

Financial Guarantees for Minerals Development Supplementary Guidance

Consultation draft: January 2020

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Purpose of the guidance

This draft supplementary guidance has been prepared to support Local Development Plan Policy 49: Minerals and Other Extractive Activities – Supply.

Its purpose is:

- to provide information on financial guarantees to secure the sustainable restoration of minerals sites to beneficial afteruse after working has ceased.

This supplementary guidance is expected to be subject to review and amendment during the period of the Local Development Plan (2019-2024) as the provisions of the Planning (Scotland) Act 2019 are enacted, and work progresses on the review of the third National Planning Framework and Scottish Planning Policy (2014).

How to make comments on the draft supplementary guidance

Starting on 3 February 2020, you may comment on the draft supplementary guidance online at www.pkc.gov.uk/ldp2guidance, or by posting your comments to the Local Development Plan Team at our office at Pullar House, 35 Kinnoull Street, Perth, PH1 5GD, or by e-mail to developmentplan@pkc.gov.uk – the last date for making comments is 16 March 2020.

For more information on the supplementary guidance and the procedures for its preparation and adoption please contact the Local Development Plan team as above or telephone us on 01738 475300.

Privacy notice

HOW WE USE YOUR PERSONAL INFORMATION

The information provided by you will be used by Perth & Kinross Council to prepare and review Development Plan policies, proposals and guidance. Your comments will be considered prior to the adoption of Supplementary Guidance in connection with the Perth and Kinross Local Development Plan and will be made available for public inspection at our principal office and on our website.

The Council may check information provided by you, or information about you provided by a third party, with other information held by us. We may also get information from certain third parties or share your information with them in order to verify its accuracy, prevent or detect crime, protect public funds or where required by law.

For further information, please look at our website www.pkc.gov.uk/dataprotection; email dataprotection@pkc.gov.uk or phone 01738 477933.

National Policy Context

The National Planning Framework (2014) emphasises the need to address restoration of past minerals extraction sites. Paragraph 4.26 of the framework underlines the need for viable restoration plans and justifies the need to address site restoration. It highlights the legacy of interventions that were required at sites where restoration obligations had been poorly managed in the past to ensure that they are properly restored.

Scottish Planning Policy (2014) sets out at paragraph 234 that Planning should ‘...safeguard mineral resources and facilitate their responsible use...’.

A set of four policy principles are set out at paragraph 235 of SPP. In terms of site restoration, two of these are relevant. They state that the planning system should:

- minimise the impacts of extraction on local communities, the environment and the built and natural heritage; and
- secure the sustainable restoration of sites to beneficial afteruse after working has ceased.

SPP highlights that Local Development Plans should set out factors that minerals proposals will need to address. These specifically include restoration and aftercare. Paragraphs 247-248 go on to state that:

- ...planning authorities should, through planning conditions and legal agreements, continue to ensure that a high standard of restoration and aftercare is managed effectively;
- a range of financial guarantee options is currently available;
- planning authorities should consider the most effective solution on a site-by-site basis; and
- planning authorities should ensure that rigorous procedures are in place for monitoring consents, including reviews of restoration arrangements at appropriate intervals...

Paragraph 235 of SPP also includes links to key documents relevant to minerals development.

Reference was also made to the report of independent review of regulation of opencast coal operations in East Ayrshire (2014). The report’s key findings are directly applicable to this draft supplementary guidance, particularly with reference to procedures for calculating and monitoring restoration guarantee bonds and the need for specialist independent verification of values.

Local Development Plan context

The purpose of this draft supplementary guidance is to provide more detail in respect of Local Development Plan Policy 49: Minerals and Other Extractive Activities – Supply.

Policy 49A requires an assessment of impact on local communities and the environment to show no adverse residual effect after appropriate mitigation.

Policy 49B states three main points that:

- The Council will require restoration, after-use and aftercare proposals to be agreed in advance of operations;
- After excavation ceases, restoration will be completed in the shortest time practicable;
- Appropriate 'on demand' financial bonds for restoration will be required, and detailed advice about the full range of financial guarantees that may be used to secure restoration will be contained within separate supplementary guidance.

