



Fax: (01343) 563483

Donnie Mackay
Environmental Health Manager

Development Services
Environmental Services Department
The Moray Council
Council Office, High Street, Elgin, IV30 1BX
Tel: (01343) 543451 DX No 520666 Elgin

Contact: Adrian Muscutt
E-mail: adrian.muscutt@moray.gov.uk
Web Site: www.moray.org

Direct Dial: (01343) 563496
Our Ref: ADM/CL/08-02487-FUL
Your Ref: LRB/Case 017

2 August 2010

Clerk to the Local Review Body
The Moray Council
Council Office
High Street
Elgin IV30 6BX

Dear Sir or Madam

NOTICE OF REVIEW: PLANNING APPLICATION 08/02487/FUL: FULL PLANNING PERMISSION TO RENOVATE AND REUSE REMAINS OF EXISTING LIME KILN TO CREATE A DWELLINGHOUSE AT BRAEHEAD QUARRY, KEITH.

Following receipt of the Notice of Review of 22 July 2010 for Application Number 08/02487/FUL, the submission of The Moray Council's Contaminated Land team to the Local Review Board for this case is provided below.

National Planning Guidance and The Moray Council's Approach to Contaminated Land in the Development Process

The planning guidance in Scotland for development of potentially contaminated sites is Planning Advice Note 33 *Development of Contaminated Land* (PAN33) as revised in 2000. PAN33 sets out the "Suitable For Use" approach to dealing with contamination through the planning system. Paragraph 19(ii) of PAN33 states that one element of this is:

"ensuring that land is made suitable for any new use, as planning permission is given for that new use – in other words, assessing the potential risks from contamination, on the basis of the proposed future use and circumstances, before permission is given for the development and, where necessary, to avoid unacceptable risks to human health and the environment, remediating the land before the new use commences."

PAN33 Paragraph 33 goes on to say that

"Planning authorities should therefore require that applications include suitable remediation measures. Where applications are approved, conditions should be put in place to ensure land is remediated before the commencement of any new use."

The guidance in PAN33 and elsewhere (particularly *Scottish Executive Paper SE/2006/44: Environmental Protection Act 1990: Part IIA: Contaminated Land - Statutory Guidance: Edition 2*), is incorporated in to The Moray Council's "Approach to Contaminated Land" strategy document, which includes as Appendix B "Contaminated Land Within the Development Control Process". Following consultation with internal and external parties, The Moray Council approved the "Approach to Contaminated Land" at the Environmental Services Committee on Wednesday 7 February 2007 and, thus, determined that this would be the way that The Moray Council would fulfil its responsibilities and duties in relation to contaminated land.

In summary, this approved approach requires that, as a planning application is submitted, the land is checked for any potential contamination risks. Where there is good reason to suppose that the land may be contaminated, an appropriate level of assessment must be made before permission is granted to ensure that the land will be safe for the new use. In addition, any remediation required must be undertaken before the land is put to its new use.

Planning Application 08/02487/FUL

After being consulted on the Application 08/02487/FUL, The Moray Council's Contaminated Land team referred to its database of potentially contaminated sites and used a screening process developed by the British Geological Society. This identified that the proposed development was on part of a former infilled quarry and lime works and, thus, there was good reason to suppose that the land may be contaminated. As a result, a letter was sent to the Applicant's Agent on 9 December 2008 requesting that, in the first instance, a site history be submitted. This letter also informed the Agent that the application could be recommended for refusal if contaminated land issues were not progressed.

Following a reminder telephone call on 7 January 2009, the Agent submitted a letter on 9 January 2009 containing a site history, which also stated that the Applicant had "dug out the lime kiln", and found that "the material used to infill the kiln... to be just black earth, with no foreign material". Based on this exercise, the Agent and/or Applicant had concluded that there was "no risk to human health".

On 15 January 2009, the Contaminated Land Officer emailed the Agent to confirm that the information submitted was not sufficient to address contaminated land concerns and recommended that a suitably qualified contaminated land consultant be employed to assess suitability for use. The Agent responded on 16 January that no further work on contaminated land would be submitted until a response had been received from the Planning Officer regarding the acceptability of the design.

An update was sought from the Agent on 18 February and, after a final reminder letter on 11 March, the Contaminated Land Officer recommended refusal on 23 March 2009 on the grounds that no satisfactory information had been submitted to determine whether the site were suitable for its intended use.

Appellant's submission of July 2010

The Appellant's appeal submission dated July 2010 states:

"To the north of the site lies a former quarry which was infilled some years back with municipal waste before being covered over. The appellants are aware that this former use could result in migrating gases and to this end, they have previously undertaken gas testing around the former landfill area, these tests did not show up any high levels of gas migration ... Unfortunately, these previous tests do not meet the current testing standards and, as such, the Council Contaminated Land Section requested significant, much more expensive testing work be undertaken before removing their objection to this development."

As a point of clarification here, it should be noted that the gas testing referred to in the Appellant's submission was carried out on the land neighbouring the application site. No report of a formal investigation of ground quality has been submitted in relation to the land subject to Application Number 08/02487/FUL. The Appellant's statement also fails to recognise that the site history also gives good reason to suppose that the land subject to Application Number 08/02487/FUL may itself be contaminated due to historic activities on this area of the former lime works and infilled quarry; not only by landfill gas but also by substances that may be present in the soil.

The Appellant's submission also refers to a statement in the Reporter's judgement on the appeal against the refusal of the previous application, 06/02751/FUL, that "it would have been right in my assessment to grant permission, with pollution risks being controlled by condition". Based on PAN33 and The Moray Council's approved policy, it is the Contaminated Land team's view that this condition would relate only to remediation of identified contamination and not to the process of assessment. The appellant's suggestion of a suspensive condition on the consent relating to gas testing and monitoring requirements goes against national planning guidance and The Moray Council's approved policy.

Conclusions

The Contaminated Land team recommended refusal of Application Number 08/02487/FUL on the grounds that:

- there was good reason to suppose that the land may be contaminated;
- no credible effort had been made to show whether the land was suitable for its intended use as a residential property with garden; and
- there appeared no likelihood that contaminated land investigations would be progressed further.

In doing so, the process followed was in full accordance with national planning guidance and The Moray Council's approved policy.

The current position is that it has not been established to the satisfaction of the Contaminated Land team that the land is suitable for its intended use and the Contaminated Land team is not in a position to recommend an appropriately robust condition on the consent that would ensure remediation to make it suitable for that use because the nature, extent and potential impacts of any contamination are not known. Should the review board be inclined to uphold the appeal in relation to Points 1,2 and 3 in the Schedule of Reasons for Refusal, the Contaminated Land team recommends that, with due regard to national planning guidance and The Moray Council's policy, consent be deferred pending consideration of the site's suitability for use. This will require submission of an appropriately targeted contaminated land assessment by a suitably qualified professional or company that complies with current guidance. This would be followed, if necessary, by submission of a formal statement, agreed by the Contaminated Land team, of remedial measures required to render the site suitable for its intended use. A condition, specifying that no development shall be undertaken until remedial measures have been performed in accordance with the agreed remediation statement, could then be attached to the consent.

Yours sincerely


Adrian Muscutt
Contaminated Land Officer