
Report to Council

Date of Meeting: 04 November 2010

Subject: Treatment of Contaminated Land in Alva

Report by: Head of Community & Regulatory Services

1.0 Purpose

- 1.1. This report fulfils the requirements of the Motion agreed at the Council Meeting of 23 September 2010 that a report be submitted on the progress made on the treatment of Contaminated Land associated with the former Alva Gas Work, Alva, and that the report should detail any outstanding issues and options to resolve them. A separate report has been submitted to the Planning Committee of 28 October 2010 on Enforcement action under the Planning Acts.
- 1.2. This report confirms that:
- 1.2.1. The current use of the site as garden ground is unlawful as planning consent has not been granted. Conditional planning consent is the most appropriate way to deal with the regulation of this use.
- 1.2.2. A Section 33A Notice was served on the owners of the site, requiring them to submit a planning application to resolve the breach of planning control. No planning application has been submitted within the specified time and a letter has been received from the owners' new solicitors advising that on the basis of advice given to them the owners are of the clear view that garden use is an established use for the land they acquired and that on that basis they do not need to submit an application for planning permission. This is contrary to advice given at the time of their purchase since their initial offer stated "This offer is subject and conditional upon our clients (Mr and Mrs Stitt) applying for and being granted a change of use consent to allow the plot of ground to be used as garden ground. Our clients undertake to lodge the appropriate planning application within 14 days of the conclusion of missives to follow hereon." Officers have seen correspondence in 2001 between Mr and Mrs Stitt and their original solicitors making clear reference to the planning status of the ground and the need for planning permission for change of use.
- 1.2.3. As there is no prospect of a planning application being submitted in the light of the letter from the current solicitors, an Enforcement Notice dated 15 October 2010 was served upon the owners of the land.

- 1.2.4. The owners of the land are the appropriate persons to bear the responsibility for regularising the specific use to which they have put the land. The Council does not have any statutory responsibility to undertake any physical works to address the unacceptable aspects of that particular use by the owners.
- 1.2.5. Council funding to carry out any treatment of this particular site by way of removal of contaminated sub-soils would not be in the public interest. The land requires that type of treatment only if its use continues to be for vegetable growing and soft landscaping. The owners' use of the land as a soft landscaped garden has itself caused the significant risk of harm to occur. Cessation of the use or a hard landscaped surface would negate the requirement for the costly and non-viable solution involving complete removal of the affected sub-soils. The contamination within the affected sub-soils is **not mobile and is bound with the sub-soils**. This was verified from the later detailed reports by the Council's consultants, the initial conclusions about possible migration being precautionary and on a worst case scenario basis. Accordingly the potential risk can be dealt with appropriately with the contamination in situ.
- 1.2.6. The Council decision of 12 March 2009 that "remediation of the additional area of land be subject to the Council obtaining a Standard Security over the property sufficient to cover the full cost of the remediation and **if this cannot be negotiated the Council will not be involved in remediation**" was duly intimated to the owners who declined to grant a Standard Security over their property for the full cost of such works. The Council's clear and definite decision that unless the condition was met the Council would not be involved in remediation did not leave it open to pursue some other option for a voluntary scheme in which the Council would be involved financially.
- 1.2.7. The works to the Woodburn Way properties (including the approved garden ground at 5 Woodburn Way) undertaken voluntarily by the Council in 2009 have been satisfactorily completed and the maintenance period has now expired. Accordingly there are no outstanding issues in respect of the works carried out by the Council.

2.0 Recommendations

- 2.1. It is recommended that members note the options detailed in this report and that (a) the contract works undertaken by the Council have been satisfactorily completed and (b) enforcement action has been taken to seek to regularise the breach of planning control.

3.0 Considerations

- 3.1 This report will deal with the various issues in turn. There have been an exceptionally high level of Freedom of Information, Councillor, MP and MSP enquiries into all aspects of this case and it is appropriate in this Report to clarify various misunderstandings and misconceptions which have arisen largely caused by the manner in which the owners have chosen to pursue this matter. Complaints and issues raised range from the identity of the person who signed for the original recorded delivery and envelopes being received in a wet condition to historical remediation of adjacent land.

