise and the Government expects the industry to play a significant role in reducing waste and cutting emissions. There has been a significant amount of new legislation and regulation in relation to sustainability including measures relating to planning, building regulations and measures aimed at increasing energy efficiency and reducing waste. Company directors in England and Wales are now subject to a duty have regard to the impact of the company's operations on the community and the environment.



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ACTION TO BE TAKEN TO ADDRESS ENVIRONMENTAL CONCERNS

The following is a summary of the matters that should be taken into account in order to assess and address the potential environmental and sustainability risks and issues associated with the acquisition, ownership and development of property in England and Wales.

Gathering the Relevant Information on Acquisition - Due Diligence

Thorough and appropriate pre-contract investigations need to be carried out in order to ascertain any potential risks and liabilities that may be associated with a particular site or property and to gather information that will be useful in connection with its future management and/or development. These will comprise:

- Pre-contract enquiries of the seller's/landlord's solicitors;
- Enquiries of the Local Authority;
- A desk-top environmental survey report (produced on the basis of information on record without any actual on-site investigation);
- (Where appropriate) a full environmental survey (this will involve on-site investigations).

These searches, enquiries and reports will cover various issues including:

- Actual or potential contamination;
- Ground conditions (including matters such as flooding and subsidence);
- The need for or existence of relevant licences or permits for activities carried on at the property;
- Use of deleterious materials in any buildings on the site;
- Compliance with legislation and regulation on sustainability;
- Planning.

Addressing Potential Liabilities

Once any potential or actual risks and/or liabilities have been identified, there will be a variety of possibilities open to a purchaser/tenant:

- Apportionment of potential and/or actual cost can be dealt with contractually, for example via reduction in the purchase price, agreement as to the responsibility for the costs of carrying out remediation works, or by taking or giving indemnities. The drafting of the purchase contract or lease will need careful consideration in order to ensure that any potential or actual liability is catered for in accordance with the intentions of the parties.
- In cases where there is contamination, specialist advice from environmental consultants and or contractors will need to be sought regarding the remediation works required (including monitoring and protective measures) and the likely level of costs involved.
- Environmental insurance is also an option and, depending on the circumstances, it may be appropriate to require a vendor or landlord to be responsible for bearing the costs of putting such insurance in place. Insurance is available for a wide range of risks including flooding, subsidence, and environmental liability.

Development Issues

- **Planning** – The various searches and enquiries carried out during the due diligence process will seek to establish the planning history of the property (which may be a useful indicator of potential contamination). They should also reveal any planning restrictions which may impact on its future development or use (for example, if the property is situated in a Site of Special Scientific Interest (SSSI)).

Where development is envisaged, discussions with the planning authority at an early stage are advisable. There is an increasing drive towards sustainable development, and specifically addressing sustainability is likely to assist. In cases where contamination might be an issue, planning conditions may be imposed requiring on-site environmental investigations and possibly remediation works prior to commencement of development.

- **Design** – The combination of regulation and Government targets to reduce carbon emissions has already brought about a change in behaviour and has been a catalyst for innovation in design. Energy efficiency, water conservation and waste disposal are becoming increasingly important. Design to take into account site conditions (eg subsidence and flooding) may also be an issue. Where development is proposed it will be important to be fully appraised of the various regulations in place and of the voluntary schemes that may add value to a development. The Building Regulations set out minimum energy efficiency and sustainability targets. Energy Performance Certificate (EPC) or Display Energy Certificate (DEC) scores (which give information as to the energy efficiency of a building) will also be a consideration, as may voluntary scheme ratings under BREEAM (BRE Environmental Assessment Method), for example, or the Code For Sustainable Homes. Poor ratings may affect the green credentials of a building.
- **Construction** – Documentation should ensure compliance with all relevant standards and regulatory requirements. Developers may wish to ensure that their construction documents contain “green clauses” covering matters such as standards, procurement, regulations, EPC/DECs and perhaps (for example) a requirement to sign up to a considerate contractor’s scheme, or for an environmental assessment on practical completion to ensure all standards are met.
- **Display Energy Certificates** – Public buildings with a floor area greater than 1,000 sqm must display a valid DEC and have a valid advisory report in their possession. The DEC shows the actual energy use and (if available) the intrinsic performance. It needs to be renewed every 12 months, so the public will be able to view the annual energy performance of such a building. The report will contain recommendations for improving the energy performance of the building.
- **Air Conditioning Inspections** – Where the effective rated output of a system within a building is more than 12 kilowatts, an air conditioning inspection is required. The inspection will incorporate a written report on efficiency including advice on improving this and on alternatives for cooling the building.
 - If the system has an output of 250 kilowatts or more, the first inspection must be carried out by 4 January 2009.
 - If the system has an output of 12 kilowatts or more, the first inspection must be carried out by 4 January 2011.

