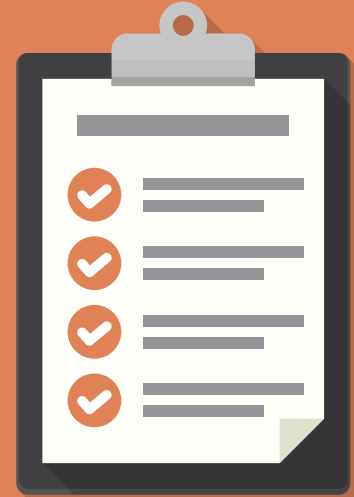


The New Build Question

With modern construction practices and stringent planning processes in the UK, it is a common assumption that new or recent housing developments will have been constructed to an appropriate standard, with the correct measures in place to ensure that homes are free of future contaminated land liability. But, is this a safe assumption to make?



The UK has a rich industrial heritage which during the 19th and 20th century operated at significant scale. Industry brought jobs and led to the formation of new settlements which often developed further into many of our towns and cities.

As a result, there are few parts of the UK that are not in some way touched by industrial heritage. Over time, industry dwindled as we became a more service-oriented economy. However, that industry left a footprint in the form of pockets of sometimes undiscovered contamination of unknown severity and magnitude.

Industrial Legacy and Regeneration

Just under 110,000 new homes were completed in England last year, reduced from prior years due to COVID-19, when delivery peaked at around 220,000.

Driven by policies focussed on the redevelopment of brownfield land, an increasing number of these homes are constructed on former industrial sites. These policies are positive in that they seek to maintain the amenity benefit and ecosystems services delivered by our green spaces, but it clearly necessitates the proper consideration of that industrial legacy and the contamination footprint left behind.

Property Construction Practices

Due diligence on new or recently developed property can sometimes suffer from complacency regarding environmental risk and the assessment of potential liability under Part 2A of the Environmental Protection Act 1990 ("the Contaminated Land Regime").

However, it should be acknowledged that there is variation in work undertaken by developers, with different practices and procedures followed across different organisations. Additionally, the legal entity actually conducting that work is not always what it seems. For this reason, it is important to conduct due diligence and not assume that environmental matters are out of scope. Key also is ensuring that the searches obtained are robust, realistic and comprehensive in their appreciation of these risks.

Can the Owner of a New Build Property Be Liable to Pay for its Remediation?

It is often assumed that under contaminated land legislation the developer of a property will be the sole target of enforcement action. Unfortunately for the prospective

A recent case highlights this issue, whereby residents of a 2014 housing estate in Bradford were told that their homes were worthless due to failures in the development process

purchaser, this isn't the case. A new homeowner cannot assume that the property developer is more likely to be served a notice to remediate contamination than they are.

There is potential for both parties to be considered members of the top liability group, known as 'Class A' persons, being those deemed to have '**Caused**' or '**Knowingly Permitted**' contamination to exist.

The construction of a house atop contamination can establish a link between the contamination and future residents which previously didn't exist. The developer may be considered a Class A person because they 'caused' that link to exist. However, the new homeowner is not immune. Should they alter the property or the grounds in some way, exposing contamination, they could similarly be considered a 'Causer' and assume the same top liability.

Furthermore, it is not uncommon for developers to disclose contamination information during the conveyance. This means the existence of contamination can be deemed as an awareness on the part of the homeowner and should they fail to remediate it they can be considered a 'Knowing Permitter' and subject again to the top liability bracket.

Potentially of greatest risk to the new homeowner is the not uncommon practice for developers to establish special purpose vehicles (SPVs) which act as the legal entity responsible for the construction, to limit their liability and protect any holding company.

As Environmental Law specialist Stephen Sykes of Sykes Partners explains:

"The SPV can be liquidated or dissolved once the development is complete, or if significant problems are encountered during the development. Hence, this is a real issue for new homeowners concerned about their Part 2A exposure."

