

Designation of third party structures & features for flood and coastal erosion risk management purposes

Information for asset owners – your questions answered

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Llywodraeth Cymru
Welsh Government

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Questions

1 – What is this leaflet about?

- a) This leaflet is about the statutory designation of third party structures and other features, as defined by the Flood and Water Management Act 2010, and applies to England and Wales only.
- b) The purpose of this legislation is to try and ensure that owners do not inadvertently alter structures and other features and potentially increase flood risk to themselves, their neighbours and the wider community.
- c) The structures and features chosen for designation will include a wide range of things from garden walls and other manmade structures to raised areas of land, embankments and other natural features.
- d) All will serve a flood or coastal erosion risk management purpose although they may not necessarily have been designed or constructed for that purpose.
- e) Once a structure or feature has been designated, anyone wishing to alter, remove, or replace it must seek consent from the responsible authority.

2 - What is the purpose of designation?

- a) Designation is a form of legal protection reserved for key structures or features that are privately owned and maintained and that contribute to the management of flood and coastal erosion risks.
- b) The principal beneficiaries will be the owners and their neighbours. It should be regarded as an additional safeguard or check that is intended to ensure that flood or coastal erosion risk is not increased through ignorance or error.
- c) A designation is a legally binding notice served by the designating authority to the owner of the structure or feature and the notice is also a local land charge. This means that the notice 'attaches to the land' on which the structure or feature is situated and will also automatically apply to anyone dealing with the land or property, including successive owners or occupiers (see also section 19 – What is a local land charge?).
- d) Designation makes no physical change to the structure or feature concerned and does not increase the risk of flooding or coastal erosion. The owner of the property can continue to have full use of the structure or feature and the only restriction is

that the structure is not allowed to be altered, removed or replaced without careful consideration and the consent of the responsible authority.

3 - Who does this leaflet apply to?

- a) This leaflet will be of particular interest to the owners of any structures or features that are or may be designated and which may be inland or on the coast.
- b) The term “owner” in relation to anything, which is or may be designated, means either:
 - i. the owner of the land on or in which the structure or feature is situated, or
 - ii. if different, the person responsible for managing or controlling the structure or feature

4 - What can be designated?

- a) There are 4 conditions that must be satisfied to enable a structure or feature (natural or manmade) to be designated; these are:

Condition
Condition 1 - that the designating authority thinks the existence or location of the structure or feature affects a flood risk or coastal erosion risk.
Condition 2 - that the designating authority has flood or coastal erosion risk management functions in respect of the risk which is affected.
Condition 3 - that the structure or feature is not already designated by another authority.
Condition 4 - that the owner of the structure or feature is not a designating authority.

- b) Therefore, any structure or feature (natural or manmade) that, in the opinion of the designating authority, affects a flood or coastal erosion risk is eligible for designation. It is entirely for the relevant authority to decide what to designate, but this might include:
 - i. A man-made structure such as a wall or building; and
 - ii. A natural feature on private land such as a hill, mound, bank or ditch.

5 - Who has the power to designate?

- a) The authorities with the power to decide and designate (the designating authorities) are:
 - i. the Environment Agency;
 - ii. a lead local flood authority;
 - iii. a district council (whether or not it is a lead local flood authority); and
 - iv. an internal drainage board.
- b) A Designating Authority is referred to as the Responsible Authority once it has designated a structure or feature (unless it has allowed another Authority to adopt the designation and become the Responsible Authority for that structure or feature).

6 - Will all privately owned and maintained flood and coastal erosion structures or features be designated?

- a) No. Only third party (i.e. not owned by a designating authority) structures or features and only those that affect a flood or coastal erosion risk will be considered for designation. Those that are vulnerable to alteration, removal or replacement are the most likely to be designated.
- b) Overall, designation is neither automatic nor mandatory. Designating authorities are unlikely to seek to designate all features that fit the broad conditions set out in the legislation but are most likely to seek designation in situations where the considered flood risk and vulnerability to damage justifies its use.

7 - Will I be consulted before my property is designated?