Thereafter, inspection is required at regular intervals not exceeding 5 years.

- **The Carbon Reduction Commitment Scheme** – Commencing in 2010, this is a compulsory carbon-trading scheme affecting those who spend more than roughly £500,000 per annum on electricity. It will apply to business and public sector organisations, government departments and local authorities and will affect many landlords as well as occupiers. It is expected to affect approximately 5,000 organisations. The performance of all participants in the Scheme will be published in a league table. Preparations are already in hand for the implementation of the Scheme. Full details have not yet been finalised and further consultation is taking place.

Sustainability in the Context of Estate Management

Property owners should be aware of the various regulatory requirements now in place, including those relating to EPCs and DEC, air conditioning systems, and also the impending Carbon Reduction Commitment scheme.

- **Energy Performance Certificates** – EPCs give an energy efficiency rating for a building based on the characteristics of the building and its services. An EPC is accompanied by a report (giving recommendations, not requirements) which will show how energy performance could be enhanced. All buildings now require an EPC on construction, sale or let unless one of the exemptions applies.

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The Grant of New Leases

Consideration should be given to inclusion of appropriate lease provisions so as to cover any relevant environmental and sustainability issues. These should be tailored to the building in question and their content will depend on the nature of the property and the age and characteristics of the building. Lease provisions should cover issues such as:

- Responsibility for any environmental liability as between landlord and tenant arising during the course of the lease;
- Recovery of the landlord's costs and expenses in dealing with any relevant "green" issues;
- Provision of information in order to facilitate assessment of (inter alia) energy and water use and waste disposal;
- Rights of entry for the landlord to carry out inspections and obtain information needed in connection with the landlord's "green" responsibilities and any environmental policies it may have for the property in question.

Disposals

During the course of any acquisition, it is useful to bear in mind what might be required when deal with the future disposal of the property. It will be useful to be able to provide purchasers with a full package of information in relation to environmental matters and to show how any environmental risks have been dealt with. Provision of comprehensive replies to pre-contract enquiries and copy environmental reports will be useful. In some circumstances, the assignment of the benefit of environmental reports or provision of warranties from the environmental consultant and/or contractor will be appropriate.

Tax

There are various tax reliefs and allowances available in respect of certain remediation and renovation works and the installation of certain "green" plant and equipment. These include Land Remediation Relief, Enhanced Capital Allowances, Flat Conversion Allowances, and Business Property Renovation Allowances. Detailed specialist advice should be sought in each case.

USEFUL WEBSITES:

Carbon Reduction Commitment: www.defra.gov.uk/carbonreduction

Energy Performance Certificates: www.communities.gov.uk/epbd

Display Energy Certificates: www.communities.gov.uk/publications/planningandbuilding/displayenergycertificates

BREEAM (BRE Environmental Assessment Method): www.breem.org

This briefing offers general guidance on environmental issues that may arise during the acquisition, ownership and development of property in England and Wales. It reflects the law as at April 2009. The circumstances of each case vary and this note should not be relied upon in place of specific legal advice.

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