EXPLANATORY MEMORANDUM TO

THE DESIGNATION OF FEATURES (NOTICES) (ENGLAND) REGULATIONS 2012

2012 No. 1693

1. This explanatory memorandum has been prepared by the Department for the Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The Minister may, under paragraph 16 of Schedule 1 to the Flood and Water Management Act 2010 ("the Act"), make provision about the content of a notice issued under Schedule 1. These regulations require that notices served under paragraph 6(3)(b) of Schedule 1, must specify the date on which it is proposed the notice shall have effect, being not less than 28 days after the date on which the notice is issued (except in emergencies). This will ensure that owners of assets will have an opportunity to make representations in respect of any decision made by a relevant authority under paragraph 6(3)(b). .

3. Matters of special interest to the Joint Committee on Statutory Instruments

These regulations are being made together with other regulations to be made under paragraph 15 of Schedule 1 to the Act, in relation to the provision of appeal rights ("the Appeals Regulations"), and which are subject to the affirmative Parliamentary process. The Appeal Regulations have already been laid in draft and provide a right of appeal for affected parties via the First-tier Tribunal in respect of initial designation decisions, and subsequent decisions (relating to applications for consent to alter, remove or replace a designated feature, or to cancel a designation, or the issue of an enforcement notice for contravening a designation) made by relevant authorities under Schedule 1 to the Act. Both these regulations and the Appeal Regulations form a package of safeguards for landowners affected by decisions made by relevant authorities under powers conferred by Schedule 1.

The Secretary of State's statement regarding Human Rights is made on the basis of the Appeals regulations and the Notice regulations becoming law on or around the same time and prior to (or at the same time as) the commencement of the remaining substantive provisions of Schedule 1 to the Act.

4. Legislative Context

4.1 Under Section 30 of, and Schedule 1 to, the Act, the Environment Agency, a local authority, or an internal drainage board (defined as "Designating Authority" within the Act) may designate (by way of notice) features in the environment that perform a flood or coastal erosion risk management function, though they may not necessarily have been designed or constructed for that purpose. Once designated, the owner of the feature cannot alter or interfere with it, without consent (also to be issued by way of notice). Consent (including variation or withdrawal of such consent) can be issued in response to an application by an owner (under paragraph 6(3)(a) or 'proactively' by an authority (under paragraph 6(3)(b). The obligation under paragraph 15 to provide (by way of regulation) appeal rights in respect

of decisions made by authorities under Schedule 1 does not provide an obligation nor a power to provide an appeal right in respect of 'proactive decisions' under paragraph 6(3)(b) of Schedule 1 to the Act. However, paragraph 16 of Schedule 1 to the Act confers a power for the Minister to make provision about the content of notices issued (in relation to all or any decisions) under Schedule 1.

These regulations require that notices served under paragraph 6(3)(b) of Schedule 1, must specify the date on which it is proposed the notice shall have effect not less than 28 days after the date on which the notice is issued, except in emergencies. This will ensure that owners of assets will have an opportunity to make representations on any change in consent, prior to it having effect.

5. Territorial Extent and Application

5.1 This instrument extends to England and applies in relation to designations of structures or features in England.

6. European Convention on Human Rights

The Secretary of State for the Environment, Food and Rural Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Designation of Features (Notices) (England) Regulations 2012 are compatible with the Convention rights.

7. Policy background

7.1 The policy objective behind the relevant substantive provisions (section 30 of, and Schedule 1 to, the Act which are to be commenced following the coming into force of these and the Appeal Regulations) is to prevent uncontrolled damage or removal of structures or natural or man made features of the environment that perform a flood or coastal erosion risk managementfunction (hereafter referred to as "assets"). Underlining this are objectives of minimising flood and coastal erosion risk; preventing damage or removal of assets and therefore economic damages from flooding/erosion; and informing people of the importance of assets for risk management so that owners make more rational decisions and avoid exposure to risk.

About two thirds (62,400) of the physical assets/features that are relied upon for flood and coastal erosion risk management are neither owned nor operated by public risk management authorities. They are known as third party assets. At present, the only legal protection from damage to assets comes from byelaws, but these extend to few - if any - third party assets. If any of these assets have been damaged or removed, or replaced with a material that cannot withstand the forces of flood water, then people and property will be put at risk. Where assets are functioning as part of a larger system of assets that work together to protect an area, damage to one could have a serious impact on the effectiveness of the whole system, and expose a larger area to flooding, or to more extreme flooding than expected. Government intervention is necessary where the market fails to recognise the consequences of risk and rational personal decisions that expose oneself and others to easily avoidable risk, as well as where the public good is not easily subscribed to by individuals.

It is not the intention that all structures or features will be designated. Any structures or features that, if damaged, would compromise the performance of flood or coastal erosion risk management systems maintained by the designating authority are the most likely to be designated.

It was not considered to be an effective approach not to legislate, as it would be highly unlikely to deliver the policy objectives. Damage to third party assets will normally be resolved, but the approach is reactive (i.e. action can only be taken after the damage has been inflicted so there is a risk that damage from flooding could be costly to repair) and is therefore expected to be less cost effective than legislation.

The provisions form part of a package of measures in the Flood and Water Management Act 2010 that responds positively to Sir Michael Pitt's review recommendations after the 2007 floods. The Act introduces a clear leadership role over local flood risk for Lead Local Flood Authorities set in the context of local and national strategies. Part of the rationale behind the Act is accepting the human cause and mitigation of flooding – to cover, for the first time, all forms of flooding including surface water flooding – which can be linked to development as much as natural processes. The Act provides for better, more comprehensive management of flood risk for people, homes and businesses, helps safeguard community groups from unaffordable rises in surface water drainage charges and protects water supplies to the consumer.

Notices under Paragraph 16 of Schedule 1 to the Act

The Act confers a power for the Minister, by way of regulations, to make provision about the content of a notice under Schedule 1.

The Designation of Features (Appeals) (England) Regulations 2012, currently laid before both Houses of Parliament, provide a right of appeal against designations, enforcement notices and related decisions made in respect of both consent to alter remove or replace a designated structure or feature and the cancellation of a designation.

During the development of the Appeals Regulations it became apparent that the requirement under the Act to provide appeal rights does not provide an obligation, nor the power, to provide an appeal right in respect of consent decisions (including variation or withdrawal) taken by authorities other than in response to an application by an owner. However Schedule 1 to the Act confers wider powers on authorities to take such ‘proactive consent decisions’ (under paragraph 6(3)(b)) and, in the absence of the power to provide a relevant appeal right against such decisions, the Notice Regulations are considered necessary and appropriate as part of the package of safeguards in relation to the rights of affected land owners.

The Notice Regulations provide a requirement for all ‘proactive consent decision’ notices issued under paragraph 6(3)(b) to specify a minimum notice period of 28 days before they have effect. This notice period will provide owners with sufficient time to engage with an authority and make representations in relation to proactive consent decisions prior to them taking effect. Once an authority has heard any representations, it can either decide to withdraw the relevant notice, variation or withdrawal of consent, or for the decision to stand. Where an authority decides to continue with the issue, variation or withdrawal of consent, it remains open to an owner to make an application, where appropriate, for alternative consent or cancellation of designation (if appropriate). If consent or cancellation is refused, the owner then has the right of appeal against these decisions pursuant to the Appeal Regulations.