3.2 Issue 1 - The current unlawful use of the land:

The unauthorised site (as shown on Appendix 2) was acquired at auction in October 2001 by the owners and occupiers of No. 5 Woodburn Way for £11,500. It was vacant land that was formerly part of a gas works site. It was not garden ground and, as such, a planning application for change of use from disused vacant ground forming part of a former gas works site to domestic garden ground was required. **The current owners of the land are aware of this requirement. Indeed, their original offer for the ground, dated 30th January 2001, was conditional upon them obtaining planning permission for change of use to garden ground.**

The owners have since used this part of the former gas works site as part of an extended garden for their home at No. 5 Woodburn Way. Planning permission has not been sought and therefore their current use is not lawful. That said, permission for garden use would be likely to be approved provided the owners do not form a link to the contaminated sub-soils and thereby create a significant health risk. Such a link can be avoided whilst still allowing the ground to be used as an extended part of their garden provided a satisfactory hard landscaped surface is maintained. The owners, however, have not only used the ground unlawfully but have also used it in such a manner that actively creates a link to the contaminated sub-soils and consequently poses a significant health risk to the householders. For the avoidance of doubt, this problem can be readily addressed by the owners seeking consent and forming a hard landscape surface. This need not involve the substantial expense (approximately £75,000 - £80,000) of complete removal of the affected soils and their replacement with new material for the sole and unnecessary purpose of achieving a soft landscape surface. There are many approved gardens throughout Clackmannanshire which are wholly or at least partially maintained with a hard landscape surface.

3.3 Issue 2 - Council issue of a Section 33A Notice:

The Planning etc. (Scotland) Act 2006 introduced a new section (S33A) in force from August 2009 giving the Planning Authority power to require the owner of land, where development had been unlawfully carried out, to make a retrospective application for planning permission for the development. The principal purpose of Section 33A is to enable the Planning Authority to deal with an unauthorised development **where it would be minded to approve the application**, particularly where that application would be subject to conditions. There is no right of appeal against a Section 33A Notice.

The owners were served with the S33A Notice (dated 09 September 2010) by recorded delivery. To assist them, the application form was substantially completed, and exceptionally, the normal planning application fee was waived. They were given 28 days for submission of the planning application for change of use from disused vacant ground forming part of a former gas works site to private garden ground. Immediately following service of the S33A Notice the Planning Service received a complaint on the owners' behalf about Enforcement Action appearing on the publicly available Planning Register. Service of a Section 33A Notice is a first stage of formal enforcement action and the Council is legally obliged to publish the Notice in the Planning Register.

3.4 Issue 3 - Enforcement Action:

As no planning application has been received within the specified period, the only course of action available for the Council to seek to regulate the breach of planning control was to pursue further enforcement action. The Enforcement Notice must also be published in the Planning Register. This course of action accords with the Council's agreed Enforcement Strategy and is delegated to officers. Accordingly, an Enforcement Notice dated 15th October 2010 was served upon the owners, requiring that the unauthorised use of the site as garden ground shall cease either permanently or until an approved scheme to eliminate the potential risk of harm has been implemented to the satisfaction of the Council.

3.5 Issue 4: Contamination and how it should be dealt with

The ultimate responsibility for dealing with the problem rests with the owners of the affected land. Whilst the Council has a duty to ensure that the matter is appropriately dealt with, the Council is under no obligation to carry out any works or meet the cost of any works.

When the Council suggested to BG Transco that they were liable for the pollution caused by previous gas operators (for whose actions BG Transco were legally responsible) BG claimed to escape liability on two statutory grounds, (firstly) that when they sold the ground responsibility passed to the purchasers (the current owners) because **BG made relevant information available to interested parties when the site was marketed**, and (secondly) that **the land was vacant and disused** and BG did not expose any person to risk because they did not bring anyone onto the land nor did they disturb the affected sub-soils by digging them up and planting them thus potentially linking the persons using the garden or its produce with the contamination.

The sellers having published the existence of the reports, the owners could reasonably have known about the contamination if they had:-

- (a) obtained a copy of the planning consent¹ that in part related to the sale of the land and was highlighted in the sale particulars, and/or
- (b) if they obtained copies of the Desktop Environmental Study and Physical Site investigation reports mentioned in the Sales Particulars to be available to the successful bidders.

(The owners did have a copy of these Sales Particulars).

¹In November 1998, British Gas plc had obtained outline planning permission for the erection of one house on land to the rear of 101 East Stirling Street (C/98/240), which included the land to which this application relates. This consent was allowed to expire, having been replaced by a subsequent application for a single house on an amended site which did not include any of the land that is the subject of this report.