- a) Yes. owners of structures or features will be contacted by way of written notice by the designating authority to:
 - i. Confirm who is the owner / maintainer of the structure or feature;
 - ii. Inform the owner of the intention to designate something that they own / maintain;
 - iii. Identify the structure or feature to be designated;

- iv. Explain the reasons for the designation including how and why the designating authority thinks the existence or location of the structure or feature affects flood or coastal erosion risk;
 - v. Explain the legal process and implications; and
 - vi. Invite representations and/or questions arising from the proposed designation and answer them where possible.
- b) If, following any discussions, the designating authority is satisfied that designation is not necessary or appropriate, it may choose not to confirm or finalise a designation.
 - c) For example, in the case of a railway line constructed on or between land banks, a designating authority may identify such banks as affecting flood risk, but may consider, following discussions with the relevant rail company, that designation is not appropriate or necessary as a competent authority or body already maintains these features as part of their long term preservation.
 - d) An owner may appeal against a designation and must start proceedings by sending or delivering a notice of appeal to the Tribunal so that it is received within 28 days of the date on which notice of the decision was sent.

8 - What are the implications of designation for me?

- a) The owner of a designated structure or feature should be able to continue to maintain and use the structure or feature following designation. If you are in any doubt about proposed maintenance or use, contact the responsible authority who should advise you on whether consent should be sought.
- b) The owner may also alter, remove or replace the feature or structure provided they have the prior consent of the responsible authority. If the owner feels that consent has been unreasonably refused on the grounds of the effect on flood and coastal erosion risk management, they have the right to appeal against refusal.
- c) There is no explicit obligation for the owner of the designated structure or feature to maintain it to any particular standard as it will always be assumed to be in the owner's self interest to secure the flood risk benefits it provides.
- d) Designations of features or structures made pursuant to the 2010 Act are legally binding and give rise to prohibitions and obligations on the part of any person dealing with, owning or occupying relevant land on which such features or structures are situated. It is therefore recommended that individuals concerned about or affected by designations seek the advice of their own independent advisers.

9 - Why is there a notice period prior to formal designation?

- a) This is an opportunity for the owner to provide more information, ask questions and gain a better understanding of what designation will mean.
- b) During the period of notice, the owner has the right to make representations to the designating authority about the provisional designation. The authority must consider these representations before reaching a decision about whether to confirm designation by means of a designation notice.
- c) During the notice period no alteration, removal or replacement of the structure or feature may be made without the written consent of the designating authority.

10 - Do I always need consent if I want to do something?

- a) Each structure or feature and its location will be different, and so there are no universal rules for what you can or can't do without consent. However, it is only actions that will affect flood or coastal erosion risk that are likely to require consent. For example, it is likely that the routine maintenance of a bank or wall will not require consent, but raising or lowering the height of such a feature is likely to require consent.
- b) Defra and the Welsh Government have recommended that responsible authorities develop a sensible approach to works requiring consent and suggest that authorities should be clear in designation or consent letters to the owner about works that do not require consent. For example, works not requiring consent might include mowing a grass bank, or painting a wall. If you are unclear, we recommend that you should contact the responsible authority who will offer advice on a case by case basis.
- c) If consent is needed the responsible authority will also supply an application form and set out the information required to enable an application for consent to be submitted.

11 - How do I obtain consent and will I be charged a fee?

- a) An application to the responsible authority should be made in writing before undertaking works that alter, remove or replace a designated structure. It is recommended that prior to a formal application the owner should contact the

responsible authority to confirm whether the nature of the proposal requires consent and to obtain an application form where necessary.

- b) There is no charge for consent applications relating to a designated structure or feature.
- c) The responsible authority may grant consent with or without conditions. Consent will only be refused if the proposed alteration, removal or replacement would unacceptably affect a flood or a coastal erosion risk.
- d) The responsible authority will aim to determine all consent applications within two months of receipt. A responsible authority which, at the end of the two month period, has not given an owner notice of a consent decision which it has taken is deemed (under the Designation of Features (Appeals) (England) Regulations 2012 and the Designation of Features (Appeals) (Wales) Regulations 2012) to have given notice refusing consent.
- e) A responsible authority may issue, alter or withdraw any consent other than on an application by an owner, i.e. a “proactive consent decision”. The authority will notify any affected owner of any such decision. An owner will then have 28 days before the proactive consent decision takes effect. The purpose of this notice period is for the owner to make any relevant representations to the authority in relation to the relevant decision. If no representations are received (or if those made do not result in any change to the proactive consent decision by the authority), the proactive consent decision will take effect on the expiry of the 28 day notice period without further notice from the authority (the original letter is the notice of the proactive consent decision). Once the proactive consent decision is effective, any owner wishing to carry out activity which may now not be permitted (as a result of the proactive consent decision) should put in an application to enable them to alter, remove or replace the structure or feature as required. If their application is refused, the owner may then appeal.
- f) An owner may appeal against the refusal of consent (received either by notice or as a result of a deemed refusal notice as above) or to any conditions imposed on consent. An owner must start proceedings by sending or delivering a notice of appeal to the Tribunal so that it is received within 28 days of the date on which notice of the decision was sent or if a decision was made but no notice was sent, within 28 days of the end of the two month period as detailed above.
- g) It should be noted that appeal applications cannot be made to the First-tier Tribunal where no decision has actually been made by the Authority, e.g. where administrative error leads to an application not being considered at all. In such instances, the complaints procedure of the relevant authority and/or alternative legal remedies should be sought. It is therefore recommended that if an owner has not