These regulations are important to facilitate the effective and fair operation of the Act as they assist in ensuring the efficacy and robustness of the designation regime. As part of a larger regulatory package, they complement (and necessarily go beyond) the required regulatory safeguards provided by the Appeal Regulations to ensure that the entirety of the decision making process of relevant authorities under Schedule 1 to the Act is robust, fair and accountable.

Consolidation

7.2 It is likely that, at some point in the future, the Act will be consolidated with other flood-related legislation, in line with the Pitt Review recommendations on a single unifying Act, although currently there is no timetable for this. A specific power has been included in the Act to allow for pre-consolidation amendment to be made.

8. Consultation outcome

8.1 There was a full public consultation on the proposed provisions as part of the development of the Flood and Water Management Bill between April and July 2009. Over 600 responses were received and are compiled in the "Summary of Responses to the consultation on the draft Flood and Water Management Bill from April 2009 – July 2009". The draft Flood and Water Management Bill (included in the consultation document) contained draft clauses on new powers to designate features. Strong support was received for introducing in the Bill a system of designation of features that affect flooding and coastal erosion risk.

In addition, the Department has informally consulted a number of interested parties on the information note and public leaflet to accompany these provisions. These included the Environment Agency, Local Government Association, Association of Drainage Boards, her Majesty's Courts and Tribunals Service, in addition to our wider stakeholder list. No significant concerns have been raised.

These provisions apply to England and have been developed in consultation with the Welsh Government who will be bringing forward substantially the same form of regulations in respect of designations in Wales.

9. Guidance

9.1 An information note has been prepared for designating authorities, which sets out practical considerations to enable designations to be made, recorded and managed effectively in the interests of flood and coastal erosion risk management. For the most part, this information note is deliberately non-prescriptive so that authorities can establish a procedure that is fit for purpose in their particular circumstances. The information note contains information about the whole designation process, and includes a section on the right of appeal and an explanation of this process. In addition, a public leaflet has been prepared to inform asset owners about the designation process.

While these are non-statutory documents, they are attached in order to aid understanding and for reference. These documents were also attached to the Explanatory Memorandum to the related Appeal Regulations and were deposited in the libraries of both Houses on the laying of those regulations.

10. Impact

10.1 The substantive provisions of Schedule 1 to the Act cannot be commenced without the appeal right conferred by the Appeals Regulations, and the Notice Regulations are, though not statutorily required, considered necessary and appropriate in relation to the safeguarding of rights on such substantive commencement. The major impact on business, charities or voluntary bodies is, in respect of the substantive provisions of Schedule 1 (rather than these Regulations), a benefit in terms of the costs of reduced flood damage which, in aggregate terms, more than offsets any costs associated with designations. A best estimate of total benefits to asset owners and the wider public is around £25m per annum, whereas costs falling on asset owners from the designation process are estimated at £0.14m per annum. Asset owners will benefit from the increased certainty that any damage to assets can be identified and acted upon, and that risk management systems will continue to operate with a reduced risk of undetected damage.

10.2 The impact on the public sector is £0.76m per annum as a cost to risk management authorities.

10.3 An Impact Assessment (prepared in respect of the substantive provisions of Schedule 1 and both the Appeals and Notice Regulations) is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is the same as for other entities, given the overall benefits in terms of reduced flood damage.

11.3 The basis for the final decision on what action to take to assist small business is that the measures impose a small annual cost to business, estimated in the Impact Assessment at £0.05m per annum. However, this is more than outweighed by a benefit to business in terms of reduced flood damage, estimated at of £7.42m per annum, giving a net position of a £7.37m saving to business.

12. Monitoring & review

12.1 These regulations contain a review clause and we will collect data to judge if the provisions are working properly, within five years of the regulations coming into force. A review will take place sooner if necessary.

13. Contact

Katy Huyerman at the Department for Environment, Food and Rural Affairs Tel: 020 7238 1204 or email: Katy.Huyerman@defra.gsi.gov.uk can answer any queries regarding the instrument.

Annex A

www.wales.gov.uk
www.defra.gov.uk

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

Information note

June 2012

Llywodraeth Cymru
Welsh Government

defra
Department for Environment
Food and Rural Affairs

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http://www.defra.gov.uk/environment/flooding/legislation/

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PB 13747

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Introduction

1.1 What is this document about?

a) This information note is about the statutory designation of structures and other features (natural or manmade) as defined by the Flood and Water Management Act 2010 (the 2010 Act), and the implications of designation for designating and responsible authorities in England and Wales.

b) This information note sets out recommendations on the practical considerations for designating and responsible authorities to enable designations to be made, recorded and managed effectively in the interests of flood and coastal erosion risk management.

c) For the most part, this information note is deliberately non-prescriptive because the decisions on designating are solely for the authorities concerned, but also so that authorities can establish a procedure that is fit for purpose in their particular circumstances. This is not statutory guidance and the designating and responsible authorities are not legally obliged to follow it in the exercise of their designation decision making powers. However, the information note does refer to statutory requirements included in the 2010 Act.

d) The structures and features eligible for designation will include a wide range of things from garden walls and other structures or buildings to raised areas of land and embankments which, in the opinion of the designating authority, affects a flood or coastal erosion risk, but which were not necessarily designed or constructed for that purpose.

e) Once a feature is designated, the owner must seek consent from the responsible authority to alter, remove, or replace it. An individual may appeal against a designation notice, refusal of consent, conditions placed on consent or an enforcement notice.

f) The cost of designation should be included in the existing asset management and regulatory budget that includes Flood and Coastal Erosion Risk Management consents and enforcements.

Please Note

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).

1.2 Who does this information note apply to?

a) This information note is specifically intended for use by the authorities in England and Wales listed below:

   i. the Environment Agency,

   ii. lead local flood authorities,

   iii. district councils, and

   iv. internal drainage boards.

b) The above authorities have legal powers to designate structures and features that affect flood or coastal erosion risk and are not directly maintained by these organisations.

c) The legal powers are set out in Schedule 1 of the Flood and Water Management Act 2010 (the “2010 Act”) and are intended to address and mitigate the risk of the alteration or removal of a structure or feature that is situated on private land and which contributes to flood or coastal erosion risk management.

d) The principles and process expressed by the 2010 Act have been explained in the public leaflet entitled “Designation of third party structures & features for flood and coastal erosion risk management purposes - Information for asset owners – your questions answered”, which will be of interest to the owners of any structures or features that are designated.

