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## North Northamptonshire Council

Contaminated Land Cost Recovery and Hardship Policy

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### **1. Introduction**

The costs of cleaning up contaminated land are not automatically covered by the public purse. The Government's policy is that the polluter (all persons who put the contamination there in the first place) should pay for any contamination they have caused by bearing the financial costs of cleaning it up.

This policy statement sets out North Northamptonshire Council's (the Council's) position on the possibility of waiving or reducing the recovery costs of remediation of land which has been determined as Contaminated Land under Part IIA of the Environmental Protection Act 1990 (Part IIA of the EPA 1990).

Part IIA of the EPA 1990 places a duty on the Council to inspect and identify contaminated land within its district. Land determined as being contaminated land requires remediation, if voluntary remediation cannot be secured within a reasonable time, the Council has a duty to serve a 'remediation notice' on any 'appropriate person' involved in the process. Dependent on individual circumstances and the nature of the contamination costs of remediation works can be very expensive and, in some cases, the appropriate person may turn to the Council for support in meeting those costs. In which case, before such notices can be served, the Government's Contaminated Land Statutory Guidance, 2012, requires the Council to adopt a Cost Recovery and Hardship Policy.

Under Part IIA, the appropriate person to pay for remediation is determined with reference to the primary legislation and statutory guidance. It is based on the polluter pays principle. In that those persons who caused or knowingly permitted a pollutant to be in, on or under the land will be the appropriate person to receive a remediation notice to ensure the work is carried out. Therefore, responsibility for the cost of the remediation rests with the person who caused or knowingly permitted the contamination. The Class A appropriate person.

If the above appropriate person cannot be found, the owner or occupiers of the land may be the appropriate person to receive a remediation notice. The Class B appropriate person.

Wherever possible, voluntary remediation of contaminated land should be undertaken, however where this cannot be achieved the local authority can serve a remediation notice specifying the time period and method of remediation. Alternatively, the local authority is entitled to complete the remediation work itself and recover the reasonable cost incurred in doing it from the appropriate person via a written agreement.

A remediation notice is a statement of the requirements needed to manage the contamination or remediate land, setting out details of the contaminant(s) and those responsible for remediation. It requires the person(s) responsible (appropriate person(s)) for the pollution or the activity leading to the determination of contaminated land, to be held liable for the cost of remediation.

When no liable parties can be found the site is deemed to be an orphan site and the responsibility then rests with the Council or the Environment Agency, if a special site, to fund remediation.

The purpose of this policy is to ensure a consistent and transparent approach when seeking to recover costs for remediation of Contaminated Land determined under Part IIA.

## **2. Information for making decisions**

In general, the Council will expect anyone who is seeking a waiver or reduction in the recovery of remediation costs to present any information needed to support such a request. A reasonable period of time will be given by the Council to allow for this information to be collected.

In making any cost recovery decision, the Council will consider any relevant information provided by the appropriate person(s).

The Council will seek to obtain such information as is reasonable, having regard to:

- (i) The accessibility of the information and the time it may take to provide it;
- (ii) The cost, for any of the parties involved, of obtaining the information;
- (iii) The likely significance of the information for any decision.

The Council will, in all cases, inform the appropriate person of any cost recovery decisions taken, explaining the reasons for those decisions.

## **3. Criteria against which hardship will be assessed**

The Statutory Guidance does not give a definition of hardship, therefore within this policy “hardship” is defined using ordinary terms, namely ‘hardness of fate or circumstance, severe suffering or privation’. In deciding if a person would suffer hardship, the Council will consider this on a case by case basis

## **4. Threat of business closure or Insolvency**

In the case of a small or medium-sized enterprise which is the appropriate person, the Council will consider:

- Whether recovery of the full cost attributable to that person would mean that the enterprise is likely to become insolvent and thus cease to exist; and if so, the cost to the local community of such a closure
- Where the cost of remediation would force an enterprise to become bankrupt, the Council will consider waiving or reducing its costs recovery to the extent needed to avoid making the enterprise insolvent.

The Council will not normally waive or reduce its costs recovery where:

- It is clear that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation
- It appears that the enterprise would be likely to become insolvent whether or not recovery of the full cost takes place; or
- It appears that the enterprise could be kept in, or returned to, business even if it does become insolvent under its current ownership.

## **5. Trusts**

Where the appropriate persons include persons acting as trustees, the Council will assume that such trustees will exercise all powers which they have, or may reasonably obtain, to make funds available from the trust, or from borrowing that can be made on behalf of the trust, for the purpose of paying for the remediation. The Council will, nevertheless, consider waiving or reducing its costs recovery to the extent that the costs of remediation to be recovered from the trustees would otherwise exceed the amount that can be made available from the trust to cover these costs.

The Council will not waive or reduce its costs recovery:

- Where it is clear that the trust was formed for the purpose of avoiding paying the costs of remediation; or
- To the extent that trustees have personally benefited or will personally benefit from the trust.

## **6. Charities**

The Council will consider the extent to which any recovery of costs from a charity would jeopardise that charity's ability to continue to provide a benefit or amenity, which is in the public interest. Where this is the case, the Council will consider waiving or reducing its costs recovery to the extent needed to avoid such a consequence. This approach applies equally to charitable trusts and to charitable companies.

## **7. Registered social landlords**

The Council will consider waiving or reducing its costs for recovery if:

- The appropriate person is body eligible for registration as a social housing landlord under section 80 of the Housing and Regeneration Act 2008
- Its liability relates to land used for social housing, and full recovery would lead to financial difficulties for the appropriate person, such that the provision or upkeep of the social housing would be jeopardised.