had a decision from an authority within two months, they contact the authority to establish whether a decision has been made.

12 - What if I do something without consent?

- a) If prohibited works take place without consent, a legal enforcement notice may be served on you, requesting that you remedy the contravention. The responsible authority is most likely to issue such notices if the works conducted without consent adversely impact on the flood or coastal erosion risk.
- b) Failure to comply with an enforcement notice is a criminal offence and may result in prosecution and a fine.
- c) The responsible authority also has the option, where works conducted without consent appear to have created an immediate and material increase in flood or coastal erosion risk, to complete or arrange for the completion of the appropriate emergency remedial works and recover the costs from the owner.
- d) An owner has the right to appeal against an enforcement notice and must start proceedings by sending or delivering a notice of appeal to the Tribunal so that it is received within 28 days of the date on which notice of the decision was sent.

13 - Powers of entry

- a) A person authorised by the responsible authority may at any reasonable time enter land to:
 - i. Determine whether a structure or feature may be appropriate for designation;
 - ii. Determine whether a designated structure or feature has been altered removed or replaced;
 - iii. Determine whether an enforcement notice has been complied with;
 - iv. If an enforcement notice has not been complied with, to take the steps specified within the notice; and
 - v. In the event that any works that have taken place without consent which may, in the responsible authority's opinion, immediately and materially increase or alter a flood or coastal erosion risk, act to remedy the situation immediately, without issuing an enforcement notice.
- b) However, a person authorised by the responsible authority may not demand entry to land which is occupied unless:

- i. At least 7 days notice has been given to the occupier, specifying the purpose for which entry is required, or
 - ii. The entry is for the purposes of remedying works that have taken place without consent and that may, in the responsible authority's opinion, immediately and materially increase or alter a flood or coastal erosion risk act to remedy the situation immediately.
- c) A person seeking to enter land must, upon request, provide evidence of their authorisation to act on behalf of the responsible authority. It is an offence to obstruct a duly authorised person from entering land, and a person guilty of this offence is liable:
 - i. On conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or both, or
 - ii. On summary conviction to a fine not exceeding the statutory maximum.

14 - Will I be eligible for any compensation?

- a) A designating authority is not required in law to pay compensation to owners of structures or features as a direct consequence of designation under the Flood and Water Management Act 2010.
- b) However, an owner may be entitled to compensation from the relevant authority if as a result of the authority entering their land for reasons outlined in 13 – Powers of entry they:
 - i. Incur any loss as a result of anything done on their land; or
 - ii. Are disturbed in the enjoyment of their land.
- c) Compensation will not be available if:
 - i. The loss or disturbance is the result of the reasonable exercise of the powers of entry; and / or
 - ii. An owner has completed un-consented works on a designated structure; and / or
 - iii. An owner has failed to comply with an enforcement notice.
- d) Any disputes about compensation are to be determined by the Upper Tribunal.

15 - Can designation be cancelled?

- e) Yes. A cancellation may result from either an application by the owner, or if the responsible authority thinks cancellation is appropriate. This is only likely to be in circumstances where the designation is no longer necessary or appropriate such as, for example, when a wall has been replaced by an alternative purpose built flood or coastal erosion defence.
- f) The responsible authority will aim to determine all cancellation applications within two months of receipt. A responsible authority which, at the end of the two month period, has not given an owner notice of a cancellation decision which it has taken is deemed (under the Designation of Features (Appeals) (England) Regulations 2012 or the Designation of Features (Appeals) (Wales) Regulations 2012) to have given notice refusing cancellation.
- g) An owner may appeal against the refusal of cancellation (received either by notice or as a result of a deemed refusal notice as per above). An owner must start proceedings by sending or delivering a notice of appeal to the Tribunal so that it is received within 28 days of the date on which notice of the decision was sent or if a decision was made but no notice was sent, within 28 days of the end of the two month period as detailed above.
- h) It should be noted that appeal applications cannot be made to the First-tier Tribunal where no decision has actually been made by the Authority, e.g. where administrative error leads to an application not being considered at all. In such instances the complaint procedures of the relevant authority and/or alternative legal remedies should be sought. It is therefore recommended that if an owner has not had a decision from an authority within two months, they contact the authority to establish whether a decision has been made.