The issue of whether it would be necessary to provide separate supplementary guidance containing detailed advice about the full range of financial guarantees that may be used to secure restoration was raised during the period for representations on the Proposed Plan (2017) and was given consideration during the Local Development Plan examination.

The representation referred to Local Development Plan Supplementary Guidance that had already been produced by East Ayrshire Council in respect of financial guarantees (April 2017) and it was suggested by the respondent that similar guidance should be provided for Perth and Kinross.

The LDP examination considered this issue and the examination report contained a recommendation to add a specific note to the policy to include provision for such Supplementary Guidance.

The Council accepted this recommendation and the policy was modified before the Plan was adopted to include a note that '...detailed advice about the full range of financial guarantees that may be used to secure restoration will be contained within separate supplementary guidance.' And this draft supplementary guidance is therefore similar in its approach and content to that of East Ayrshire Council.

If restoration is agreed, why do we ask for financial guarantees?

The planning authority recognises the importance of ensuring that appropriate restoration plans are in place for minerals development sites to ensure that as development progresses land is successfully restored to a high standard. This is important to ensure that the impact on local communities and the environment is minimised.

Planning conditions and/or planning obligations attached to planning consents for specific developments can require appropriate decommissioning, restoration, aftercare and mitigation measures to be put in place. It is expected that developers will carry out restoration proposals in accordance with the approved plans.

The purpose of requiring a financial guarantee is to ensure that if the development or its restoration ceases prematurely or is carried out other than in accordance with the approved plans, the planning authority can call on all or part of the financial guarantee to finance the carrying out of the outstanding works to ensure that all the restoration, aftercare and mitigation requirements attached to permissions for minerals development may be met.

The financial guarantee would not therefore be invoked where a restoration is implemented in accordance with a planning permission. However, financial guarantees are an important means of ensuring that key obligations are met if the developer is unable or unwilling to comply with the consented plans. This includes for example where a company is in liquidation and/or where there is a significant planning breach.

Financial guarantees are also an important means of providing reassurance that decommissioning, restoration, aftercare and mitigation obligations will be met should a liquidation or significant planning breach occur. It is fundamental that the value of the financial guarantee must, at every stage of the development, be enough to cover the outstanding works needed to meet these obligations. Regular reviews of the financial guarantee are therefore essential, and the review period should be based on the scale and type of the development.

What financial guarantee arrangements should the Council put in place?

Financial guarantees should reflect the scale and type of development proposed, and should consider the costs of mitigation, decommissioning, restoration and aftercare of the proposed development. The drawing up of restoration guarantee bonds is a corporate task drawing on expertise from finance, legal, and planning services and input from external independent financial and environmental advisors will also be required.

Our general approach to putting financial guarantee arrangements in place will be:

- applicants for minerals development should set out the specific details of the financial guarantee proposed at application stage
- the financial guarantee arrangement must be agreed and in place prior to commencement of development;
- variations to the previously agreed terms of a financial guarantee arrangement will be considered by and will require the approval of the planning authority

Our process for securing appropriate financial guarantees will be:

1. Applicant to submit detailed proposals at application stage

Applicants for minerals developments should set out the specific details of the financial guarantee proposed at application stage – including detailed proposals for decommissioning and site restoration in accordance with the EIA report.

This must include a breakdown of costs, and confirmation of the restoration guarantee proposed.

2. Independent assessment of the proposed decommissioning and restoration plans

The proposed decommissioning and restoration plans and costs must be subject to an independent assessment to examine and verify the costs of decommissioning, restoration and aftercare throughout the life of the proposed development (including the operational, restoration, aftercare and mitigation periods).

The costs of the independent assessment will be met by the applicant through an 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. Types of guarantee and risk

There are several mechanisms available for providing the financial guarantee, and the Council is required to assess the risk rating for each form of guarantee proposed.

Low risk options that minimise risk to community and environmental interests are preferred.

The risk rating will be a consideration in the determination of applications for minerals development where it will be used to inform consideration of the appropriateness and acceptability of each mechanism.