1.3 What is designation and what can be designated?

a) Designation is a form of legal protection or status reserved for certain key structures or features that are privately owned and maintained, but which make a contribution to the flood or coastal erosion risk management of people and property at a particular location.

b) A designation is expressed as a legally binding notice served by the designating authority on the owner of the feature and is also protected as a local land charge. This means that the designation will ‘attach’ to the land and will also automatically apply to anyone dealing with the land and to successive owners or occupiers of a particular property or parcel of land.

c) A designated structure must be associated with and, in the opinion of the designating authority, affect a flood or coastal erosion risk.

d) There are 4 conditions that must be satisfied to enable a structure or feature (natural or manmade) to be designated. These are:

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

e) Therefore, any structure or feature (natural or manmade) that, in the opinion of the designating authority, affects a flood or coastal erosion risk, whether or not it was originally intended to do so, is eligible for designation. The important consideration is the effect of the structure or feature on a flood or coastal erosion risk.

f) Examples of structures or features that could be designated include:

i. Walls (standalone or the side of a building);

ii. Earth embankments;

iii. Shingle banks; and

iv. Isolated pieces of naturally high ground.

g) It is envisaged that designation will be risk based and targeted where it is most appropriate. That means that ultimately each designation (and designation policy) is a decision for each designating authority based upon what it considers to be appropriate in the context of local circumstances and the flood or coastal erosion risk present.

h) It is recommended that in formulating designation policies and taking designation decisions, consideration should be given to:

i. The strategic direction set in the local (and national) flood risk management strategies and any other key plans and documents at an authority's disposal; and

ii. The nature and approach of the owners of structures or features in relation to any flood or coastal erosion risk management functions they might themselves already have and/or any existing programme of maintenance and preservation of the structure or feature concerned.

i) At no time must a decision be made about designating a structure or feature on the basis of anything other than flood or coastal erosion risk.

j) Designation is neither automatic nor mandatory, though clearly authorities must give proper consideration to the use of their designation powers in the context of their flood and coastal erosion risk management functions. Whilst it is entirely for designating authorities to set their designation policy and make designation decisions, it is not envisaged that they will seek to designate all features that fit the very broad conditions set out in the legislation. As a priority, it is recommended that authorities direct designation to those situations where the considered flood risk and vulnerability to damage most justifies its use.

k) A discursive and agreement-based approach is recommended as the desired approach when dealing with the owners of structures or features in relation to a proposed designation.

2. Designation Process

2.1 Overview of designation process

a) Schedule 1 of the 2010 Act sets out the legal framework by which a designating authority may designate a structure or feature that affects flood or coastal erosion risk.

b) The authorities with the power to designate 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.

c) The following staged procedure sets out the process for designation.

2.2 Stage 1 - Assess the current status of the structure or feature

a) Identify a structure or feature (natural or manmade) of the environment for designation.

b) Ensure that the structure or feature is not ‘owned’ by another responsible authority.

c) Start a file and record Stage 1 and any subsequent information relating to the designation process. It is vital that an accurate record of all the information used to support the designating/responsible authority’s decisions, along with the decisions themselves, is maintained in order to inform the required reasons for the decision and in case of need in the event of an appeal.

d) Check that the structure or feature concerned satisfies all four legislative conditions for designation, which are (together with recommendations on actions/factors to consider):

Condition	Recommendation
Condition 1 - that the designating authority thinks the existence or location of the structure or feature affects a flood risk or coastal erosion risk.	The designating authorities will need to review historic records relating to past floods and/or coastal erosion events and consider any information provided in relation to future risks.
Condition 2 - that the designating authority has flood or coastal erosion risk management functions in respect of the risk which is affected.	Whilst it is envisaged that the Environment Agency will be designating structures or features associated with main rivers and the sea and Lead Local Flood Authorities, District Councils and Internal Drainage Boards will be designating structures or features associated with all other sources it is acknowledged that there will be some overlap in responsibilities where these sources interact. Therefore, it is essential that all authorities develop clear communication processes to discuss these issues accordingly. However, this must come back to the flood or coastal erosion risk management functions held by each authority.
Condition 3 - that the structure or feature is not already designated by another authority.	The identification of the other authorities in the area, accurate record keeping and the collaborative working approach referred to above will assist in ensuring that all interested authorities are aware of what has been designated within its area. Designated structures or features should all be recorded as a local land charge as swiftly as possible so the register of local charges can be checked by anyone at both an early stage of a new designation process and at the point of recording a new local land charge in order to avoid any duplication
Condition 4- that the owner of the structure or feature is not a designating authority.	

e) If any of the above four conditions cannot be met then designation is not possible and no further action is needed (note that by virtue of condition 4 a designating authority can't designate something that it owns itself. In addition, if the designating authority already undertakes to maintain a structure or feature it does not own using permissive powers then designation is not likely to be appropriate).

f) Other recommended factors for consideration on a designation decision:

i. Assess the flood or coastal erosion risk associated with a structure or feature in terms of the consequence of its alteration, removal or replacement. If this is unknown then an assessment should be made before proceeding any further. Where this assessment suggests that the negative consequences of changes to this structure or feature are significant, it is recommended that the authority should consider including this structure or feature, once designated, as part of their routine inspection regimes as appropriate so that it can be monitored. This information could then be conveyed to the owner so that they are aware of the risk and may assist with the monitoring accordingly.

ii. Consider the general circumstances of the owner of the structure or feature. If the designating authority is confident that the owner is aware of the flood or coastal erosion risk management function that their structure or feature serves and that the management, use or treatment of that structure or feature does not give rise to adverse risks, then designation may not be appropriate. There is nothing in the provisions to prevent a designating authority reaching an agreement with a third party and in respect of flood risk management without recourse to a designation. It is likely that this will be the case when dealing with other competent organisations or bodies who own relevant structures/features.

iii. Assess the vulnerability of the structure or feature to damage or change. For example, is there a history of damage or change, does ownership change frequently, is it obvious that the structure or feature has a flood or coastal erosion risk management purpose, is it still needed for such a purpose (this will influence need and priority)?

iv. Assess the need to designate the structure or feature (this decision needs to be based on the above factors).

v. If necessary and appropriate, assess the priority for designation (this is a risk based assessment that should take into account all of the above).

vi. Assess any need for emergency repairs by the owner or immediate direct intervention by the designating authority. (If yes see 5 - Emergencies).

2.3 Stage 1 Decision Point

At the end of Stage 1 a decision whether to proceed with the designation process must be taken by the Designating Authority, and it is recommended that this decision making and associated reasoning is clearly documented.

2.4 Stage 2 - Initial contact with the maintainer

a) If designation is still considered appropriate:

   i. Establish ownership of the feature using existing records / land registry searches or other means; and

   ii. Contact the owner to confirm ownership and contact details in relation the structure or feature.

b) Designating authorities may wish at this point to write to owners where designation is being considered in order to gauge initial owner/occupier response and to gather further information on which to make a designation decision.

2.5 Stage 2 - Decision Point

At the end of stage 2 a decision whether to proceed with or halt the designation process must be taken by the designating authority.

