



Brownfield Land – what buyers should ask themselves

Buying property is always a sure-fire way of increasing stress levels, even when the transaction goes through like clockwork. In today's market, both policy and economics often dictate that buyers need to consider previously developed land – brownfield sites.

These sites bring with them a whole range of issues arising from their previous uses. Any buyer of land needs to be aware of an owner's responsibilities to its neighbours, its workforce and the environment, all of which could be affected by pollution or contamination on the land.

The Contaminated Land (England) Regulations 2000¹ came into force on 1st April 2000 and can force polluters and owners to clean up land, if it falls within the Regulations' definition of "contaminated". As the costs of clean-up can exceed the value of the land, it is crucial to investigate this threat at an early stage. The liability for clean-up can lie with the owner, even if he is not the original polluter. If the prospective buyer knows the risks at an early stage, they can influence the negotiations with the Sellers.

When is land "Contaminated"?

"Contaminated land" 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 a significant possibility of such harm being caused; or
- (b) pollution of controlled waters is being, or is likely to be, caused;"²

"Harm" means harm to the health of living organisms or other interference with the ecological systems of which they form part and, in the case of man, includes harm to his property."³

¹ SI 2000/227. Similar provisions exist in Wales.

² Environmental Protection Act 1990 (s.78A) (2)

³ Environmental Protection Act 1990 (s.78A) (4)

This is not a definition that is easy to use in practice. But what a prospective buyer needs to bear in mind is, that for the land to be contaminated, there need to be three “ingredients”:-

A *receptor*, such as a person, a protected habitat, or watercourse, which could be harmed by contamination;

A *source*, in other words, something nasty in or on the ground

A *pathway*, which means a mechanism whereby the nasty stuff can get to the vulnerable receptor. This could be as simple as a child eating contaminated soil, or it could be the movement of water through the land leaching contaminant into an adjacent brook.

Mix these three ingredients together, and you have a problem.

The important thing for a buyer to remember is that if ANY of the ingredients are removed, the land is no longer “contaminated”. So, if a buyer can stop the receptor coming into contact with the contaminant, for instance by capping a site, then the “pathway” is gone. Using bioremediation or simply “dig and dump” will remove the source. And if a buyer can use the contaminated part of the site as, for example, a parking area rather than as a children’s playground, he is effectively removing the receptor from the land. Sometimes an imaginative development scheme can be a much cheaper way of solving a problem than engineering works.

A buyer should look into this issue at an early stage when considering leasing or buying a site. A lot of information is easily available and quality comprehensive desktop studies can be obtained relatively cheaply and quickly.

Buyers should also be aware that they may face other forms of liability in relation to polluted land, which lie outside the scope of this short article; contact DSL for advice.

Finally, any buyer should remember the cardinal rule, that ignorance of the law offers no protection in this field!