

HARDSHIP POLICY 2020

Recovering costs associated with the remediation of contaminated land sites under The Environmental Protection Act 1990 (as amended)

1. Introduction

This policy statement sets out Runnymede Borough Council's (RBC'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 (EPA 1990). The policy was adopted by the Environment and Sustainability Committee on 8 July 2020.

Part IIA of the EPA 1990 places a duty on the Council to inspect and identify contaminated land within its Borough. Land determined as being contaminated 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 Governments Contaminated Land Statutory Guidance, 2012, requires the Council to adopt a Cost Recovery and Hardship Policy.

The cost recovery approach is limited only to the Council's "reasonable costs". This includes any costs incurred by the Council in managing or carrying out remediation of any land determined as contaminated. However, the Council will always seek to do such work economically. There is no Statutory requirement on the Council to pay for remediation for which it is not itself liable, only to consider reducing or waiving cost recovery in certain circumstances.

If parties have purchased environmental indemnity insurance as part of the conveyancing process, such policies should be called on and used prior to invoking the procedures in this policy.

Remediation Notices

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.

Once remedial works have been deemed necessary, a remedial Options Appraisal will be undertaken by the Council as detailed in the Environment Agency's Land Contamination Risk Management (LCRM).

Appropriate persons

An appropriate person can be:

- Class A person(s) - who caused or knowingly permitted the contaminating substances to be in, on or under the land in question, or
- Class B person (s) - the owner or occupier of the contaminated land, where a Class A person cannot be found
- There are circumstances where a person may be both a Class A and a Class B person.

2. Regulatory content

'Statutory Guidance' in this policy refers to:

- Environmental Protection Act 1990: Part IIA. Contaminated Land Statutory Guidance, Department for Environment, Food and Rural Affairs, April 2012.
- Environmental Protection Act 1990: Part IIA. Contaminated Land - Radioactive Contaminated Land Statutory Guidance, Department of Energy and Climate Change, April 2012.

The Contaminated Land (England) Regulations (2006) (SI 2006/1380) sets out provisions relating to the identification and remediation of contaminated land under Part IIA of the Environmental Protection Act 1990 as amended.

Part IIA of the Environmental Protection Act 1990 gives the Council duties and powers to deal with the identification of Contaminated Land, namely:

- Section 78E - to require remediation of contaminated land.
- Section 78F - to determine the appropriate person to bear responsibility for remediation.
- Section 78H - A duty to consult with those who may be responsible for remediation, three months prior to serving a remediation notice (not required when there is imminent danger of serious harm or pollution).
- Section 78N - power to carry out remediation.
- Section 78P - power to recover costs of remediation.

The Council under this policy may consider the possibility of waiving or reducing the cost of the remediation of land determined as contaminated land under Part IIA (Section 78) of the Environmental Protection Act 1990.

3. Cost recovery decisions

The Council will seek to promote fairness, transparency and consistency as well as the need to prevent hardship when making decisions regarding financial responsibility for remediation of contaminated land.

The following considerations should be made when making cost recovery decisions, with the enforcing authority having regard to the circumstances of each individual case:

- Aim for an overall result which is just, fair, and as equitable as possible to all who have to bear the financial burden of remediation, including national and local taxpayers.
- Wherever possible, apply the "polluter pays" principle, whereby the costs of remediating pollution are borne by the polluter.
- When deciding how much of the Council's costs should be recovered, consider whether reasonable costs can be recovered by deferring recovery and securing them by a charge on the land in question under section 78P of the EPA 1990. Such deferral may lead to payment from the appropriate person either in instalments (see section 78P(12)), or when the land is next sold.

4. Information for Making Decisions

The Council will seek to obtain any such information as is reasonable from anyone seeking a waiver or reduction in the recovery of remediation costs. The Council will consider all relevant information provided by appropriate person(s).

Any appropriate person(s) who is seeking a waiver or reduction in the recovery of remediation costs are required to submit to the Council any relevant information to support this request within 28 days of being informed of the proposed cost the council is seeking to reclaim. In the event that an appropriate person cannot achieve that timescale they should contact the Council setting out the reasons in writing why they cannot achieve this and the Council will consider if it is reasonable to extend the timescale for the provision of information.

5. 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 use the process of considering each case through a Hardship Panel.

6. Considerations Applying both to Class A & Class B appropriate Persons

Commercial Enterprises

The Council will apply the same parity of approach to all types of commercial or industrial enterprises which are identified as appropriate persons. This applies whether the appropriate

person is a limited company (whether public or private), a partnership (whether limited or not) or an individual operating as a sole trader.

Threat of Business Closure or Insolvency

In the case of a small or medium-sized enterprise being, or being operated / controlled by, 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 potential cost to the local economy of such a closure.

For these purposes, a “small or medium-sized enterprise” should be taken to mean an independent enterprise which matches the definition of a “micro, small and medium-sized enterprise” as established by the European Commission recommendation of 6 May 2003, and any subsequent definition from time to time. Under the 2003 definition this would cover any such enterprise with fewer than 250 employees, and either an annual turnover of no more than €50 million, or an annual balance sheet total of no more than €43 million.

Where the cost of closure appears to be greater than the costs of remediation that the Council would have to bear themselves, the Authority is able to waive or reduce its costs recovery to the extent needed to avoid making the enterprise insolvent.

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

- it is satisfied 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.