2.6 Stage 3 - Provisional Designation Notice

a) In order to formalise a proposed designation, the designating authority must first provide a provisional designation notice to the owner.

b) The provisional designation notice must specify:

   i. the structure or feature to be provisionally designated;

   ii. the date on which the provisional designation takes effect;

   iii. the reasons for the provisional designation;

   iv. how representations to the responsible authority may be made;

   v. the period within which representations may be made, which must be a period of at least 28 days beginning with the date of the notice; and

   vi. the effect of designation, namely that a person may not alter, remove or replace a designated structure or feature without the consent of the responsible authority (this is the same effect as a confirmed designation).

c) It is recommended that authorities seek legal advice before sending any notices. It is particularly important that any formal notice is supported by relevant reasons for the designation and is technically and procedurally correct. This is because, in the event of any appeal, the designation process may fail on the basis of any such errors in the notice. A legal check before sending is therefore recommended.

d) Send out the provisional designation notice to the ‘owner’ using “Recorded Signed For” or other secure means.

e) For legal purposes start the “clock” (Time Zero) with the date of the notice (see timeline in Figure 2).

f) Allow an absolute minimum of 28 calendar days and a suggested maximum of up to 35 calendar days to receive representations from the owner. Designating authorities should note that, under the 2010 Act, a provisional designation must be confirmed within the time period of 28 days to 60 days from the date of issue (the “provisional notice period”) otherwise a provisional designation notice lapses and the process must start again from Stage 3. 28 days is the statutory minimum period for representations, as specified in primary legislation, and 35 days is a suggested maximum in order to allow time for consideration of all representations and for a notice to be confirmed, if appropriate, before the 60th day has passed.

2.7 During the provisional notice period

a) During the provisional notice period, the owner has the right to make representations to the designating authority on the provisional designation. The authority must consider these representations before confirming designation by means of a designation notice or allowing it to expire without confirmation.

b) However, the structure or feature is to be treated as though it has been formally designated for the provisional notice period of 60 days from the provisional designation notice date (or such earlier date as may be reached by confirmation of the designation). This means that during this period no alteration, removal or replacement of the structure or feature may be made without the written consent of the designating authority.

c) The designating authority may issue an enforcement notice to any person that contravenes a provisional designation notice and it is the same offence to fail to comply with an enforcement notice relating to a provisional designation as it is for a final designation.

2.8 Stage 3 – Decision Point

a) At the end of stage 3 a decision whether to confirm the designation must be taken. The designating authority must consider any representations made about the provisional designation before deciding to confirm a designation by issuing a notice.

b) Note that the decision to proceed must be taken (and therefore a notice confirming the designation must be issued to the owner) between Time Zero plus 28 days (minimum) and Time Zero plus 60 days (maximum), after which the provisional designation lapses and power to confirm the designation expires.

2.9 Stage 4 – Confirm Notice

a) Within the time window specified below, prepare a legal notice confirming a provisional designation, which must be in accordance with the requirements of Schedule 1 to the 2010 Act. Under the 2010 Act, the notice must:

   i. specify the provisional notice to which it relates;

ii. specify the structure or feature to be designated (a simple map or diagram may be helpful);

iii. specify the reasons for the designation;

iv. give information about the procedure for bringing an appeal under regulations under paragraph 15 of the 2010 Act (the Designation of Features (Appeals) (England) Regulations 2012 and the Designation of Features (Appeals) (Wales) Regulations 2012); specify the period within which an appeal may be brought (an appeal 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 the notice was sent to the appellant as outlined in Rule 22 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) 2009); and

v. explain the effect of designation namely that a person may not alter, remove or replace a designated structure or feature without the consent of the responsible authority.

b) In addition, it is recommended that designating authorities should be clear on the extent of the designation in their designation letters to owners. It is recommended that, where appropriate, the letter should detail relevant routine maintenance that the designating authority considers does not constitute alteration requiring consent (or which they consent to as a matter of course) under the Act. It is suggested that authorities are sensible and clear in their communication with owners in order to avoid unnecessary consent or enforcement administration.

c) Send the confirmation notice to the 'owner' using "Recorded Signed For" postage or other secure means and during the following time window:

i. after the end of the period specified in the provisional notice within which representations may be made (i.e. Time Zero plus 28 days (minimum) or 35 days (recommended maximum) on time line); and

ii. before the end of the period of 60 days beginning with the date of the provisional notice (Time Zero plus 60 days).

d) Any notice issued confirming a designation issued outside this time window will be invalid. Failure to meet these timescales would necessitate having to repeat the full designation process from the beginning of stage 3 (Provisional Designation Notice). Consequently, the 35 days maximum for receipt of representations is recommended to ensure there is adequate time to take a decision and prepare and send a designation notice confirming a provisional designation.

e) Provide a copy of the confirmation notice to other authorities, which the responsible authority thinks would have an interest for their information.

f) Instigate registration of the designation of the structure or feature as a Local Land Charge on the specific property or parcel of land.

g) Ensure that the responsible authority's file records / assets register / database etc are updated as appropriate.

3. Designation Consents Process

3.1 After designation

The owner of a designated structure or feature should be able to continue to use the structure or feature following designation. They may also alter, remove or replace the structure or feature 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 the refusal.

3.2 Consent to alter, remove or replace a designated structure or feature

a) An application for consent to the responsible authority should be made by the owner before undertaking any works that alter, remove or replace a designated structure.

b) It is recommended that designating and responsible authorities should be clear on the extent of the designation and/or permissions granted in their designation and consent letters to owners. It is recommended that, where appropriate, the letter(s) should detail relevant routine maintenance that the authority considers does not constitute alteration requiring consent (or which the authority routinely and/or currently consents to) under the Act. It is suggested that authorities are sensible and clear in their communication with owners in order to avoid unnecessary consent or enforcement administration. For example, it may be appropriate in the case of designation of a grassy bank that an authority makes it clear that cutting the grass is an acceptable maintenance activity that does not alter the function or nature of the feature and so does not require consent. Or in the case of a designated wall, it may be appropriate for the authority to say that painting does not require consent. If an owner is in any doubt they should contact the responsible authority.

c) On request, the responsible authority will set out the information required for consent to be given and may supply an application form to enable an application for consent to be submitted and considered.

d) On receipt of an application, or if it otherwise thinks it appropriate, the responsible authority may by notice given to the owner:

   i. consent to specified alterations, or alterations of a specified kind, to a designated structure or feature;

   ii. vary or withdraw consent under paragraph (i) (but not retrospectively). For example, if consent has been given in respect of certain activity, the authority reserves the right to vary or withdraw such consent if circumstances change, and such a variation or withdrawal applies to the specified activity going forward, but does not have the effect of rendering such activity already carried out as at the date of the variation or withdrawal as unlawful.

