



East Ayrshire Local Development Plan

Supplementary Guidance

Financial
Guarantees

Supplementary Guidance: Financial Guarantees

Contents

- 1. Context and purpose of supplementary guidance**
- 2. Why are financial guarantees required?**
- 3. The approach to securing financial guarantees**
 - **Key principles**
 - **Process**
 - **Monitoring and review**
 - **Standardised wording**

1. Context and Purpose of Supplementary Guidance

1.1 The purpose of this Supplementary Guidance is to provide detailed guidance on policy RE5 of the East Ayrshire Local Development Plan, which requires that where necessary in terms of the scale and complexity of the proposal, and the consequences of any failure to restore the site, the Council will require an appropriate financial guarantee in respect of wind energy, waste management, landfill and electrical infrastructure proposals, to ensure that all decommissioning, restoration aftercare and mitigation requirements attached to planning consents can be met in full.

1.2 The Council recognises the importance of ensuring that appropriate restoration plans are in place for infrastructure projects, to ensure that when such developments come to an end, land is successfully restored to a high standard. The implementation of such restoration is crucial in safeguarding the quality of East Ayrshire's environment in perpetuity and to ensuring any impact on local communities is minimised.

1.3 Planning conditions and/or Section 75 legal obligations attached to planning consents for specific developments can require appropriate decommissioning, restoration, aftercare and mitigation measures to be put in place. The purpose of requiring a financial guarantee is to ensure that if the development or its restoration is not carried out in line with the approved plan, the Planning Authority can call on all or part of the financial guarantee to finance the carrying out of the outstanding works. This includes the situation where a company is in liquidation and where there is a significant planning breach.

Policy RE5 and this Supplementary Guidance apply to the following types of development where necessary in terms of the scale and complexity of the proposal to the following types of application:

- Wind energy developments of all scales
- Waste management and landfill
- Electrical infrastructure projects

1.4 This Supplementary Guidance relates only to the Local Development Plan and does not at this stage therefore, apply to minerals development (including open cast coal surface mining, quarries or onshore oil or gas exploration), which will be the subject of a separate LDP. The Supplementary Guidance will be subject to review and amended at a future date to apply also to the forthcoming Minerals Local Development Plan.

2. Why are financial guarantees required?

2.1 It is expected that developers carry out restoration proposals as per their planning consent. This being the case, the financial guarantee covering the financial liability of the development during the overall phases will not be invoked.

2.2 However, financial guarantees are an important means of ensuring that key obligations are met in the event that the developer is unable or unwilling to comply with the consented plans. This includes the scenario in which the developer is in liquidation or where there is a significant planning breach.

2.3 Financial guarantees are also an important means of providing reassurance to local communities that decommissioning, restoration, aftercare and mitigation obligations will be met should a liquidation or significant planning breach occur.

2.4 Effective financial guarantees should reflect the scale and type of development proposed, drawing on the expertise and professional independent assessment of industry specialists or consultants, who act on behalf of the Council prior to the consideration of any application and/or as compliance monitors on behalf of the Council during the course of the development. A fundamental principle of this concept is that the value of the financial guarantee must, at every stage of the development, be sufficient to cover the outstanding works required to meet the requirements of the planning consent. On receipt of the independent assessment of the scale and type of the financial guarantee required for the development, the Council will then consult the developer and agree the financial guarantee to be secured against the development. Regular reviews of the financial guarantee are therefore essential and the review period will be based on the nature of the development.

3. The approach to securing financial guarantees

Principles

3.1 The approach to financial guarantees is based on three principles of practical importance:-

- In support of their planning applications, applicants will be expected to set out the specific details of the financial guarantee arrangement they propose. This will require to comply with this Supplementary Guidance and will form part of the assessment process by the case officer and, if relevant, the Planning Committee;
- Any such financial guarantee arrangement will require to be put in place prior to commencement of the development on site; and
- Any variation or deviation which an applicant may subsequently propose to a financial guarantee arrangement previously agreed when approving their application will require to be approved by the Planning Authority. Where the original planning decision was taken by the Planning Committee or the Council, any variation will be reported back to the Planning Committee or the Council for their further consideration.

3.2 Within the Council, financial guarantees will be managed corporately, by the relevant Depute Chief Executive, taking into account, where relevant, assessments by:

- Independent Environmental Consultants;
- Finance Services;
- Legal Services;
- Planning and Economic Development Services, and
- Additional external advice as required.

