

# Contaminated Land – the basics



**With its long industrial past, the UK has a legacy of sites that have been affected by contamination.** This contamination can cause harm to people- either those living on the contaminated site or when the contamination migrates and affects other properties.

Because of this in 2000 the UK government brought in legislation specifically to address contaminated land. This legislation tends to be referred to as the ‘contaminated land regime’ and it also sometimes referred to as ‘Part 2 A’ which is because the main legislation on contaminated land is set out in Part 2 A of the Environmental Protection Act.

## What is contaminated land?

There is a legal definition of ‘contaminated land’ which is by reference to statutory guidance. Just because land has contamination in it does not mean that it meets the legal definition of ‘contaminated land.’ To reach the legal definition the contamination has to present a real health risk to humans or livestock, as detailed in the statutory guidance.

## How do I know if the property I am looking to buy constitutes ‘contaminated land’?

The starting point is to look at the history of the property. If the property had been greenfield land before it was developed as (say) a house then the risk of the property being ‘contaminated land’ can be ruled out. On the other hand if the property has an industrial history (say it was a factory 50 years ago) then there is a risk that the property could have contamination on it.

The Landmark and Argyll reports are designed to ‘screen out’ the vast majority of properties where we can be confident that the property would not meet the legal definition of ‘contaminated land.’

This does not mean that there might not be any contamination at all on the property – but even if there were it would not reach the threshold of the legal definition.

If the Landmark or Argyll report says that the property has ‘Passed’ in respect of contamination, then there is nothing further to worry about. If the report has ‘Further Action’ for contamination this means that further evaluation is necessary. The recommendation will usually be to contact the local authority to see if they have any records to show that the property was tested for contamination before the current building was built. This is usually the case with houses that were built from around 1990 onwards. In the majority of cases the local planning authority will be able to confirm that either the site was cleared for contamination or that contamination was identified but then remediated before the current building was put up. However there will be a minority of cases where the local authority will not have this information and therefore it will be necessary to carry out some physical checks.

If this is necessary Argyll can advise on the next steps to follow – these will usually consist of a Phase 1 walkover survey and possibly then a Phase 2 Intrusive study in which soil samples are taken and then analysed in a laboratory for contamination. If a site is found to be heavily contaminated then a purchaser would normally want a price reduction to reflect the costs that may be required to remediate the property. It is important to realise that even if the council has not yet taken regulatory action for the property it may still do so in the future.

## Who has to pay for any remediation work?

The contaminated land regime is based on the principle of 'polluter pays.' There is no time limit on this and so in theory even if the polluter caused the contamination many years ago he is still liable for it. However in practice the original polluter (say the company that owned the factory 50 years ago) has often long since disappeared in which case the legal responsibility for remediation of a property which has been designated as 'contaminated land' will fall on the current owner of the property. This is one reason why it is vital to carry out a contaminated land desk top report before buying any property and avoid the risk of unwittingly acquiring a property with a major liability.

## Insurance and contaminated land

General building insurance will not cover any costs relating to contaminated land. To obtain cover for that risk it will be necessary to obtain specialist cover. Whether cover will be available and the cost of the premiums will depend upon the type of property and information about the contamination. If it is a residential property and the only report available is the Landmark or Argyll report then it is usually possible to obtain cover at reasonable rates.

## Advice about environmental risks in client care letters

It is vital to raise the issue of potential environmental risk to your clients in order to protect their investment and the reputation of your practice. Indeed, it is the primary requirement under the Warning Card that the solicitor advises the client on potential contaminated land liabilities.

We therefore recommend that you provide clear advice in your client care letter. To assist you in this, the following paragraphs have been developed by Landmark's legal team.

Option 1 is for use if your practice always undertakes a report as a matter of policy in all conveyancing transactions.

Option 2 can be used if your practice recommends an environmental report in every transaction and requests that the client provides confirmation that they would not require a report to be undertaken.

### Option 1 – Policy of the practice

For your protection, and the protection of your lender, it is our policy to undertake an environmental search.

This examines whether the property is situated on or near land that may be contaminated by, for example, past industrial processes or waste disposal.

The purpose of this is to identify from available data whether there are current and potential contamination risks prior to purchase because you could be responsible for costs for cleaning up the site in the future. It will also identify other environmental risks that may spoil the use or enjoyment of your new property, such as whether the property lies in a flood plain.

To guard against risks identified or unknown when the search is undertaken, insurance can be obtained which provides cover toward the cost of clearing the site from contamination. This can be used when the site is subject to a remediation notice by the local authority, or to prevent it from becoming the subject of such a notice.

### Option 2 – Recommendation

For your protection, and the protection of your lender, we recommend that you undertake an environmental search. This examines whether the property is situated on or near land that may be contaminated by, for example, past industrial processes or waste disposal. The purpose of this is to identify from available data whether there are current and potential contamination risks prior to purchase because you could be responsible for costs for cleaning up the site in the future. It will also identify other environmental risks that may spoil the use or enjoyment of your new property, such as whether the property lies in a flood plain.

We can also offer a search informing you of planning applications and land use issues which could potentially affect the value of your property in the future. We will undertake this search as a matter of course, unless you do not require us to do so and specifically instruct us to the contrary.

Should you not require us to undertake this search, please would you confirm this in writing by return and bear in mind that I will not be in a position to advise you on these issues in this transaction. To guard against unknown risks at the time of the search, or risks identified within the report, insurance can be purchased at the same time of ordering the search. This will cover you for the costs of clearing contamination if your site is subject to a remediation order by the local authority, or to prevent it becoming subject of an order.