The extent of the waiver or reduction will normally be sufficient to avoid any financial difficulties.

## **8. Specific considerations applying to Class A Persons**

The Council will consider if the Class A person caused or knowingly permitted the contamination in the course of carrying on a business, and whether or not that person is likely to have financially benefited from the activity in question. If that person did financially benefit, the Council would not waive or reduce cost recovery unless in the circumstances described below.

## **9. Where other potentially appropriate persons have not been found**

In some cases where a Class A appropriate person has been found, it may be the case that the Class A appropriate person already found would then identify another person who caused or knowingly permitted the presence of the significant contaminant in question, but who cannot now be found for the purposes of treating them as an appropriate person. For example, this might apply where a company has been dissolved.

The Council will consider waiving or reducing its costs recovery from an existing Class A appropriate person if that person demonstrates to the satisfaction of the Council that:

- Another identified person, who cannot now be found, also caused or knowingly permitted the significant contaminant to be in, on, or under the land; and
- If that other person could be found, the Class A appropriate person seeking the waiver or reduction of the Authority's costs recovery would either:
  - Be excluded from liability by virtue of one or more of the exclusion tests set out in Section 7 of the Statutory Guidance, or
  - The proportion of the cost of remediation which the appropriate person has to bear would have been significantly less, by virtue of the guidance on apportionment set out in Section 7 of the Statutory Guidance.

Where an appropriate person makes a request that the Council's cost recovery be waived or reduced by virtue of this section, the Council will require that person to provide evidence that a particular person, who cannot now be found, caused or knowingly permitted the significant contaminant to be in, on, or under the land. The Council will not normally regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

The Council will seek expert help in liability apportionment, to assess requests for waivers or reductions in cost recovery.

## **10. Specific considerations applying to Class B Persons**

In some cases, the costs of remediation may exceed the value of the land in its current use (as defined in Section 8 of the Statutory Guidance) after the required remediation has been carried out.

In such circumstances, the Council will consider waiving or reducing its costs recovery from a Class B person if that person demonstrates to the satisfaction of the Council that the costs of remediation are likely to exceed the value of the land. In this context, the "value" will be taken to be the value that the remediated land would have on the open market, at the time the cost recovery decision is made, disregarding any

possible blight arising from the contamination. A minimum of three valuations will be required, and to be independently verified by an expert appointed by the Council, with costs of verification to be recovered by the Council.

In general, the extent of the waiver or reduction in cost recovery will be sufficient to ensure that the costs of remediation borne by the Class B person do not exceed the value of the land after remediation has taken place. However, if the remediation would result in an increase in the value of any other land from which the Class B person would benefit, this will be considered when deciding the extent to which it should seek to recover its costs.

### **11. Precautions taken before acquiring a freehold or a leasehold interest**

In some cases, the appropriate Class B appropriate person may have been unaware that the land in question was, or might be, contaminated when they acquired it. Precautions may have been taken to ensure that the Class B appropriate person did not acquire land which is contaminated. In these cases, the Council will consider reducing its costs recovery where a Class B appropriate person who is the owner of the land demonstrates to the satisfaction of the Authority that:

- The person took such steps prior to acquiring the freehold or the leasehold interest in the land, as would have been reasonable at that time to establish the presence of any contaminants;
- When the person acquired the land, or accepted the grant of assignment of the leasehold, the person was nonetheless unaware of the presence of the significant contaminant now identified, and could not reasonably have been expected to have been aware of its presence; and
- It would be fair and reasonable, considering the interests of national and local taxpayers, that the person will not bear the whole cost of remediation.

In some cases, the Class B appropriate person may have decided, with information in hand of the possibility of the land being contaminated, to take a risk that the land would not be found to be determined as contaminated.

The Council will bear in mind that the safeguards which might reasonably be expected to be taken will be different in different types of transaction. For example, acquisition of recreational land as compared with commercial land transactions, and as between buyers of different types e.g. private individuals as compared with major commercial undertakings. The precautions taken will have also changed over time.

### **13. Environmental Insurance**

A range of commercial and homeowner environmental insurance policies have been available in the UK for several years. A valid environmental insurance policy if held by a Class A or B appropriate person often provides protection against risk of liability under the contaminated land legislation. Such policies, especially for domestic properties, normally only cover pre-existing contamination unknown at the time the property/land was purchased. In this context this may include Part IIA sites where there was no evidence of significant contamination at the time of the property transfer. Some commercial policies do cover pre-existing contamination known to the insurer and insured when the policy is taken out.

In the event of any liability residing with an appropriate person the Council will enquire if a valid environmental insurance policy is held and the scope of cover it provides. If cover provided by the policy protects the insured against all or part of any liability under Part IIA the Council will take this into account when making any cost-recovery decisions.

### **13. Payment of the Council's costs**

In each case where the Council has used public funds to remediate land in its area, a decision will be taken by the Council - taking account of all circumstances pertaining to the matter - whether to recover any or all of the funds expended on a property in order to make it suitable for use.

The Council will also consider how payment to the Council should be made. This could, for example, take the form of payment of the full amount within a fixed period, by instalments or by attaching a charge to the property so that it is recovered when the property is sold. In the latter case, the Council will consider whether it could recover reasonable costs by deferring recovery and securing them by a charge on the land in question.

### **14. Review mechanism**

This policy will continue to be reviewed at intervals of no later than 5 years and as required by any significant change in legislation or on the issue of updated Statutory Guidance by the Government.

### **15. Data protection**

Information regarding individual financial status will need to be gathered should any applications be made for hardship. All information gathered as part of applications for hardship will be treated in accordance with GDPR and will only be used for the sole purpose of assessing ability to pay in each individual case.