Although there is no need for full remediation of the subject site and the Council has no legal obligation to carry out or pay for any works necessary to address any contamination problem, the report to Council of 12th March 2009 considered whether this additional site acquired by the owners of 5 Woodburn Way should be included as part of the voluntary scheme by the Council to

deal with the gardens of residential properties at Woodburn Way/Henry Street (including the original garden of 5 Woodburn Way). The Council agreed that the additional area of land at 5 Woodburn Way, Alva would be included in the voluntary scheme only if the owners agreed to grant to the Council a Standard Security over the property sufficient to cover the full cost of works attributable to the additional site, and that if that could not be negotiated, then the Council would not be involved in remediation of that additional site. The owners offered a £5,000 Standard Security secured over only the additional ground and as such the terms of the Council decision were not satisfied. That fell far short of the Council's pre-condition and thus in accordance with the minuted decision the additional ground was not included in the voluntary scheme, which was completed some time ago and the maintenance period has expired. Accordingly there are no outstanding issues relating to the voluntary scheme.

The current cost to remediate the site is estimated to be at least £75-80,000. Albeit unnecessary, had the same works been undertaken on the additional ground at the time the voluntary scheme with carried out, the cost would have been £60-70,000, far in excess of the £5,000 security offered by the owners.

Furthermore, in the intervening period the Council's accounting rules have been clarified to the effect that Council capital funding can no longer be used to fund private property and in this case the cost of remediation to such property. The Council does not, therefore, have a budget for such work.

The other option available to the Council is to serve a formal Remediation Notice under the Environmental Protection Act 1990 as amended. Such a Notice would not be suited to a situation involving a relatively small piece of ground in private ownership where there is no overarching public benefit to balance even the preliminary cost to the Council (£18,500 for a Detailed Quantitative Risk Assessment (DQRA) to be undertaken prior to commencing the statutory process compared to a value of £5000 assessed by the owners' surveyors for the ground after treatment). Any works carried out in response to the Notice would benefit only the owners and their family.

The land only requires remediation involving costly removal and replacement of soils if the owners continue to use it as a soft landscaped garden. Cessation of that use or appropriate hard landscaping would negate any requirement for a solution similar to that already carried out under the voluntary scheme. **No-one would reasonably and sensibly contemplate expending some £75,000-£80,000 on an action which is not needed, simply to achieve something of a value of £5,000.**

The owners have been advised of the environmental health concerns arising from continued use of the garden purposefully as soft landscaping, planting and vegetable growing.

3.6 Issue 5: - Remediation of the Woodburn Way properties (including the original garden of 5 Woodburn Way)

In June 2008, the Council agreed to pursue a voluntary scheme whereby it would arrange for affected parts of the approved gardens of residential properties (at Woodburn Way/Henry Street) that had been constructed on or near the site of the former Alva Gasworks to be appropriately treated at the

Council's cost. The developer had long since gone into liquidation and no longer existed and the current owners of the houses, even if they were original purchasers from the developer, could not possibly have known that the dedicated garden ground was contaminated when they bought the houses. As such, these circumstances were entirely different from those which arise in this case where the owners could reasonably have known about the contamination, the ground is not dedicated to the associated house, planning consent was not secured and full remediation is neither necessary, economically viable, or affordable. The total cost to the Council, including prior site investigation costs was around £400,000, with 5 Woodburn Way (authorised garden area) costing around £50,000.

4.0 Summary of Options

- 4.1 To take no further action is not a feasible option as the Council has a statutory duty to pursue such action as is necessary to reduce the potential risk of significant harm to an acceptable level.
- 4.2 It appears that the owners consider that there remains an option whereby the Council will carry out voluntary remediation of the unauthorised extended garden in the same manner as it did in respect of the gardens already remediated. When the owners declined to provide the security required by the Council decision of 12 March 2009, the second part of the decision took effect and the Council "will not be involved in remediation". The voluntary remediation contract duly proceeded excluding the extended ground and was completed. Moreover this report has already demonstrated that regardless of the Council decision, such an option is not economically viable, not necessary, and not in the public interest.
- 4.3 Accordingly the Council has subsequently required to consider its statutory position, it being clear from the volume of enquiries, questions, and representations made by and on behalf of the owners which have been devoted exclusively to challenging the decision already taken by the Council, either directly or indirectly, that a viable voluntary scheme for remediation was not attainable.
- 4.4 The Council could proceed with formal Remediation action under Environmental Protection legislation but investigations and further discussions with the technical consultants have confirmed that a Detailed Quantitative Risk Assessment (DQRA) would be required at a cost greatly in excess of the value of the ground as opposed to the Generic Quantitative Risk Assessment sufficient for the purposes of the voluntary scheme. The necessary scientific assessment will require different and additional data to be evaluated because the Council would now be dealing only with the extended ground but this would be come within the DQRA. This report has already set out that the formal statutory process is not well suited to a small piece of ground in private ownership. It should also be noted that the formal statutory process would also involve formal notices to be published in the Contaminated Land Register and one of the aspects which commended the voluntary scheme was that it did not result in formal notices being published and thus removed the possibility for the owners of the property being blighted. Whilst another and more financially feasible option remains available pursuit of formal Remediation action is not considered a currently viable option.

