

THE EFFICACY OF THE PLANNING SYSTEM IN REMEDIATING RADIOACTIVELY CONTAMINATED MOD LAND by Wendy Le-Las

During the first few months of the year 2000, attention was firmly focussed on the new contaminated land regime. However, the relevant Circular makes it clear that it does not apply to radioactive contamination. Part IIA of the 1990 Environmental Protection Act makes provision for the regime to be applied to such contamination, but we have yet to see precisely how the Secretary of State will choose to do it.

In February 1998, DETR issued a consultation paper entitled "Control & Remediation of Radioactively Contaminated Land". It states:

Land contamination which might cause problems if new uses of land were to be introduced, where those new uses would require an application for planning permission, is dealt with under the planning and building control system i.e. planning permission would not be granted unless the land was suitable for use.

At the time, the Government's Radioactive Waste Management Advisory Committee (RWMAC) expressed its doubts on the wisdom of this approach because of:

...the burden it places on the planning system, for which the process itself was not designed.

RWMAC's remit is usually confined to commenting on the management of civilian radioactive waste, but in 1999 it was invited by the Ministry of Defence (MOD) to consider its arrangements for dealing with the potential for radioactive contamination on sites that have been part of, or remain within, the defence estate. RWMAC's doubts have been enhanced by this study. They fall into two main categories:

§ there is no statutory requirement to consider possible on-site contamination as an integral part of development control procedures;

§ the secrecy surrounding the use of defence land makes the imposition of appropriate planning conditions extremely difficult.

Planning procedures focus almost exclusively on the *future* use of land. Development plans consist of policies to be applied to *new* development. The aptly named proposals maps allocating sites for specific uses accompany local plans and unitary development plans (Part II). Since the advent of s.54A it has been desirable, from the point of view of both the MOD and local planning authority (LPA), for a site destined for civilian use to be inserted into the relevant development plans, but, in practice, this has proved difficult. The MOD timetable for the release of land rarely synchronises with the development plan cycle. Usually the LPA prepares a development brief for large sites, which reiterate the relevant development plan policies and indicate a preferred use for the site.

The procedures that constitute the development control system are geared to examining the proposed development in the light of the policies and sites allocated in the

development plans. It is the character of the proposed development that determines:

- the need, or otherwise, for an Environmental Impact Assessment;
- the choice of Statutory Consultees (e.g. Environment Agency or Scottish Environment Protection Agency) to be contacted by the LPA;
- whether the decision is taken by LPA or the Secretary of State;
- the reasonableness of any conditions.

Where does existing on-site contamination fit into the frame? The short answer is that it does not, in terms of its being a statutory requirement. PPG23 advises LPAs, with a number of contaminated sites in their area, to have a specific question relating to the issue on their planning application form. An Environmental Statement can be used to point up the benefits of the project over the existing situation e.g. the remediation of the site. If there is known to be contamination on the site, then the planning department will send a copy of the application to the environmental health officer, and PPG 23 exhorts LPAs to bring in the Environment Agency at the earliest opportunity. Whether or not this happens is clearly dependent on the completeness of the records available to the LPA, and the efficiency of its corporate memory. There are difficulties enough with regard to civilian sites, but those in MOD ownership present a different order of problem.

Whereas a competent LPA has some idea of the history of civilian land use in its area, it will be far from certain what has been happening on land controlled by the MOD because it enjoys Crown immunity. Since 1977 Crown developers have been requested to make an early approach to the LPA when the project might be of special concern to the LPA or the public: the procedures for a Notice of Proposed Development mimic those of development control. With regard to knowing of past contamination, the pitfalls are obvious:

§ what went on prior to 1977?

- do the relevant polluting activities come within the remit of the planning acts?
- if they do, would they be deemed to be of interest to the LPA or the public, and therefore the subject of a Notice of Proposed Development, or would national security considerations screen the activity from public view?
- would such a Notice be devoid of publicity because it was stamped "Special Urgency", which limited the decision by the LPA to 14 days?

Thus, if the land has been in MOD ownership, it is unlikely that the LPA or the Environment Agency will have an adequate record of contamination on site. They will be heavily reliant on what they are told by the MOD or its agents: the honesty and quality of the Land Quality Assessment will be critical: there is no statutory provision for auditing such an assessment. If evidence of contamination is omitted altogether then no conditions will be applied, and if it is admitted only in part, then the conditions will be inadequate. If an LPA imposes draconian conditions on a failsafe basis, then the

developer can appeal on grounds of unreasonableness, and have costs awarded against the LPA.

Any condition is likely to be of the kind that has to be implemented prior to the development being allowed to go ahead. If the condition is broken, then the LPA may take enforcement action e.g. serve a breach of condition notice. However, it should be noted that in most cases the condition would not specify standards of remediation: normally the developer will propose a remediation scheme. The environmental health officer or the Environment Agency may have views on it but without an in-depth knowledge of the site and its history, it is difficult to gainsay those who have this information. There is a tendency to just rely on the developer's consultants. Planning permission and the setting of conditions are based on the information supplied. If, in retrospect, this turns out to be wrong, then the MOD carries the liability. Thus planning permission does not provide a copper-bottomed guarantee the site is fully remediated even to the standard appropriate for a restricted use. There is the additional problem that there are no nationally agreed standards for the remediation of radioactively contaminated land: the use of the 1993 Radioactive Substances Act and its associated Exemption Orders places remediated sites outside regulatory control, but does not necessarily ensure their fitness for unrestricted use.

The fact that, in the future, the site may well need to be redeveloped for a use requiring a higher standard of remediation begs the question of record keeping. The latter has been made simpler for LPAs by the introduction of Geographical Information Systems. However these cost money to set up, and LPAs are short of resources so records are not yet on-line nation-wide. Any system is only as good as the information fed into it. As we have seen historic records may be sketchy. It is to be hoped that new records will be accurate despite the risk that any hint of contamination may blight the future of the site. Given the pressure on local authorities to find suitable sites for housing land, and the Government's commitment to use brownfield land for 60% of new development, it is to be hoped that LPAs will insist that contaminated land is remediated to the highest possible standard for housing land, or re-remediated from, say, industrial/commercial land to the higher standards required for housing.

LPAs will always remain the first port of call for prospective developers. However, every decade or so, the boundaries of some local authorities are changed. This brings with it the threat of losing records, and sudden changes in staff, which can mean the loss of the corporate memory. As the years roll on the local folk memory of MOD contamination is also lost. It is essential that the record of radioactive, and indeed other contamination, is stored in a national register held by either the Environment Agency or the Land Registry so that any prospective developer may double-check on whether the relevant site is contaminated with radioactive material.

It would appear that the planning system should not be relied upon to ensure that surplus MOD land is free of radioactive contamination because:

1. Crown immunity has enabled much polluting activity to take place outwith any regulatory system, including planning. To impose meaningful conditions requires

knowledge of the type and extent of pollution, and this is not always available even for restricted uses;

2. On such a vital issue it is essential that a national register backs up LPA records operated either by the /Scottish Environmental Protection Agency or the Land Registry.

3. the primary focus of planning procedures is the future use of the land. There is no statutory requirement to investigate the state of the site;

4. There is a clear division of responsibility between LPAs and pollution control agencies.

The most an LPA can do is impose a planning condition saying that clean up should take place. Clearly the past history of MOD land makes the remediation of its radioactive legacy especially difficult. However, with the exception of (1) above, these findings apply to civilian sites, contaminated with radioactive waste, and contaminated land in general . RWMAC awaits with interest further planning guidance on land contamination and the revision of PPG 23.