East Ayrshire Council
Comhairle Siorrachd Àir an Ear

East Ayrshire Local Development Plan 2

SUPPLEMENTARY GUIDANCE

FINANCIAL GUARANTEES

1. Policy context

1.1 The purpose of this document is to provide detailed Supplementary Guidance on policy FIN1 of the East Ayrshire Local Development Plan 2 (LDP2) Policy FIN1, as set out below, requires that, where necessary in terms of the scale and potential environmental impact of a proposal and/or where restoration and aftercare are essential, the Council will require an appropriate financial guarantee in respect of minerals, renewable energy, waste management, electrical infrastructure and other proposals as appropriate, to ensure that all decommissioning, restoration, aftercare and mitigation requirements attached to planning consents can be met in full.

Policy FIN1: Financial Guarantees

Where necessary in terms of the scale and potential environmental impact of a proposal, and/or where restoration and aftercare are essential, the Council will require a financial guarantee for renewable energy, minerals, waste management and electrical infrastructure projects, to ensure that all decommissioning, restoration, aftercare and mitigation requirements attached to planning consents can be met in full. A financial guarantee may be required for other types of development, dependent on scale, potential impact and the requirement for decommissioning and restoration.

Any planning permission granted for such developments will be appropriately conditioned and/or subject to a Section 75 obligation to ensure that a financial guarantee is put in place, to the satisfaction of the Council. No development will be permitted on site until any legal obligation and planning conditions have been discharged by the Council.

The financial guarantee will be reviewed at regular intervals, by an independent party, to ensure it remains of a sufficient level to cover all potential restoration, aftercare, decommissioning and mitigation costs.

This policy will be accompanied by Financial Guarantees Supplementary Guidance.

1.2 In terms of national policy, paragraph 247 of Scottish Planning Policy supports the use of financial guarantees, in relation to minerals extraction, as a means of ensuring restoration and aftercare are undertaken to a high standard. This support is carried forward into the draft NPF4, which, in policy 22 supports the consideration of a range of financial guarantee options to provide assurance that a high standard of restoration and aftercare will be delivered. Over the last decade, with the increase in renewable energy development within East Ayrshire, the council has established a robust process of requiring financial guarantees for renewable energy and other non-minerals developments. This is supported through policy FIN 1 of LDP2.

2. Basic principles

Why is a financial guarantee required?

2.1 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 an acceptable standard which should take account of existing land use and employ the best environmental practices. 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.

2.2 Planning conditions and/or obligations for specific developments require decommissioning, restoration, aftercare and mitigation measures to be put in place. Developers are required to comply with all such conditions and obligations associated with their development. That being the case, any financial guarantee would not require to be called.

2.3 The purpose of requiring a financial guarantee is to ensure that if the development is not decommissioned or the site not restored in line with what has been approved, as the developer is unable or unwilling to undertake the work, the Planning Authority can call on all or part of the financial guarantee to finance the completion of such works. This includes the situation where a company is in liquidation or where there is a significant planning breach. Under normal circumstances, enforcement action can be taken with costs recouped from the developer or land owner if those parties still exist. A guarantee must, however, be in place so that eventualities such as liquidation can be managed in such a way as to ensure that the Council is not forced to undertake and fund restoration or decommissioning works itself at its own expense. Guarantees are also an important means of providing reassurance to local communities that decommissioning, restoration, aftercare and mitigation obligations will be met.

What developments are financial guarantees required for?

2.4 The requirement for a financial guarantee, as per Policy FIN1 of LDP2 and this Supplementary Guidance, applies to the following types of application, where it is necessary in terms of (i) the scale; (ii) the potential environmental impact; and/or (iii) where restoration and aftercare are essential:

- **Minerals extraction**
- **Renewable energy**
- **Waste management**
- **Electrical infrastructure projects**

As per FIN1, there may be other types of application that a financial guarantee is required for, over and above the four uses listed above. This would be due to their scale, potential impact and possible need for restoration and aftercare.

2.5 The planning authority will determine the need for a financial guarantee, taking account of the factors set out in paragraph 2.4 and the level of risk should a site not be restored. This will involve considering whether the development involves a significant change in land form or has the ability to significantly affect the environment if not implemented as per the consent. The requirement for a financial guarantee must be considered from the perspective of development not taking place as consented at any stage of the development and not just at the end of its life. A financial guarantee will normally only be required for temporary consents where there is a requirement for decommissioning and/or restoration to be considerations from the outset. However, depending on the nature of a development, some permanent consents may also require to be supported by a financial guarantee.

2.6 The types of development listed above present a number of risks in their delivery. Financial guarantees therefore account for a wide variety of breaches that may take place or as a result of works not undertaken. Financial guarantees should not be seen exclusively as a mechanism for ensuring the end decommissioning/ restoration. Breaches or works not undertaken include, but are not limited to:

- Offsite obligations
- Landscaping
- Habitat management

How will financial guarantees be secured through the planning process?