16 - Can I object or appeal against designation?

- a) Initially the designating authority will issue a 'provisional designation notice'. You will be given a minimum of 28 days (Notice Period) in which to make representations to the designating authority.
- b) If, upon review of your representations, the designating authority decides to proceed and designate the structure or feature, it will confirm the provisional designation by giving a notice to that effect to you. If you are still concerned you may then lodge a formal appeal against the designation.

- c) It is recommended that when an owner disagrees with a decision they should consult the designating or responsible authority to see if any Alternative Dispute Resolution (ADR) procedures are in place for resolving disputes regarding decisions on designation, consent decisions, cancellations and enforcement notices so as to avoid unnecessary appeals through the courts and tribunals. If ADR procedures are in place, the owner should bear in mind that they have 28 days to lodge an appeal with the First-tier Tribunal in respect of an authority's disputed decision. Therefore, it may be appropriate for the owner to lodge any appeal as a first step, and the hearing can be adjourned to allow time for the parties to seek resolution between themselves. If the parties do not agree or if the alternative resolution attempt fails, the First-tier Tribunal can still consider the appeal application.

17 - How can I Appeal?

- a) Appeals against decisions from the designating authority will be made to the General Regulatory Chamber of the First-tier Tribunal. The Environment jurisdiction will hear these appeals. The First-tier Tribunal is administered by Her Majesty's Courts and Tribunals Service, an executive agency of the Ministry of Justice and is independent from the Designating / Responsible Authority. Further information is available from <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/environment/index.htm>.
- b) Appeals should be made by sending or delivering a notice of appeal to the Tribunal so that it is received within 28 days of the date on which notice of the decision was sent (please note: this 28 day period after the issue of a formal notice of designation during which an appeal may be lodged should not be confused with the previously allowed time period for making representations about a provisional designation).

c) Appeals should be sent to:

First-tier Tribunal (Environment)
General Regulatory Chamber
PO BOX 9300
Leicester
LE1 8DJ

Tel: 0300 1234 503
Fax: 0116 249 4253

Email: GRC.environment@hmcts.gsi.gov.uk

d) If an owner wishes to submit an appeal outside of this time limit you can do so, but you must provide good reason for the delay.

e) Owners who wish to appeal against a designation notice are requested to indicate their intention to appeal to the designating authority at the earliest opportunity.

18 - What can I appeal against?

a) As illustrated in Figure 1 below, in relation to a designated structure or feature the owner can appeal to the First-tier Tribunal (Environment) against:

- i. designation; or
- ii. the refusal to cancel a designation; or
- iii. a decision in connection with a consent application; or
- iv. enforcement notices.

b) The right of appeal rests with the owner of the designated structure or feature, but where an enforcement notice has been issued the right of appeal is extended to include the person who carried out the activity giving rise to enforcement (where that person is not the owner).

c) An appeal against the Responsible Authority will be against a specific decision taken by that authority. The decision will have been conferred to the owner, normally by means of a 'Notice'.

- d) The Flood and Water Management Act 2010 sets out the basis for decision making by the Designating / Responsible Authority. Decisions must be risk based and a designation may only be made if the following criteria are satisfied:
- i. the item to be designated is a structure or a natural or manmade feature of the environment;
 - ii. the authority thinks the existence or location of the structure or feature affects a flood or coastal erosion risk;
 - iii. the Designating Authority has the flood or coastal erosion risk management functions in respect of the risk which is affected;
 - iv. the structure or feature is not already designated by another Designating Authority; and
 - v. the owner of the structure or feature is not a Designating Authority.
- e) Where an appeal has been made the effect of the designation remains in place until the appeal has been determined.
- f) Where an appeal is made against an enforcement notice, the effect of the enforcement notice is suspended until the appeal is determined.
- g) Any party to a case has a right to appeal a decision of the First-tier Tribunal on a point of law arising from the Tribunal's decision. The right may only be exercised with permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be heard by the Upper Tribunal.