Where a responsible authority issues, alters or withdraws any consent **other than on an application by an owner**, i.e. a "proactive consent decision", the authority

must notify any affected owner of any such proactive consent decision. The letter must say that an owner has 28 days before the proactive consent decision takes effect and should inform the owner that 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.

e) If an application for consent is refused, it is recommended that the notice specifies the period within which an appeal may be brought. An appeal 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 the notice was sent to the appellant as outlined in Rule 22 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) 2009.

f) The responsible authority should aim to determine all consent applications within two months of receipt as appeal rights against a decision made by the authority are engaged if notice of such a decision is not received within this time limit. 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 are available to an applicant. 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.

g) Consent may be:

   i. general or specific;

   ii. absolute or conditional.

h) The responsible authority may refuse to give consent only on the grounds that, in the authority's opinion, the proposed alteration, removal or replacement would affect a flood risk or a coastal erosion risk.

i) The owner may appeal against the refusal of consent or to any conditions imposed on consent (see section 7 - Appeal Process).

j) If any work is done without consent or completed differently to that specified in the consent, this will constitute prohibited works under the 2010 Act. A retrospective consent in such circumstances is not appropriate. It is important that the owner is aware of the requirement to have all works fully covered by the scope of the consent given so that they can inform the responsible authority should

circumstances change which give rise to the need to alter the scope of the consent before works are carried out.

k) If works are carried out without or beyond the scope of consent, then enforcement action should be considered. If the works do not affect a flood or coastal erosion risk then a letter should be sent to the owner confirming that the responsible authority is aware of the completion of works without consent; but that enforcement action will not be pursued at this time because as there does not appear to be any affect on any flood or coastal erosion risk. Such letter should reserve the power to instigate enforcement action in the future should the authority become aware of any such affect on risk by such prohibited works. See section 4 – Enforcement process for more detailed information on enforcement powers available.

l) There is no obligation on an owner to maintain a structure or feature, although it is obviously in their own best interest to ensure that it continues to provide the same benefit to the flood or coastal erosion risk management system. If the owner becomes aware of any issues with the structure or feature, they should advise the responsible authority as soon as possible. A designated structure or feature may require remedial works as a result of natural deterioration and through no fault of any party. In these cases it would be beneficial to enter into a dialogue with the owner in order to agree the best approach to restoring the structure or feature.

4. Enforcement Process

4.1 Overview of the enforcement process

For structures or features subject to either a provisional or confirmed designation notice, the following may lead to legal enforcement action by the designating/responsible authority:

i. any alteration, removal or replacement completed without (or beyond the scope of) the consent of the responsible authority;

ii. breach of consent / conditions.

4.2 Enforcement procedure

a) In situations involving works on structures or features subject to either a provisional or confirmed designation notice where no consent has been granted, the responsible authority should:

i. Assess the flood or coastal erosion risk implications of what has occurred and the urgency for any remedial actions.

ii. Consider the need for (and legal power to undertake) emergency works and instigate if appropriate. Legal advice will be needed to establish the legal authority to exercise a power of entry and undertake necessary emergency remedial works, particularly in the case of land which is occupied.

iii. In less urgent situations, seek to resolve any problems through a dialogue with the relevant person who may have undertaken prohibited works and who may be willing to rectify without recourse to formal enforcement.

iv. Where appropriate, seek legal advice before instigating formal enforcement.

b) Where formal enforcement is appropriate a responsible authority can produce an enforcement notice, which may be served on:

i. the person who undertook prohibited works on a designated structure or feature; or

ii. the owner of the designated structure or feature.

c) The enforcement notice must direct the recipient to take specified steps, within a specified period, to remedy the contravention and must clearly set out the ramifications of not complying with the notice.

d) It is recommended that the notice specifies the period within which an appeal may be brought. An appeal 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 the notice was sent to the appellant as outlined in Rule 22 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) 2009.

e) If there is an appeal the effect of the enforcement notice is suspended until the appeal has been determined (see section 7 - Appeal Process), unless steps need to be taken as a matter of urgency, in order to deal with an immediate and material increase in or alteration of a flood or coastal erosion risk.

4.3 Failure to comply with an enforcement notice

a) If the party who was served the enforcement notice fails to comply with it:

i. they have committed an offence and are liable, on summary conviction, to a fine not exceeding level 5 on the standard scale;

ii. the responsible authority may take the steps specified in the enforcement notice themselves or authorise someone else to;

iii. the responsible authority may require the party to pay any expenses incurred under paragraph ii; and

iv. any payment required under paragraph iii may be recoverable as a debt.

b) The responsible authority will need to consider the appropriate course of action to ensure that the designated structure or feature continues to provide the same contribution to the flood or coastal erosion risk management system.

5. Emergencies

5.1 Overview of emergencies

a) Any issues or concerns relating to the condition of designated structures or features will normally be picked up by routine inspections either by the owner or the responsible authority long before the structure or feature is in serious danger of physical failure.

b) To assist with the early identification of any issues it is recommended that during the assessment stage the consequences of the structure or feature failing should be determined and, if high, a monitoring regime adopted and agreed with the owner.

c) However, this may not always be the case and there may be situations where, for example, a designated wall may have been demolished without consent, leaving a gap in the defences of the flood and coastal erosion risk management system. In such circumstances, emergency action may be appropriate.

5.2 What is an emergency?

a) The 2010 Act confers powers on authorities to act in an emergency. These powers allow an authority to act to remedy an emergency situation without giving an enforcement notice and to recover the costs of doing so from the owner.

b) Under the 2010 Act, an authority only has such emergency powers if:

   i. the structure or feature concerned is designated; and

   ii. a person has undertaken prohibited works, i.e. a person has altered, removed or replaced a designated structure or feature without (or beyond the terms of) consent, and

   iii. the authority thinks that such alteration, removal or replacement immediately and materially increases or alters a flood or coastal erosion risk.

c) An emergency under the 2010 Act is therefore a situation in which works to a structure or feature give rise to an immediate or material change in flood or coastal erosion risk.

d) Responsible authorities and indeed the owners need to bear in mind the fact that the owner is under no obligation to maintain a structure or feature to a required standard and flood risk emergencies may arise naturally and through no act or intervention of any party. The use of emergency powers may not be appropriate in such circumstances as, in order to make use of such powers, an authority must be satisfied that a person has undertaken prohibited works. Before considering the use of emergency powers, authorities are advised to seek legal advice.

5.3 Procedure for emergency works by responsible authority

a) Emergency works may be appropriate if:

   i. a person has carried out works on a designated feature without consent or is in breach of consent / conditions; and

   ii. the responsible authority thinks the contravention may immediately and materially increase or alter a flood risk or coastal erosion risk.

b) The responsible authority may:

   i. act to remedy the contravention without giving an enforcement notice;

ii. require the owner to pay the expenses of the remedial action if the owner has completed works without consent or is in breach of any consent or conditions contained therein; and

iii. recover the expenses as a debt.

c) Decisions on use of emergency powers should be based on a risk assessment with the level of detail being proportionate to the urgency.

d) Decisions must be taken by a competent authorised person employed by the responsible authority. Authorities will need to determine their competent authorised personnel are trained accordingly. This process requires professional input and authorities will need to assure themselves that they will be able to defend any decisions taken if the owner decides to appeal.

e) Authorities are advised to ensure they are satisfied of the legal authority to use emergency powers in all cases, especially where emergency works are proposed for land which is occupied. Appeals against the use of emergency powers are likely to focus on the necessity for and proportionality of the works. It should be noted that whilst owners may not in some cases challenge the emergency works themselves (as they may derive a benefit), where legal authority for such works cannot be established, authorities may not have the legal basis to recover their costs.