2.7 The Council, through policy FIN 1, requires that a financial guarantee should be secured by planning condition and/or planning obligations. It is the Council's preference that both planning condition and obligations be used.

- The planning condition will require that an effective means of decommissioning/restoration must be in place, before the commencement of development.
- The planning obligation will set out the detail of what will be required in the financial guarantee which should include the financial guarantee form and quantum figure.

The combination of the planning condition and legal agreement provides a full range of enforcement powers to the Council, that neither on their own can provide. This is important in providing comfort to the Council and communities should matters arise where enforcement action is required. This approach is supported by the Heads of Planning Scotland Position Statement on 'The Operation of Financial Mechanism to Secure Decommissioning, Restoration and Aftercare of Development Sites' (published October 2018).

Who can be party to a financial guarantee?

2.8 A landowner may be party to a financial guarantee, along with the Council and the developer. For the Council to agree to a shared financial guarantee, all parties must meet the Council's requirements in terms of (i) the form of financial guarantee; (ii) the value of financial guarantee and (iii) if applicable, the guarantee provider, in terms of its financial security.

2.9 The planning obligations/financial guarantee will set out clearly the circumstances, whereby any party can draw on the financial guarantee. To reduce the financial risk, the

Council will require that any claims on the financial guarantee by a landowner who is party to an agreement, shall result in monies being paid to the Council in the first instance. Thereafter, the landowner would be able to make a claim to the Council with evidence the financial guarantee monies will be put to their intended purpose.

3 Securing Financial Guarantees - Process

3.1 In order to secure a financial guarantee the following steps will be followed:

Submission of a draft decommissioning and restoration plan

I. All applications for the types of developments listed in Section 1 will require to be accompanied by an outline Installation, Operation, Decommissioning and Restoration Plan. The plans must be sufficiently detailed in terms of their delivery to allow an effective estimate of costs. For minerals extraction proposals, the outline restoration plan should take a phased approach to restoration, setting out the order of restoration across the site.

II. **Submission of the breakdown of costs to implement the plan and proposed financial guarantee mechanism.**

Alongside the outline plan, the developer must submit a breakdown of costs to implement the Plan. Details must also be provided of the proposed financial guarantee mechanism to be used

III. **Independent assessment of the costs**

The applicant's 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, aftercare and mitigation. This independent assessment is critical to ensuring the quantum accurately reflects costs; if the calculation of the guarantee quantum is flawed then no matter how efficient monitoring and review mechanisms are, the funds available will likely be insufficient to restore the site to the expected standard. This is a significant risk to compliance with the planning permission. In calculating and verifying the quantum, consideration needs to be given to building in extra costs that might be incurred by a planning authority doing these works, as opposed to an operator already established on the site.

Applicants are expected to meet the cost of the independent assessment. The maximum decommissioning, restoration, aftercare and mitigation figure, as provided by the Council's independent assessor and taking account of inflation, will normally be used by the Council as the required amount (quantum) in the financial guarantee to be provided. An alternative quantum may be negotiated, where there is evidence to support it, subject to final agreement by the Council.

IV. **Assessment of the proposed type of guarantee**

As set out in the Appendix, there are a number of types of financial guarantees available to developers; the appropriate type will depend on the nature and scale of the proposed

development. The Council will give preference to low risk options that minimise financial risk and ultimately reduce the risk of decommissioning and/or restoration not being carried out as intended. The Council will not accept guarantees that are deemed high-risk. For more information on the types of financial guarantee available, please refer to the Appendix. All those party to the guarantee (i.e. Council, developer and, in certain occasions land owners) must agree to the type of guarantee to be used. In considering the type of guarantee proposed by the applicant, the Council's Finance, Legal and Planning Services will consider:

- The associated risk rating of the proposed financial guarantee;
- The sufficiency of the quantum proposed, taking into account the assessment provided by the Council's independent assessor;
- The financial strength of the proposed provider of the guarantee.

V. Determination of the planning application

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. Any recommendation for approval will be subject to planning obligations to secure the financial guarantee. If the quantum figure is still to be agreed at the time of determination, this will not in principle prevent the Council from determining the application. Further negotiations can take place to reach a quantum figure for inclusion within the planning obligation, which must be agreed prior to commencement of development

Any planning consent will not be issued until the planning obligation has been concluded. As per policy FIN 1, no development will be permitted on site until the guarantee is in place and relevant planning conditions or obligations implemented.

In relation to applications under Section 36 of the Electricity Act (1989), or any other consenting regime, the Local Development Plan and this Supplementary Guidance are material considerations. In setting out its position as a statutory consultee, the Council will request that the content of this SG to be taken on board in any determination by Scottish Ministers, recognising the importance of securing financial guarantees for the applicable development types.