In addition to voluntary winding down, insolvency results in the same outcome for the new buyer. Of all industrial groups,

“ Just under 110,000 new homes were completed in England last year, reduced from prior years due to COVID-19, when delivery peaked at around 220,000

the construction industry tends to have the highest level of collapses, with over 2,000 firms entering formal insolvency procedures in 2020.

Where this occurs, as is illustrated in the adjacent Bradford Case Study, should the regulators enforce their powers under Part 2A, with the developer absent they may look at the second tier of liability, ‘Class B Persons’. A Class B Person is defined as someone who can be held responsible simply by virtue of them being the owner/occupier of the land.

What is the Cost of Contaminated Land Liability?

Whilst the regulators can only require “reasonable” remediation, the regime does not impose a financial cap on liability. In a case involving the remediation of coal tar beneath the gardens of 11 new homes in Doncaster in the early 2000’s, the cost came to £66,000 per residence.

How Can a Conveyancer Protect Their Client?

The key is to treat the purchase of a new or recently constructed property with the same level of scrutiny as would be the case with any other property.

The first step is to obtain an environmental search which employs a robust methodology with respect to contamination and newly developed properties, and not rely on an assumption of a developer safety-net. The search should identify if any significant risks are present and highlight these as a ‘further action’ on the front page of the search.

Where ‘Further Action’ is advised in the case of a recently-developed property, a conveyancer may wish to first determine whether a National House Building Council (NHBC) Certificate (or similar) is available and ensure it covers contaminated land. Otherwise, planning documents demonstrating that contamination has been addressed during development may assist - so long as these evidence the complete discharge of all relevant conditions to the full satisfaction of the Local Authority. Provision of such information to the search provider can often result in a revision free of charge. Moreover it will give confidence on the part of the legal professional that the assessment is based on sound evidence that contamination issues have been considered, and their duty of care to the client has been fulfilled. A helpful infographic with more detail on how to deal with Further Action results is included on page 16 of this supplement.

Contaminated land is a specialist area, so where such information isn’t at hand, many legal professionals engage the help of environmental specialists to guide them. FCI is a team of chartered experts and environmental property professionals, with many years’ experience in dealing with complex contaminated land cases. FCI offers a free information review service and bespoke advice, but has also developed off-the-shelf solutions for exactly these instances, working on behalf of the legal professional, sourcing information, liaising with regulators and reporting back in the form of an affordable **FCI Appraisal*** report, or even an **FCI Walkover**** if a physical inspection is



Case Study: Worthless Homes in Bradford

A recent case highlights this issue, whereby residents of a 2014 housing estate in Bradford were told that their homes were worthless due to failures in the development process.

The 13-property estate adjoins a former landfill site, which records suggest received industrial, commercial and household waste.

Authorities identified a risk of methane and carbon dioxide migrating from the landfill into the properties. Consequently, a key condition imposed by the Local Planning Authority was the effective remediation of the site before building certificates could be issued.

The developer was required to fit a membrane to prevent gas ingress. Evidence of correct installation was lacking, and final building compliance certificates weren’t issued.

Residents later seeking to re-mortgage were met with a zero-valuation due to the absence of a final lawful building certificate.

Breaches such as this could be dealt with by an enforcement notice under Section 172 of the Town and Country Planning Act, or as a remediation notice under Part 2A of the Environmental Protection Act. Whilst steps might first be taken to hold the developer accountable, should the authorities be unable to reach that party, the notice could fall at the feet of the property owner. In this case, the developer has gone into administration and has reportedly not responded to approaches by residents or authorities.

requested. FCI’s risk assessment systems also ingest all mitigating information to ensure that subsequent searches ordered on similarly affected properties don’t require the same information to be sourced or reviewed time and again.

Finally, the Law Society’s Practice Note on Contaminated Land advises solicitors to consider the appropriateness of an environmental insurance policy to cover the costs of remediation of both undetected and disclosed contamination and related liabilities. It’s worth noting that FCI Searches include a free remediation warranty with all passed residential environmental reports, for 6 years, up to £100,000, providing peace of mind for conveyancers and their clients.

*Prices starting from £200 + VAT for residential properties

** Prices starting from £995+VAT for residential properties