5.4 Procedure for emergency works by owner of designated feature

a) There is no provision in the legislation for an owner to carry out emergency repairs to a designated structure without prior consent from the responsible authority.

b) However, it is recommended that this matter is discussed with the owner and the responsible authority should be prepared to waive the need for prior consent in the event of works being of a genuine emergency nature. In such circumstances the owner should inform the responsible authority at the earliest opportunity. A record of the discussions should be made accordingly.

6. Powers of Entry

6.1 Powers of Entry

a) Whilst the powers of entry conferred by the 2010 Act are widely drafted, it is recommended that such powers only be used in a reasonable and proportionate way and that authorities develop a consistent and measured approach to their use which, where possible, ensures that routine entry onto premises is on a ‘permission basis’ with owners rather than through immediate use of such statutory entry powers.

b) Under the 2010 Act, a person authorised by the designating/responsible authority may at any reasonable time enter land:

i. to determine whether a structure or feature may be designated;

ii. to determine if a designated or provisionally designated structure or feature has been altered, removed or replaced without consent;

iii. to determine whether a person has complied with an enforcement notice; and

iv. to complete emergency remedial works.

c) It is recommended that “at any reasonable time” be considered to mean Monday – Friday between the hours of 9am and 5pm. However, for the purposes of completing emergency remedial works, it may be necessary to enter outside of these times. This is on the understanding that the emergency remedial works must be completed in a timely fashion to prevent the failure of the flood or coastal erosion risk management system of which the structure or feature is a part.

d) However, a person authorised by the designating/responsible authority may not demand entry to land which is occupied unless:

i. at least 7 days notice has been provided to the occupier, specifying the purpose for which entry is required;

ii. entry is for one of the purposes listed above; and

iii. the person seeking to enter land can, upon request, produce evidence of authorisation.

e) Again, it is recommended that entry onto occupied land is done on a ‘permission basis’ with the occupier but, where a power of entry is needed, it is recommended that the above entry notice is given in writing.

6.2 Complaints relating to Powers of entry

The complaints procedure of the designating/responsible authority should be included with the written notice informing the occupier that the authority intends to exercise the power of entry. This gives the occupier recourse if they feel the power of entry was not exercised appropriately.

6.3 Compensation for owners

a) Designating and responsible authorities will also need to be aware that the 2010 Act provides for compensation for the owner if, as a result of entering their land, they:

i. incur any loss as a result of anything done on their land; or

ii. are disturbed in their enjoyment of their land.

b) However, compensation will not be available to an owner if:

i. the loss or disturbance is the result of the reasonable exercise of the powers of entry; and / or

ii. the owner has completed works without consent on a designated structure; and / or

iii. an owner has failed to comply with an enforcement notice.

c) Any disputes about compensation are to be determined by the Upper Tribunal.

d) To try and avoid this situation, it is recommended that, during discussions and correspondence with the owner about the designation and/or consent process, the designating/responsible authority clearly explains the powers of entry and the action they might take. Ideally the owner would agree access by permission where needed, but where it is obvious that this is not likely to be the case, their concerns or lack of co-operation should be recorded as early as possible in order to inform later decisions about what steps to take.

7. Appeal Process

7.1 Overview of Appeal Process

a) As illustrated in Figure 1 below, in relation to a designated structure or feature the owner of the structure or feature can appeal to the General Regulatory Chamber of the First-tier Tribunal 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 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.

c) The regulations that govern the appeals in relation to designation are "The Designation of Features (Appeals) (England) Regulations 2012" and "The Designation of Features (Appeals) (Wales) Regulations 2012". The Designation of Features (Notices) (England) Regulations 2012 and The Designation of Features (Notices) (Wales) Regulations 2012 are relevant in respect of the required content of notices issued by responsible authorities in relation to a decision in connection with consent other than in response to an application.

d) 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 that contravened the designation, where that person is not the owner.

e) Decisions within the scope of an appeal include:

i. a designation;

ii. a decision made by the Responsible Authority, upon receipt of an application by the Owner, to alter, remove or replace a designated structure or feature (including refusal and consent conditions);

iii. a decision by the Responsible Authority, upon receipt of an application by the Owner, to refuse to cancel a designation; and

iv. an enforcement notice.

f) 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).

g) 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

h) An appeal against the Designating/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'.

i) The 2010 Act sets out the clear basis for decision making by the Designating/Responsible Authority. Decisions must be based upon relevant reasons given (which should include the reason(s) why a flood or coastal erosion risk is affected) and a designation may only be made if the following 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.

j) Under the regulations governing appeals, an appeal against a Designation Notice can be made on any grounds.

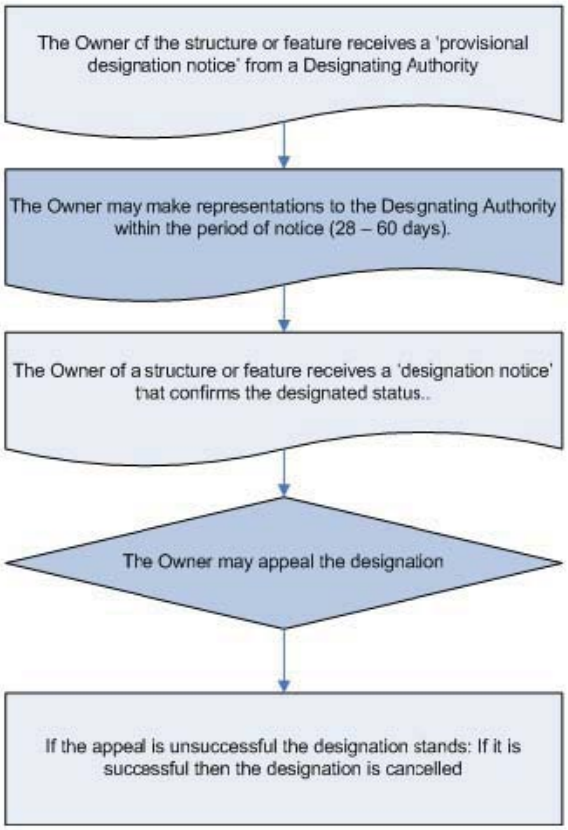
k) To avoid unnecessary appeals and challenges to designation and consent decisions, our recommendation is that authorities assure themselves that notices and correspondence issued are procedurally and factually correct and expressed in an appropriate and lawful way.

l) An appeal connected to a consent application is likely to consider whether the proposed alteration, removal or replacement would affect a flood or coastal erosion risk and whether the refusal to grant consent was therefore justified. The determination in such cases, therefore, is likely to be a matter for technical judgement of risk on the basis of arguments/opinions presented by both parties.

m) If conditions have been applied to a consent application, these could also be subject to an appeal. Again, the determination of such an appeal is likely to be of a technical nature about the reasonableness of the condition in the context of risk management i.e. what is the flood or coastal erosion risk and what effect does the condition have on it and is it reasonable/proportionate?

n) The same applies to the refusal to cancel a designation. A request to cancel a designation is likely to be refused where the flood or coastal erosion risk(s) identified within the designation notice still apply. The owner of the designated structure or feature may, for example, appeal such a refusal by challenging the presence of the risk and/or the structure or feature’s affect on that risk.

The right to an appeal.



