

Number 3

## 10 Things that Developers should know about Environmental Law

This short article cannot deal with every aspect of Environmental Law, however we have summarized below 10 key points which developers should be aware of:-

### Contamination

Prior to purchasing any land for development, it is very important that the developer establishes whether the site falls within the definition of 'contaminated land' in Part IIA of the Environmental Protection Act 1990 and, if so, obtain professional advice as to who will be liable for the site remediation. 'Contamination' depends on the physical characteristics of the site, its current use and the potential (end use) receptors that may suffer harm, for example, children in a residential area. The contaminant must either be causing harm to the receptor or there is a significant possibility of such harm being caused by the contaminant to that receptor. The Act, therefore, does not seek to impose strict liability just because the site contains a contaminant that exhibits harmful qualities, a link must be demonstrated between the source and the potential receptors. Furthermore, the Act does not impose uniform remediation standards.

### Landfill Tax

Where contamination of a development site is a constraint and needs to be removed, the developer can avoid paying landfill tax on those materials that need to be transported to a landfill site. The Landfill Tax exemption must be applied for at least 30 days prior to the work being undertaken.

### Flood risk

If flood alleviation measures are requested as a condition of the development, the developer may be expected to fund these measures in advance of construction of the development. In any event, insurance for the property could be difficult to obtain if these measures are not in place if the property would be subject to flood risk.

### Environmental Impact Assessment ('EIA')

For many developments there is a legal obligation to provide an EIA to accompany the planning application (outline and detailed). There are three key statutory determination periods that a developer should be aware of when programming a project that requires an EIA:-

- where a request for a screening opinion (to determine whether an EIA is required) has been submitted to the local planning authority or the Secretary of State, they are allowed up to three weeks to come to a decision regarding whether an EIA is required. It is prudent to confirm that the planning case officer has delegated powers to make the screening decision. The screening period is not obligatory at present.
- where a scoping report (scopes the scale and issues of the EIA it is written) has been prepared for an EIA project, there is a statutory consultation period of five weeks where the scoping report is sent to at least the following: English Nature, the Environment Agency and the Countryside Agency for consultation. The requirement for a scoping report is not obligatory at present.

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- The statutory period for the determination of a planning application with an EIA is up to 16 weeks. A normal planning application determination period is up to 8 weeks.

## EIA information

The quality of an EIA is dependant on the quality of information available. To minimize the likelihood of call-in or judicial review, developers should be mindful of the information requirements of the project, for example, seasonal availability of information (ecology) and appropriate project information.

## Environmental consultants

It is recommended that developers use an environmental consultancy that has membership of the Institute of Environmental Management and Assessment (IEMA). IEMA is the largest environmental professional membership body in the UK.

## Air Quality

Developers should be aware that where a local planning authority has designated air quality management areas (AQMAs), development within such areas maybe subject to restrictions, for example, the number of vehicle movements permitted.

## Travel plans

Under PPG 13 (2001), a local planning authority may request a travel plan for proposed development. The objective of travel plans is to reduce the proportion of single-occupancy car use associated with the development. They are increasingly included within Section 106 agreements and can carry substantial financial penalties by way of enforcement. Owing to the length of determination that can often be involved to reach agreement of a travel plan, it is advisable to prepare travel plans as early as possible in the development process, if required, rather than waiting for one to be required as a condition, which may delay commencement on site.

## Habitats Regulations

Where a development may impact on an ecological habitat or species listed under the Conservation (Natural Habitats, & c) Regulations 1994 (known as the Habitats Regulations) lengthy and detailed negotiations may be required with English Nature and the relevant local wildlife trusts and developers may be required to produce an Appropriate Assessment. It is worth bearing in mind that many of the sites listed in the Habitats Regulations carry European (for example, Special Protection Areas known as 'SPA's' or Special Areas of Conservation known as 'SAC's') or International designations (e.g. Ramsar sites)

## Managing the financial risk of contamination

Specialist environmental insurance is increasingly used to manage pre-existing and future site contamination liabilities. Policies vary in quality and value for money. Their wording should be compared to other policies and carefully scrutinised and negotiated so that they fit the needs of the deal, circumstances and parties involved. Historical contamination liability can also be managed when purchasing a site by persuading the seller to carry liability for a limited period and indemnifying the purchaser in respect of liabilities that may arise after the sale. The indemnity can be embodied in either the sale and purchase agreement or a separate pollution indemnity agreement.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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