



Government of **Western Australia**
Contaminated Sites Committee

Decision in Respect of Appeal Against Classification

Contaminated Sites Committee Reference No. CSC 10/2014

Contaminated Sites Act 2003, Part 8, Division 2

Appellant: Anketell Commercial Pty Ltd

Site: Lot 3 on Diagram 83118 as shown on Certificate of Title Volume 2034 Folio 48
Known as 793 Thomas Road, Anketell, WA, 6167

Decision: **Appeal Dismissed**
Classification remains *possibly contaminated – investigation required*

Date: 06 November 2015

1.0 Summary

- 1.1. The site is currently owned by Anketell Pty Ltd. The site address is Lot 3 on Diagram 83118 as shown on Certificate of Title Volume 2034 Folio 48 known as 793 Thomas Road, Anketell, WA, 6167.
- 1.2. The site is approximately 1.6957 hectares and is currently a vacant bush block. The southern boundary of the site fronts onto Thomas Road and an unnamed unsealed road runs along the western boundary of the site. The site is odd-shaped with the widest portion adjacent to Thomas Road with the site narrowing towards the north. There are several dirt tracks throughout the site.
- 1.3. Lots 2 and 3 are currently zoned 'development' under the City of Kwinana's Town Planning Scheme No 2 and zoned 'urban' under the Metropolitan Region Scheme.
- 1.4. The CEO of the Department of Environment Regulation (DER) classified the site *possibly contaminated – investigation required* (PCIR) by a Notice of Classification dated 20 August 2014, pursuant to the *Contaminated Sites Act 2003* (Act).
- 1.5. The Appellant, Anketell Commercial Pty Ltd represented by Mr Ian McKellar of Civil Technology, first lodged the appeal to the Contaminated Sites Committee (Committee) on 4 September 2014.
- 1.6. The Appellant provided further grounds of appeal in a letter dated 6 November 2014 with an attached Report by Ace Environmental titled '*Asbestos and Remediation and Validation Report*' (Ace Environmental) dated October 2014.
- 1.7. On 7 November 2014, in accordance with section 80 of the Act, the Committee requested the CEO of the DER to provide a report on the appeal. The report was received on 31 December 2014 and subsequently forwarded to the Appellant for a response.
- 1.8. On 24 February 2015, the Appellant provided a response to the CEO's Report.

- 1.9. On 21 April 2015 the Committee requested the CEO to comment on the Appellant's response.
- 1.10. On 8 June 2015, the Committee received the CEO's comments in a letter dated 3 June 2015.
- 1.11. On 30 June 2015, the Committee forwarded the CEO's comments to the Appellant for a further response.
- 1.12. The Appellant provided the further response in a letter dated 14 August 2015.
- 1.13. The Committee considered all documents provided by both the Appellant and the CEO throughout the document exchange listed above.
- 1.14. The Committee considered all grounds of appeal and decided that the appeal should be dismissed for the reasons set out below and that the classification should remain *possibly contaminated – investigation required*. Under section 82(2) of the Act this decision is final and without appeal.

2.0 Appeal Grounds (summary)

The Appellant raised a number of grounds of appeal in the initial appeal document and subsequent correspondence. The wording of the grounds was confusing and repetitive. In summary, the grounds of appeal were:

- 2.1. Unknown third parties dumped the waste on the site illegally.
- 2.2. The CEO did not consult the CEO of the Department of Health (CEO of DoH) as required under the CS Act.
- 2.3. The CEO did not conduct a risk assessment as required under the CS Act.
- 2.4. The CEO did not inquire about future proposals to change the use of the site.
- 2.5. There is no evidence that the soil at the site was at any stage contaminated.
- 2.6. There is no evidence the vegetated areas were contaminated.
- 2.7. The CEO did not require a standard contamination condition on Approval 150300 and this is evidence that the contamination issues at the site have been largely resolved.
- 2.8. The Committee is not constrained as the CEO may be in classifying the site. In view of the remediation that has been undertaken since the CEO's decision, the classification should be changed to *'report not substantiated'*.

3.0 DER responses to the Appeal (summary)

- At the time of classification, information indicated that the site had been used for unauthorised and uncontrolled disposal of waste materials. A land-use that has the potential to cause contamination.
- ACM fragments were dispersed in several locations due to vehicle movements. Presence of significant quantities of ACM at the site, some in a highly fragmented state presents a potential risk to human health.
- The Act does not place any requirement on the CEO to consult with the owner prior to the classification to verify information provided in the Form 1 Report.