Process

3.3 In order to secure an appropriate financial guarantee the following steps will be followed:

1. All applications for the types of developments listed in Section 1 will require to be accompanied by detailed proposals for decommissioning and site restoration, in accordance with the Environmental Statement. This will include a breakdown of costs and confirmation of the restoration guarantee proposed.
2. The proposed decommissioning and restoration plans will be assessed by the Council's independent assessor, who shall review the proposed scheme and provide the Council with an independent assessment of the costs of decommissioning, restoration and aftercare throughout the life of the proposed development (including the operational, restoration, aftercare and mitigation periods). The cost of this assessment will be met by the developer through a formal legal agreement under Section 69 of the Local Government (Scotland) Act. The maximum decommissioning, restoration, aftercare and mitigation figure, as provided by the independent consultant and taking account of inflation, will be used by the Council as the required amount (quantum) in any financial guarantee to be provided.
3. Table 1 below outlines the mechanisms available for providing the financial guarantee alongside a risk rating associated for each form of guarantee. The risk rating is intended to be used to inform consideration of the appropriateness and acceptability of each mechanism in the context of individual planning applications. Financial guarantees with a high risk rating are unlikely to be acceptable to the Council, unless supported by an alternative agreement and/or additional compensatory arrangements that may be put forward by the operator. **The Council's is likely to give preference to low risk options that minimise risk to community and environmental interests.**

Financial guarantee type	Risk level (as assessed by the Council)
Surety bond	Medium
Bank guarantee	Medium
Parent company guarantee	High
Mutual funds	High
Escrow account	Low
Pay as you go Escrow	High
Pay as you go Escrow / bond	Low

Table 1: Types of financial guarantees and their associated risk

4. On receipt of the information from the applicant and the independent assessor, the Council's Finance, Legal and Planning Services will consider, at the earliest possible opportunity:
 - the purpose(s) of the proposed financial guarantee;
 - the associated risk rating of the proposed financial guarantee with reference to the risk assessment contained within the Cabinet Report of 21 May 2014 entitled 'Decommissioning, restoration, aftercare and mitigation financial guarantees' and the Council's Accounting Policy Bulletin 8A 'Financial Guarantees', and
 - the sufficiency of the quantum proposed, taking into account the assessment provided by the independent assessor.
 - the financial strength of the proposed provider of the guarantee, if appropriate.

Consideration shall also be given at this stage as to any requirement for further external advice.

5. The following matters will be considered by officers when assessing the terms of the proposed financial guarantee:
 - The reason why the financial guarantee is required i.e. decommissioning, restoration, aftercare, mitigation or in combination;
 - The Guarantee should be sufficient to cover all aspects of the project
 - The risk it is required to cover i.e. breach of any planning conditions, associated legal obligations relative to decommissioning, restoration, aftercare or mitigation or insolvency;
 - The guarantee should be able to be utilised to cover all elements of risk
 - The length of time the financial guarantee is required to cover and its expiry;
 - The guarantee should be sufficient to cover operational (including the setting up period), decommissioning and aftercare requirements.
 - What will constitute a valid call being made on the financial guarantee;
 - The guarantee should be sufficient to be called upon should a planning breach or insolvency takes places.
 - When can the monies be claimed;
 - The Planning Authority should be able to call on the guarantee prior to carrying out any necessary works.

- The financial guarantee's quantum profile and the triggers for reduction in value and associated timescales.
 - The financial strength of the issuing institution, where appropriate.
6. The proposed terms of any financial guarantee, will be taken into account in the determination of the planning application. In line with the Council's scheme of delegation, the consideration of the financial guarantee will be included within the report determined under delegated authority or to be presented to the appropriate decision-making forum / Committee.
 7. Should an application be approved, an appropriate planning obligation will be required to ensure that the financial guarantee is put in place. As per policy RE5, no development will be permitted on site until the guarantee is in place and relevant planning conditions or obligations discharged.

Monitoring and review

3.4 Compliance monitoring is essential to ensuring that all pre-commissioning, decommissioning, restoration and aftercare requirements are fully met. The Compliance Monitoring regime shall ensure that the operators comply with the agreed scheme and that their actions do not adversely affect the site restoration liability.

3.5 Consistent with RE5 and, as part of any compliance monitoring regime agreed through the development management process, the financial guarantee will be reviewed at regular intervals based on the nature of the development to ensure that it is in line with the cost of meeting any pre-commissioning, decommissioning, restoration and aftercare obligations at any point in the development with the ability for funding to be decreased or, if necessary, increased as various stages of a development are completed and the extent of disturbance is reduced (or increased). For clarity, the review should assess the extent of development undertaken to the review date and include an assessment of likely future actions that may be undertaken on site until the next review date.

3.6 As per policy RE5, the regular review of financial guarantees should include a review of (i) the guarantee mechanism, to ensure this is still appropriate; (ii) the value covered by the guarantee, to ensure this continues to meet all costs, including a review of the inflationary factors that were initially incorporated, and if applicable; (iii) the remedial measures necessary to ensure that the financial liability meets the terms of the financial guarantee.

3.7 Where, following review, it is demonstrated that the existing financial guarantee requires to be amended, this should be implemented by the operator within 28 days of notification that an amendment is required. Failure to provide a financial guarantee which equates to the financial liability or for the operator to undertake the necessary remedial works to reduce financial liability in an agreed time frame subject to compliance monitoring, would constitute a significant planning breach, at which time consideration will be given to utilising enforcement measures and calling in the bond.

Standardised wording

In order to ensure a consistent approach, standardised wording for financial guarantees, planning conditions and legal obligations is being developed, which will be used as templates for all documentation. These will be available from the Council's Planning Service.



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