

UPDATE

Site Contamination

The contamination of residential dwelling sites featured prominently in the press during 2009, with cases of recently-approved dwelling sites allegedly contaminated by metallic wastes, gas leaks and other toxic substances being reported in the press.

Though the contaminants and circumstances resulting in the failure to discover the contaminants varied widely, each story carried with it an express or implied accusation that the Council in whose area the sites were located was, as the assessing authority for the development applications in respect of these sites, somehow responsible or negligent in "allowing" dwellings to be built upon contaminated sites.

It is the Council's role as a relevant authority under the *Development Act 1993* which often results in criticism of the Council from the public and the media when previously undiscovered site contamination rears its ugly head.

Where site contamination is, or is suspected to be present on a proposed development site, the Council can seek site contamination assessment reports and remediation works from the applicant, **if** the Council's Development Plan contains provisions concerning site contamination.

Some examples of site contamination provisions in Development Plans are:

Objectives

Protection of human health and the environment wherever site contamination has been identified or suspected to have occurred.

Appropriate assessment and remediation of site contamination to ensure land is suitable for the proposed use and provides a safe and healthy living and working environment.

Principles

Land Division should only occur where:

- (a) *the land is suitable for its intended or particular use;*

Development, including land division, should not occur on contaminated land or on potentially contaminated land unless either of the following applies:

- (a) *remediation of the site is undertaken to a standard that makes it suitable and safe for the proposed use;*
- (b) *the site will be maintained in a condition, or the development will be undertaken in a manner, that will not pose a threat to the health and safety of the environment or to occupiers of the site or land in the locality.*

Where a site is known to be contaminated, the Council's role in dealing with this contamination is reasonably certain – it needs proof that the site can be remediated or otherwise maintained or managed so that the land is suitable for the proposed development.

However, the question remains – what should cause a Council to **suspect** that site contamination may be present on land upon which development is proposed to occur?

Certainly, when a Council is assessing a change in land use application, the previous authorised use(s) of the land are relevant. If land was authorised for a commercial or industrial use of some sort, then it may be reasonably suspected that contamination may be present on the site.

Likewise, a suspicion can arise from a structure present on the land. For instance, a development application may include the

removal of a septic tank. The age of the septic tank may give rise to a reasonable suspicion that the site of the septic tank may be contaminated.

Furthermore, the Council may have historical records of contaminated land, or may have received complaints from neighbours which may cause a suspicion that land may be contaminated. In these situations, this suspicion may justify the Council requiring site assessment reports (and if applicable, remediation proposals) from an applicant.

Unknown site contamination – Council's responsibilities as a "relevant authority"

Where site contamination is not known, or not suspected to exist at a site, there are limited "triggers" for the status of the land to be investigated.

New complying dwelling provisions in Item 2B of Schedules 4 and 5 of the *Development Regulations 2008* contain a "trigger" for Councils to discover otherwise unknown site contamination. Schedule 5 Item 2B prescribes that an applicant for a new complying dwelling must include with their development application, a declaration indicating whether or not, to the best of the applicant's knowledge, the land is or may have been, subject to site contamination. In the event that the land is or may be contaminated, the application must also include a site contamination audit report.

Item 2B of Schedule 4 states that where an applicant has declared that the development site is or may be contaminated, or the Council suspects the land may be contaminated, the development must be processed as a "merit" development, unless the applicant provides a site contamination audit report which proves that the land can be remediated. The remediation of the land in accordance with the report may then become a condition of approval.

For merit applications, the Council must rely on referrals to the Environment Protection Authority in accordance with Section 37 of the *Development Act 1993* and Schedules 8 and 21 of the *Development Regulations 2008*. However, the situations where a development application for residential development can be referred to the EPA are limited to:

- land divisions creating 1 or more additional allotments for residential purposes within a certain distance from:
 - an Extractive Industry Zone;
 - a landfill waste depot;
 - sewerage treatment works;
 - a STED with a peak-loading capacity of more than 100 persons per day;
 - a piggery where more than 100 pigs are confined at any one time; or
 - land where poultry are kept involving a shed area exceeding 1,000m²
- land divisions creating 50 or more allotments for a residential purpose.

Outside of these legislative "triggers", there are no other ways in which "unknown" site contamination can be discovered by a Council. In these situations, it is the responsibility of the Environment Protection Authority to investigate and take action to ensure sites are remediated in accordance with the *Environment Protection Act 1993*.

It is expected that, at some point in the near future, the *Development Act* and *Development Regulations* will be amended so that, either, new referral powers will be granted to the EPA in relation to site contamination, or that site contamination investigations will be required from a developer whenever a change in land use to a "sensitive" land use occurs (i.e. residential/educational). We will keep you informed if and when these changes occur.

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