- 4.5 The other statutory option available to the Council as Planning Authority is to seek to regulate the breach of planning control which had occurred. In this regard Officers have already followed this option under delegated powers by serving the S33A Notice inviting the owners to submit a planning application and the follow-up Enforcement Notice.

This option represents the most cost effective and flexible approach to the resolution of the problem. The Council is not obliged to embark upon a further costly ground investigation exercise and if the issue can be dealt with within the confines of appropriate planning conditions the Council can pursue with the owners a resolution of the contamination issue in a manner which need not involve financially non-viable costs of the magnitude of a scheme requiring removal of contaminated soils and their replacement with fresh soils.

The adoption of this option was considered necessary and appropriate not only in the wider public interest but also to limit the continued risk to the Council in failing to pursue formal action in terms of its various statutory duties.

5.0 **Sustainability Implications**

None

6.0 **Resource Implications**

6.1 *Financial Details*

- 6.1.1 The full financial implications of the recommendations are set out in the report. This includes a reference to full life cycle costs where appropriate. Yes

- 6.1.2 Finance have been consulted and have agreed the financial implications as set out in the report. Yes

6.2 *Staffing*

There are no resource implications for the Council from the recommendations of this report, beyond the time of staff at an appropriate level within the authority in undertaking normal regulatory work. To date, however, an extraordinarily high volume of staff time has been deployed in dealing with the many and repetitive Freedom Of Information and other enquiries generated by this issue and it is hoped that this report adequately and comprehensively addresses this issue.

7.0 **Exempt Reports**

- 7.1 Is this report exempt? Yes (please detail the reasons for exemption below) No

8.0 Declarations

The recommendations contained within this report support or implement our Corporate Priorities and Council Policies.

(1) **Our Priorities 2008 - 2011** (Please double click on the check box)

- | | |
|--------------------------------------------------------------------------|-------------------------------------|
| The area has a positive image and attracts people and businesses | <input type="checkbox"/> |
| Our communities are more cohesive and inclusive | <input type="checkbox"/> |
| People are better skilled, trained and ready for learning and employment | <input type="checkbox"/> |
| Our communities are safer | <input checked="" type="checkbox"/> |
| Vulnerable people and families are supported | <input type="checkbox"/> |
| Substance misuse and its effects are reduced | <input type="checkbox"/> |
| Health is improving and health inequalities are reducing | <input type="checkbox"/> |
| The environment is protected and enhanced for all | <input checked="" type="checkbox"/> |
| The Council is effective, efficient and recognised for excellence | <input type="checkbox"/> |

(2) **Council Policies** (Please detail)

Council's Enforcement Strategy

9.0 Equalities Impact

- 9.1 Have you undertaken the required equalities impact assessment to ensure that no groups are adversely affected by the recommendations? Yes No

10.0 Legality

- 10.1 It has been confirmed that in adopting the recommendations contained in this report, the Council is acting within its legal powers. Yes

11.0 Appendices

1 Site Plan

12.0 Background Papers

- 12.1 Have you used other documents to compile your report? (All documents must be kept available by the author for public inspection for four years from the date of meeting at which the report is considered)

Yes (please list the documents below) No

Council Report 12th March 2009 entitled Remediation of Contaminated Land

Report to Planning Committee of 28 October 2010

Planning etc. (Scotland) Act 2006

Council's Enforcement Strategy

Environmental Protection Act 1990 as amended

Planning Consent C/98/240

Section 33A Notice

Enforcement Notice

Copy correspondence between the Owners and their solicitors in 2001

Author(s)

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Approved by

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Garage Garage

Clackmannanshire Council

Clackmannanshire Council

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Scott Court

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WOODBURN WAY

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HENRY STREET

54 to 88

288500

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Date:
18-Oct-2010

Unauthorised Use Of Garden Ground To Rear Of 5 Woodburn Way, Alva. FK12 5LB

Ward: Clackmannanshire North

OS Grid Ref: NS 884 969

0 10 20 30 40 Meters

Scale: 1:500

Clackmannanshire Council

www.clacksweb.org.uk

Services to Communities
Kilnraigs
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