The Owner must not alter, remove or replace the structure or feature without permission of the Designating / Responsible Authority.

The Designating Authority must consider any representations made to it. If it decides not to confirm the provisional designation then the designated status expires 60 days from the date of the provisional designation notice.

Whilst for the purposes of this diagram the appeal right against a designation has been illustrated it must be noted that an owner of a structure or feature may also appeal against any notice conferring a decision that has been issued by the relevant authority

Figure 1

o) Where an appeal has been made against either a designation, a refusal to consent to the alteration, removal or replacement of a designated structure or feature, a cancellation of a designation or in relation to any conditions attached to any such consents, the effect of the designation remains in place (and therefore all alterations, removals or replacements are prohibited) until the appeal has been determined.

p) By way of an example, where an appeal against an enforcement notice is made because a person alleges that they have not undertaken prohibited works, the effect of the enforcement notice is suspended until the appeal is determined. The existence or lodging of an appeal does not preclude the use of emergency powers where necessary/appropriate.

q) 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 Tribunals decision. The right may only be exercised with permission of the First-tier Tribunal or Upper Tribunal. Where permission is given the further appeal would be heard by the Upper Tribunal.

r) All parties must seek their own independent legal advice in relation to any appeal they make or defend.

7.2 Alternative Dispute Resolution

a) It is recommended that authorities set up a procedure for resolving disputes regarding decisions on designation, consent decisions, cancellations and enforcement notices so as to avoid unnecessary appeals through the courts and tribunals. As an owner has only 28 days to lodge an appeal with the First-tier Tribunal in respect of an authority's disputed decision, we recommend that any dispute resolution procedure advises the owner to lodge any appeal as a first step. Then, if both the owner and the authority are in agreement, the First-tier Tribunal has the power to adjourn or postpone a hearing to allow time for the parties to seek resolution between themselves. If they do not agree or if the alternative resolution attempt fails, the First-tier Tribunal can still consider the appeal application. Alternative Dispute Resolution is not a statutory requirement but is recommended in order to save unnecessary time delay and costs where disputes can be resolved between the parties.

8. Local Land Charge Registration Process

8.1 Overview of the local land charge process

a) It is vital that when land or property ownership changes the new owners are aware of the existence of the designation of any structures or features on their property. Registering the designation as a local land charge is considered to be the best means of achieving this.

b) A Local Land Charges Register is maintained by every local authority in England and Wales, with the exception of County Councils. The purpose of this register is to record details of all entries registered against properties within the borough that fall within the definition of a local land charge, which is a restriction or prohibition on a parcel of land securing payment or restricting use and is binding on successive owners.

8.2 Procedure for registering a local land charge

a) It is recommended that the task of registering local land charges should only be undertaken in conjunction with the responsible authorities' Estates and / or Legal specialists.

b) When registration has been successfully completed the designating authority must update their records as appropriate.

c) Inform the owner that a local land charge has been applied to the land on which the designated structure or feature is located.

d) Timely and effective registration of a land charge will provide other designating authorities with an opportunity, when searching the local land charge register, to see where new designations have been completed. However, in the ethos of effective partnership working, it is expected that designating authorities will have already shared this information with its neighbouring authorities accordingly.

9. Review and Cancellation of Designations

9.1 At any point after designation:

a) The responsible authority is advised to periodically review whether the current designation of a structure or feature is adequate and/or still appropriate. The frequency of these reviews is a matter for the responsible authority to determine based on the level of risks involved and such a review may also be prompted by the receipt of an application from the owner to cancel a designation.

b) The review must, consider whether the cancellation of the designation is appropriate because, for example, the structure or feature has been removed as part of a consent and therefore no longer exists, or its affect on a flood or coastal erosion risk has been superseded by other works (note that cancellation may also be appropriate if the responsible authority wishes to directly maintain the feature on a regular basis).

c) If cancellation is appropriate the responsible authority must inform the owner of a designated structure or feature by means of a Cancellation notice which must specify:
    i. the designated structure or feature;
    ii. the date on which the cancellation takes effect; and
    iii. the reasons for the cancellation.

d) If an application to cancel the designation is refused, it is recommended that the notice specifies the period within which an appeal may be brought. An appeal 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 the notice was sent to the appellant as outlined in Rule 22 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) 2009.

e) Responsible authorities are also required:
    i. to inform the other authorities, which the responsible authority thinks would have an interest, of the cancellation of a designation; and
    ii. cancel the local land charge.

f) On review, it may also be deemed appropriate to extend the designation to new or other structures/features located on the same (or neighbouring) parcel of land as an existing designation. In such cases, a new designation process should be undertaken for such new/other structures or features.

g) The responsible authority should ensure that they update their records accordingly.

h) If an owner has applied to cancel a designation but has not had a decision from an authority within two months, it is recommended they contact the authority to establish whether or not a decision has been made. Where an authority makes a decision but does not notify the owner within two months, this is taken to mean that cancellation has been refused, and the owner may appeal. Where an authority does not make a decision within two months, e.g. because of an administrative error, the owner should follow the authority’s complaint process in the first instance and/or pursue other legal remedies, as an appeal application cannot be made where no actual decision has been taken.