- The Appellant advised by telephone conversation on 4 August 2014 that he was aware that unauthorised waste disposal had occurred, verifying information provided in the Form 1 Report. Mr Barber provided no further information relating to the contamination of the site.
- The DER in consultation with the Department of Health (DoH) classified the site PCIR on 20 August 2014.
- DER considered the soils at the site were contaminated ACM levels above the asbestos guideline criteria (for residential sites it is 0.015w/w asbestos for ACM).
- DER and DoH have a Memorandum of Understanding. The multi-purpose classification CSP04 form was agreed between both agencies and signed on 19 August 2014 with the current classification of PCIR.
- The report – *Asbestos Remediation and Validation Report*, October 2014 was referred to DoH for technical advice on the adequacy of the asbestos remediation and validation conducted on the site in August 2014.
- DoH advised that cleared portions of the site had been remediated and were suitable for the proposed residential land use.
- Aerial imagery indicated that vegetation increased from 2008 – 2014. Fly tipping occurred in areas that are now densely vegetated. Insufficient information was provided in the Ace Environmental report to show that these areas had been adequately investigated or remediated.
- DER and DoH agree that these dense vegetated areas need further investigation in accordance with the appropriate guidelines.
- Section 16 of the Act prohibits of the CEO from reclassifying the site '*report not substantiated*'.
- The site was vacant at the time of classification. A subdivision application was lodged for the site and adjacent properties with the Western Australian Planning Commission in July 2014 for redevelopment and residential purposes. DER did not consider it necessary to seek further information from the Appellant on the future use of the site.
- Based on the contamination uncertainties and the proposed redevelopment of the site for sensitive land use, DER recommended that a contamination condition EN9 be applied to the approval of the subdivision application, as published in the Model Subdivision Conditions Schedule (Department of Planning and WAPC, October 2012)
- DER recommends the appeal be dismissed and that the PCIR classification should remain, pending the submission of further information on the vegetated portions of the site to the satisfaction of DoH.

4.0 Committee's decision

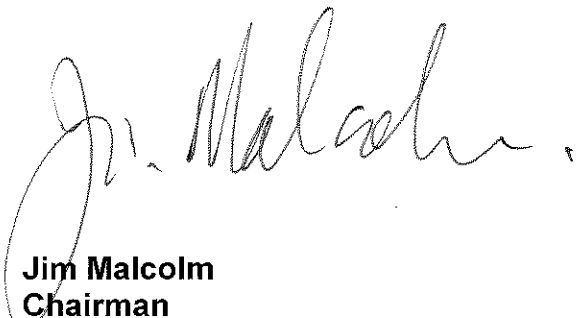
- 4.1. The Committee has decided that ground 2.1 is not a valid ground of appeal against the classification of the site.
- 4.2. The Committee has decided that regarding ground 2.2 the CEO did consult the CEO of DoH and reach agreement on the classification of the site.
- 4.3. The Committee has decided that regarding ground 2.3 the Act does not require the CEO to conduct a risk assessment before classifying a site.
- 4.4. The Committee has decided that regarding ground 2.4 the classification of a site is not determined by the possible future changes of use.

- 4.5. Regarding ground 2.5 the Committee has decided from the Ace Environmental report provided by the Appellant that contamination was found on the site and that some remediation was undertaken.
- 4.6. Regarding ground 2.6 the Committee has decided on the basis of aerial photographic evidence in the Ace Environmental report that the vegetated area has changed through time and that areas now vegetated could have been sites of the dumping of waste and vehicle movements in the past.
- 4.7. The Committee has decided that in relation to ground 2.7 the CEO's requirements in relation to a proposed commercial development involving a car park is not evidence that the CEO's views have changed regarding the classification and is not sufficient to override the CEO's recommendation that the appeal should be dismissed and that the classification should remain unchanged for the present.
- 4.8. Regarding ground 2.8, the Appellant has correctly identified the Committee's review as *de novo* but has misunderstood how that affects the Committee's review. The Committee can take into account additional information that existed at the time of the CEO's decision but might not have been before the CEO when the original decision was taken. This does not extend to the Appellant's remediation undertaken since the classification was made. The CEO's decision cannot be found to be faulty on the ground of failing to consider information that did not exist when the decision was taken. The Committee has decided that this ground of appeal should be dismissed.

5.0 Conclusion

The Committee has decided that all grounds of the appeal should be dismissed and that the classification should remain *possibly contaminated – investigation required*.

Note: section 82(2) of the Act provides that the CSC's decision under that section is final and without appeal. Section 83 of the Act provides that the CEO of the Department is to give effect to the outcome of the appeal as soon as practicable and to ensure that the details are published in the prescribed manner.



Jim Malcolm
Chairman

and as agent for and on behalf of
the Contaminated Sites Committee