Financial guarantees with a high risk rating are unlikely to be acceptable, although consideration may be given where additional support is proposed. This could be in the form of an alternative agreement and/or additional compensatory arrangements.

The following table of financial guarantees and their associated risk is based on research into the operation of financial mechanisms to secure decommissioning, restoration and aftercare of development sites carried out by the Bonds Working Group of the HOPS Energy and Resources sub-committee (June 2015). Some of the information in the table is itself based on information reported to East Ayrshire Council in 2014 as part of its review of financial guarantees in respect of the restoration of coal sites. It outlines seven of the mechanisms available for providing financial guarantees alongside a risk rating for each form of guarantee.

Type of guarantee	Method	Risk level
Surety bond	Bond is based on a technical appraisal, financial structure and track record of developer	Medium risk
Bank guarantee	Bank provides restoration guarantee and takes standard security over an asset or provides overdraft facility	Medium risk
Parent company guarantee	Parent company provides legally binding guarantee	High risk
Mutual fund	Trade guarantee scheme where developer pays into an independent fund – in the event of liquidation the fund pays out up to a pre-determined value (that may also be constrained by the size of the fund)	High risk
Escrow account	Money is deposited into (and subsequently repaid from) an account to the value of the outstanding liability	Low risk
Pay as you go Escrow	Money is deposited into an account on an amount per unit when it is earned (extracted) by the development	High risk
Pay as you go Escrow and Bond hybrid	A bond provides a restoration guarantee while the pay as you go Escrow account is growing	Low risk

4. Assessment of financial guarantee: risk level

On receipt of information from the applicant and the independent assessor, the following information will be considered:

- the purpose of the proposed financial guarantee
- the associated risk
- the sufficiency of the quantum proposed taking into account the independent assessment
- the financial strength of the proposed provider of the guarantee

5. Assessment of financial guarantee: its scope – should it be called upon

When assessing the terms of a proposed financial guarantee, Council officers will consider:

- the reason why the financial guarantee is necessary – decommissioning, restoration, aftercare, mitigation or in combination. The guarantee should be sufficient to cover all aspects of its intended purpose
- the risk the financial guarantee is required to cover – for example breach of planning conditions, legal obligations relating to decommissioning, restoration, aftercare, mitigation or insolvency. The guarantee should be able to be utilised to cover all elements of risk

- the length of time that the financial guarantee should cover and its expiry. The guarantee should be sufficient to cover the setting up period, operational, decommissioning and aftercare phases
- What will constitute a valid call being made on the financial guarantee?
- When can the monies be claimed if required? The planning authority should be able to call on the guarantee prior to carrying out necessary works
- The financial guarantee's quantum profile, triggers for changes in value (increases and reductions), and associated timescales
- The financial strength of the issuing institution, where appropriate

6. The financial guarantee proposed will form part of the determination of the application

The proposed terms of any financial guarantee will be a material consideration in the determination of applications for minerals development. Depending on the level at which the decision is taken, the consideration of the financial guarantee will be included in the report of handling determined under delegated authority or will be presented in a report to committee for determination.

7. Requirement for planning obligation

If the planning authority is minded to approve an application for minerals development, an appropriate planning obligation will be required to ensure that the financial guarantee is put in place. Local Development Plan Policy 49 requires that the financial guarantee arrangement must be agreed and in place prior to commencement of development ('...agreed in advance of operations...')

What monitoring arrangements should the Council put in place?

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

Consistent with Policy 49: Minerals and Other Extractive Activities - Supply and as part of any compliance monitoring regime agreed through the development management process, the financial guarantee will be reviewed at regular intervals.

The review will examine the progress 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. Funding for the financial guarantee may need 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.

As per Policy 49, the regular review of financial guarantees should include a review of:

- the guarantee mechanism, to ensure this is still appropriate
- the value covered by the guarantee, to ensure it continues to meet all costs, including a review of the inflationary factors that were initially incorporated
- if applicable, the remedial measures necessary to ensure that the financial liability meets the terms of the financial guarantee

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.