3.2 Within the Council, the work involved in managing and finalising financial guarantees requires the collaborative input of a number of services, primarily Governance Services (Planning and Legal) with strong support from Finance. Final approval is required from the Depute Chief Executive (or any interim substitute should the position be vacant), recognising the importance of financial guarantees to the overall work and responsibilities of the Council.

4 Monitoring & Review

4.1 A fundamental element of the approach to financial guarantees is that the guarantee must be regularly reviewed to ensure that it remains fit for purpose. This is a clear requirement of policy FIN 1. This should ensure that fluctuations to the cost of the decommissioning, restoration, aftercare and mitigation are reflected within the quantum contained in the financial guarantee.

4.2 In most cases, developers will be required to review the quantum of the financial guarantees every 5 years. This requirement will be set out in the panning condition and planning obligation. For certain types of development, such as minerals extraction where operations take place on a phased basis, more regular review may be necessary, often annually, and this will be stipulated in the planning condition/planning obligation. This review must take account of market costings at that time and include an inflationary allocation. 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.

4.3 At the agreed times for review, the developer should provide the Council with a report detailing the proposed quantum value for the forthcoming guarantee period. This should be accompanied by details of the financial guarantee mechanism that is proposed.

4.4 On receipt of the information the Council will instruct an independent review, at the developer's expense, of the information to confirm if the proposed quantum is sufficient. Where, following review, it is demonstrated that the quantum requires to be increased or decreased, this should be implemented by the developer within the time period specified within the condition/obligation.

5 Standardised Wording

5.1 In order to ensure consistency, the Council has developed a standardised approach to the wording of financial guarantees, and associated planning conditions/obligations. These templates will be prepared and refined as appropriate for provision to applicants.

Appendix

Risk Level of Financial Guarantee Type as Assessed by East Ayrshire Council				
Type	**Method**	**Challenges**	**Benefits**	**Risk level**
Pay as you go Escrow/Bond	• Hybrid of a bond and pay as you go escrow • The bond is required to cover the shortfall while the escrow balance accrues.	• Developer required to pay for bond while making deposits to escrow account • Regular accounting process required to ensure escrow instalments paid as per planning conditions/obligations • Bond is subject to regular review • General approach of insurance industry may result in full value of bond not being realised, leading to potential Court proceedings.	• Provides security of funds after breakeven point • Deliverable solution for developers.	**Low**
Escrow account	• Funds deposited in joint ring-fenced bank account to value of the quantum contained in planning obligation • Funds repaid to developer if value of quantum/liability reduces over the lifetime of the development	• Requires large cash deposit by developer	• Funds available to implement conditions/obligations in event of breach • Interest accrues on deposit, although this may be lower than general increase in retail prices.	**Low**
Surety bond (Restoration or aftercare bond)	• Bond value based on technical appraisal, financial structure and track record of developer • Bonds only for limited period usually 5 years	• If called by Planning Authority, provider will claim back money from developer leading an increased risk of liquidation • Bond to be subject to regular review • Risk that developer cannot get a new bond after five years • General approach of insurance industry may result in full value not being realised, leading to potential Court proceedings	• Can provide restoration guarantee for larger sums of development liability	**Medium**

Bank guarantee	• Bank provides restoration guarantee • Bank requirements will depend on financial security of operator Can be provided for periods in excess of 5 years	• If called by Planning Authority, would have a direct financial impact on the developer who may already be in financial difficulty • Calling event could result in liquidation of company • Bank may contest the "calling" leading to delay	• Minimal cost to developer	**Medium**
Parent company guarantee	• Restoration Guarantee provided by parent company. • Legally binding document which can be used to enforce the obligation/call the guarantee	• If parent company is in financial difficulty settlement is unlikely • If the parent company goes into liquidation, the guarantee disappears	• No cost to developer	**High**
Mutual funds	• Trade guarantee schemes, where several operators pay into a fund, allowing risks to be spread • In the event of liquidation, fund pays out up to a maximum predetermined value	• Terms set out a maximum amount that the fund will pay out. Such a scheme would only be acceptably where this amount is greater than the quantum included in the planning obligation. • Not widely used in the sectors falling under this policy, with the exception of quarries. • There will be a limited financial value, constrained by the size of the fund	• Independent provision • Low cost to developer	**High**
Pay as you go Escrow	Money deposited into joint account, on an amount per unit when it is earned by the development i.e. coal extracted, wind energy generated.	• Value of cash in the account does not equate to the liability of the development until at least 5 – 10 years into the development • Regular accounting process required • If liquidation event occurs during the early deficit period, account cannot pay for the restoration. • If planning breach occurs during the early deficit period - possibility that funds would not be available to resolve breach.		

		• If a planning breach occurs which requires shutdown of site in deficit stage of scheme - restoration unachievable		

TYPES OF FINANCIAL GUARANTEE AND THEIR ASSOCIATED RISK. RISK LEVEL AS ASSESSED EAST AYRSHIRE COUNCIL

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