



PINS NOTE 03/2022

To:	All Inspectors, All Examining Inspectors, All Casework Managers
Relevancy:	All Planning and Enforcement casework, Local Plans, Infrastructure and Specialist
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Securing contributions towards European site mitigation

Introduction

1. In July 2021, Cornwall Council adopted their [Supplementary Planning Document \(SPD\), European Sites Mitigation](#). Providing that an applicant has not undertaken their own Habitat Regulation Assessment (HRA) and mitigation process, the SPD requires a strategically led financial contribution to be made for relevant development to mitigate the impacts from recreational activity within the designated site. The SPD states that “this will need to be agreed and secured prior to approval of the development and delivered through section 106 agreement, Unilateral Undertaking or through a planning condition as appropriate”.
2. Under the section entitled the Penhale Dunes SAC - Site Improvement Plan, the SPD sets out under the sub-heading “Condition”: “The development hereby permitted shall not be commenced until the Local Planning Authority has approved, in writing, a scheme to secure mitigation of the additional recreational pressures to the Penhale Dunes Special Area of Conservation, together with an appropriate mechanism to secure delivery of the mitigation”. It goes on to state under the “Informative”, that the Penhale Dunes SAC - Strategic Mitigation Plan, to be delivered by the Council, is considered by Cornwall Council, in agreement with Natural England, to be an approved scheme and appropriate mechanism. Where the applicant agrees to accept this Mitigation Plan the condition can be satisfactorily addressed by means of a financial contribution towards the Mitigation Plan. In this instance, such a contribution would amount to <<£180 per dwelling>>.

3. Thus, Cornwall Council are requiring such contributions to be secured on a single dwelling by condition rather than by a s106 agreement. **It is possible that other LPAs have adopted a similar approach or may do so in the future.**
4. Given that mitigation is clearly intended to take the form of a financial contribution, the LPA should be asked how, exactly, this financial contribution is to be legally secured against the landowner and successors in title and what form the “scheme to secure mitigation” will take.
5. If the scheme is to be secured by way of a legal agreement, the restriction on the use of Grampian-style planning conditions for such purposes is clearly set out in paragraph 010 (Reference ID 21a-010-20190723) of the [PPG chapter on the “Use of Planning Conditions”](#):

“A negatively worded condition limiting the development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate in the majority of cases. Ensuring that any planning obligation is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed. It encourages the parties to finalise the planning obligation or other agreement in a timely manner and is important in the interests of maintaining transparency”.

However, paragraph 010 of the PPG further states:

“[...] in exceptional circumstances a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate, where there is clear evidence that the delivery of the development would otherwise be at serious risk (this may apply in the case of particularly complex development schemes). In such cases the 6 tests should also be met”.

“Where consideration is given to using a negatively worded condition of this sort, it is important that the local planning authority discusses with the applicant before planning permission is granted the need for a planning obligation or other agreement and the appropriateness of using a condition. The heads of terms or principle terms need to be agreed prior to planning permission being granted to ensure that the test of necessity is met and in the interests of transparency”.

6. Therefore, in such cases, Inspectors will need to clearly define what “exceptional circumstances” justify using a condition.

Action

7. Inspectors should be aware that the consideration of mitigation measures to avoid or reduce the harmful effects of development on a European site,

including contributions towards mitigation strategies, must be undertaken within the framework of Appropriate Assessment. [PINS Note 05/2018r3](#) provides advice on Habitats Regulation Assessment and the consideration of mitigation in casework.

8. When undertaking the Appropriate Assessment, Inspectors must consider whether conditions or other restrictions could ensure that site integrity would not be adversely affected. The [PPG's chapter on Appropriate Assessment](#), paragraph 004 (reference ID: 65-004-20190722) states that "any measures used to inform the decision about the effects on the integrity needs to be sufficiently secured and likely to work in practice".
9. If the LPA is requiring contributions to be secured by way of a condition, it will be necessary to write to the LPA asking them for evidence as to how such a scheme will secure the contribution. If this is by a method other than a legal agreement, please inform the legal team (via the Knowledge Centre) so they can monitor and examine any new mechanisms being used.
10. If the use of a condition is being put forward by the LPA / parties, Inspectors should consider:
 - What are the "exceptional circumstances" which justify going against the PPG's preferred practice of using a legal agreement, in the interests of certainty and transparency?
 - What is the evidence that the delivery of the development would be at risk, given that a simple legal agreement could be used directly to secure the contribution?
 - Where are heads of terms/ principal terms, and evidence that these have been discussed with the applicant?
11. It should also be noted that it has been known for agreements under section 111 of the Local Government Act 1972 to be used as a method of securing the contribution. However, it would not normally be an appropriate method to secure an 'as of yet unpaid' contribution. An undertaking to pay the contribution would not be secure, as it would be a personal undertaking on the part of the party signing it and there is no statutory provision equivalent to s106(3) which would make the agreement enforceable against successors in title. Furthermore, there would be no obligation for the LPA to spend the money in a particular way which will raise doubt as to whether the mitigation is secure.

Further Information

12. Please contact [Knowledge Centre](#) if you have any general queries on this Note.
13. For case-specific queries, Inspectors should contact their IM in the first instance. The IM may raise the matter with the relevant PFL if necessary.

14. Non-salaried Inspectors should approach [Resource and Process Ownership Team](#) with any queries in the first instance.