The right to an appeal.

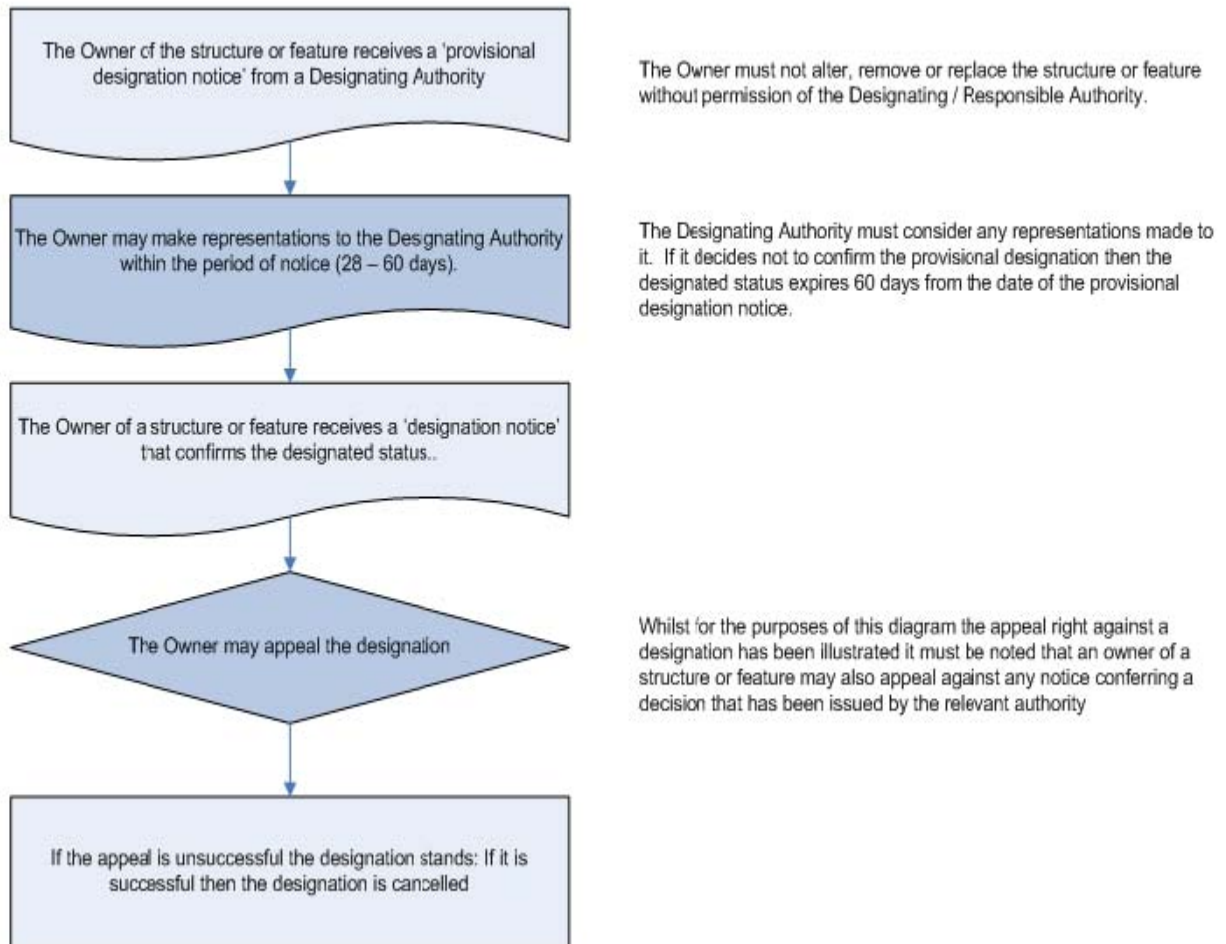


Figure 1

19 - What is a Local Land Charge?

- a) In legal terms, a local land charge is a restriction or prohibition on land with or without buildings or is a financial charge attached to the land. It is binding on successive owners or occupiers of a particular property or parcel of land. It is normally a creation of statute.
- b) When land or property ownership changes the new owners need to be aware of the existence of any planning decisions or other obligations such as the designation of any structures or features on the land or property and the implications for them.
- c) Registering the designation as a local land charge is considered to be the best means of achieving this.
- d) The designating authority will carry out the necessary registration of the local land charge at the time of designation.