Trusts

Where the appropriate person(s) includes any person acting as trustees, the Council will assume that such trustees will exercise all of their necessary powers, or powers that they may reasonably be able to obtain, to make funds available from either the trust or from borrowing that can be made on behalf of it, for the purpose of paying for the remediation. The Authority 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 those costs.

The Authority should not waive or reduce its costs recovery:

- where it is satisfied that the trust was formed for the purpose of avoiding paying the costs of remediation; or
- where the trustee(s) has personally benefited under the trust. In such circumstances they will be treated as an individual.

Charities

As Charities are intended to cooperate for the benefit of the community the recovery of costs may jeopardise the charity's ability to deliver its charitable purposes, the Authority 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.

Social Housing Landlords

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

- the appropriate person is a body eligible for registration as a social housing landlord under section 2 of the Housing Act 1996 (for example, a housing association);
- its liability relates to land used for social housing; and
- full recovery would lead to significant financial difficulties for the appropriate person, such that the provision or upkeep of the social housing would be jeopardised significantly.

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

7. 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.

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 Authority 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.

8. Specific Considerations Applying to Class B Persons

Costs relative to land values

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 Authority 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 taken into account when deciding the extent to which it should seek to recover its costs.

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, taking into account 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.

9. 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.

Hardship Panel

The Council's Hardship Panel (the Panel) will consider the cost recovery associated with remediation of contaminated land.

The Hardship Panel will consist of:

- Principal Environmental Health Officer (Chair)
- Financial Services Manager
- Legal Officer
- A representative of the Ward (Ward Councillor)

Ordinarily the Panel meeting will be a face to face process, but an appropriate person can provide written evidence in lieu of attendance. Attendees must provide any written evidence at least 28 working days prior to the hearing.

Any representations made by Ward members to the Panel should be in writing. The Panel can receive technical support and advice from the Environmental Protection Team.

A report will be provided for the Panel by the Environmental Protection team. The Panel will agree on the information required in order to assess the hardship of the responsible person(s). The Panel before making a decision will have regard to:

- the guidance in this Policy and the Statutory Guidance
- the report of the officer in the Environmental Protection Team
- any representations from the persons concerns
- any reports of experts
- any representation from the relevant Ward member

Below is a non-exhaustive list of examples of information the Council may ask for:

- Land Registry and Title Deed documents details to show the purchase date and presence of any restrictive covenants. The value of the land on the open market (the Council would expect at least three valuations to be obtained from estate agents/surveyors);

- The value of the land (independently validated) disregarding the fact that it has been identified as contaminated by the Council;
- Statement of the amount of all debt secured on the land, (not limited to mortgage loans) will be required;
- Whether the land is held for investment;
- Whether the land is held for business or purely residential purposes;
- Where the land is owned / occupied by a company the profit and loss accounts and balance sheets for a period of (3/5 years);
- Where the land is used for business purposes, details of the income generated through the use of the land and the costs involved;
- Where the land is owned / occupied by an individual, details of the persons assets/savings;
- Where the land is owned / occupied by an individual, details of the person's debts and income;
- Where the land is owned / occupied by an individual, details of the persons incomings and outgoings;
- Where the land is owned / occupied by a company, details of any insurance policies in place which cover the costs of the remediation of land;
- The amount of capital available to the person, and whether there is sufficient capital to meet the cost;
- The personal needs of the individual - health and age of the individual and the existence of dependents;
- The assets of the person, and the ability of the person to raise finance against the assets
- Whether the person is running a business on the land (i.e. gaining an income from the use of it by another person or carrying out a business activity on the land);
- Where the person owns the contaminated land, whether the remediation is likely to increase the value of the land by more than the cost of the remediation such that the person should be able to borrow against the land to raise the necessary finance;
- The amount the person paid for the land and whether when they bought the land the price reflected the state of contamination (if indeed they were aware of such contamination); or
- Any other relevant information which is applicable to the person and which may indicate that hardship would be caused.

In each case, the Panel will make a decision as to what it considers is fair and reasonable in the circumstances. This decision will also depend on what amounts the Council is likely to be able to afford to pay out. The Panel will inform the appropriate person(s) of any cost recovery decisions taken and explain the reasons for those decisions. The Panel will aim to make decisions within 3 weeks of being presented with all the relevant information. The decision of the Panel will be sent to the persons concerned within 1 week of the decision being made.

If the person is aggrieved by the decision of the Panel, the person concerned may appeal that decision by informing the Council in writing within 21 days of the date of the decision document.

An Appeals Panel will review evidence presented at the original Hardship Panel, the deliberations of that Panel, and any new representations. They will consider the appeal and confirm, vary or quash the original decision.

As well as presenting any original information the appellant is entitled to present relevant new information to the Panel.

The Appeals Hardship Panel will consist of:

- Chief Finance Officer
- Corporate Head of Environmental Services (Chair)

- Solicitor to the Council
- A member of the relevant Council Committee (Environment and Sustainability)

If the appropriate person does not repay the amount that the Authority is seeking to recover, then the Council will consider the most appropriate option to recover costs.

Tax relief for the clean-up of contaminated land in certain circumstances to corporations. More details of the tax relief are available <https://www.gov.uk/hmrc-internal-manuals/corporate-intangibles-research-and-development-manual/cird60015>.

Through the landfill tax credit scheme, it may be possible to apply for grants to fund schemes for land reclamation. Further information may be obtained from The Environmental Trust Scheme Regulatory Body Limited (Entrust) at www.entrust.org.uk

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.