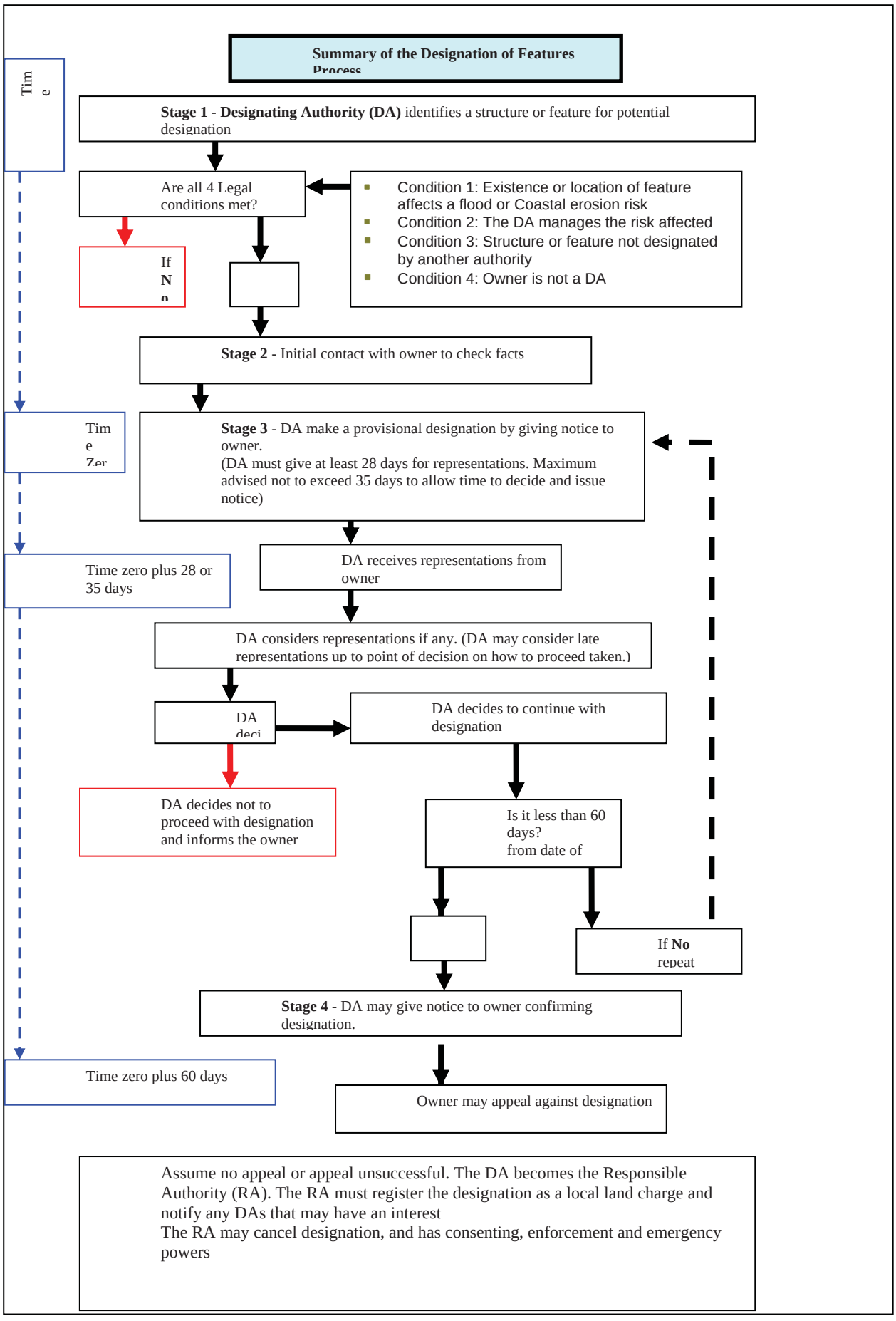

Summary of the Designation of Features Process
Time
Stage 1 - Designating Authority (DA) identifies a structure or feature for potential designation
Are all 4 Legal conditions met?
Condition 1: Existence or location of feature affects a flood or Coastal erosion risk
Condition 2: The DA manages the risk affected
Condition 3: Structure or feature not designated by another authority
Condition 4: Owner is not a DA
If No
Stage 2 - Initial contact with owner to check facts
Time Zero
Stage 3 - DA make a provisional designation by giving notice to owner.
(DA must give at least 28 days for representations. Maximum advised not to exceed 35 days to allow time to decide and issue notice)
Time zero plus 28 or 35 days
DA receives representations from owner
DA considers representations if any. (DA may consider late representations up to point of decision on how to proceed taken.)
DA deci
DA decides to continue with designation
DA decides not to proceed with designation and informs the owner
Is it less than 60 days? from date of
If No repeat
Stage 4 - DA may give notice to owner confirming designation.
Time zero plus 60 days
Owner may appeal against designation
Assume no appeal or appeal unsuccessful. The DA becomes the Responsible Authority (RA). The RA must register the designation as a local land charge and notify any DAs that may have an interest
The RA may cancel designation, and has consenting, enforcement and emergency powers

Figure 2

Definitions	Explanation
Designating authority	**Any of the following can be a designating authority:** **a) the Environment Agency,** **b) a lead local flood authority,** **c) a district council (whether or not it is a lead local flood authority), and** **d) an internal drainage board.** **A designating authority is the authority which designates a structure or feature.**
Responsible authority	**The responsible authority in relation to a designated structure or feature is normally the authority which made the designation. Once a structure or feature has been designated, the designating authority becomes the responsible authority, unless it has allowed another authority to adopt the designation and become the responsible authority for that structure or feature).**
Owner(s)	**The term "owner(s)" in relation to anything which is or may be designated means either:** **a) the owner(s) of the land on or in which the structure or feature is situated, or** b) **if different, the person responsible for managing or controlling the structure or feature.**
Provisional designation	**Provisional designation relates to the first stage in the designation process during which the owner is consulted by the designating authority.**

Annex B

www.wales.gov.uk www.defra.gov.uk

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

Information for asset owners – your questions answered

June 2012

Llywodraeth Cymru
Welsh Government

defra
Department for Environment
Food and Rural Affairs

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http://www.defra.gov.uk/environment/flooding/legislation/

Any enquiries regarding this document/publication should be sent to us at:

floodwateract@defra.gsi.gov.uk or Defra, Flood and Water Directorate, Area 2C Ergon House London SW1P 2AL

or

Floodcoastalrisk@wales.gsi.gov.uk or Flood & Coastal Erosion Risk Management, Department for Environment & Sustainable Development, Welsh Government Third Floor, South Wing, Pillar B02, Cathays Park, Cardiff, CF10 3NQ

PB 13746

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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 section19 – 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).

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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

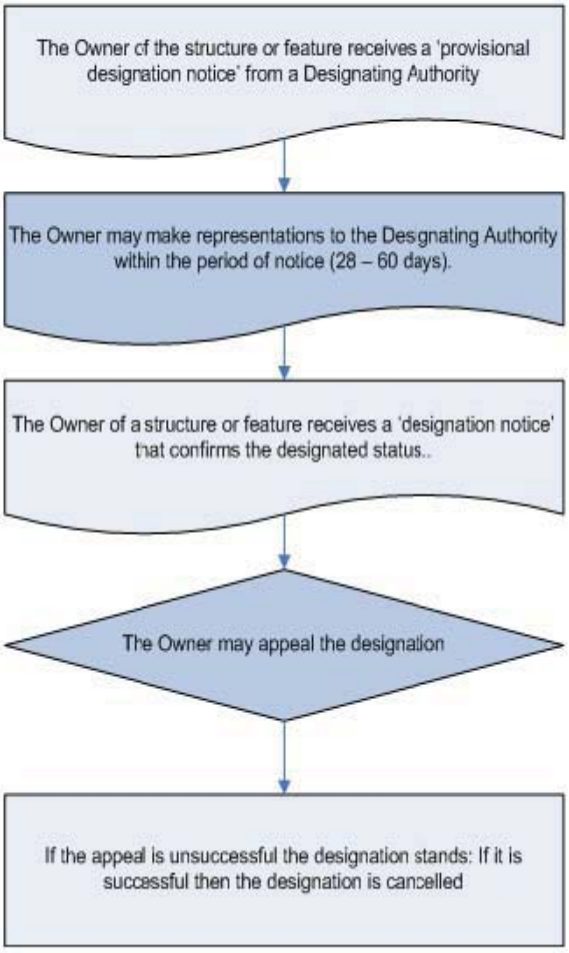
   v. the owner of the structure or feature is not a Designating Authority.

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 Tribunals 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.



The Owner must not alter, remove or replace the structure or feature without permission of the Designating / Responsible Authority.

The Designating Authority must consider any representations made to it. If it decides not to confirm the provisional designation then the designated status expires 60 days from the date of the provisional designation notice.

Whilst for the purposes of this diagram the appeal right against a designation has been illustrated it must be noted that an owner of a structure or feature may also appeal against any notice conferring a decision that has been issued by the relevant authority

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.