



# **Developer Funded Highway Works carried out under Section 278 of the Highways Act 1980**

## **Guidance Notes for Developers**

**(Legal Agreement – Stage 2 Design Audit – Construction Phase)**

**Section 1: General Terms of the Legal Agreement to allow works on the Highway**

**Section 2: Stage 2 Technical Assessment and Safety Audit**

**Section 3: Construction Phase**

**Appendices : Supplementary Information.**

October 2017

## Definitions

<b>Audit Engineer</b>	Kent Council Engineer undertaking an audit of the design and/or construction of the works
<b>Development Control Team Leader</b>	Kent County Council Bridge Manager for the Scheme
<b>Consulting Engineer</b>	The Developer's Consulting Engineer
<b>Developer</b>	The Organisation / Individual funding the works
<b>Development Agreements Project Manager</b>	Kent County Council Project Manager for the Scheme
<b>Development Agreements Manager</b>	Kent County Council Development Agreements Manager
<b>Director of Law &amp; Governance</b>	Kent County Council's Legal and Democratic Services responsible for drafting the Legal Agreement and dealing with all legal matters
<b>Kent County Council</b>	Kent County Council's department responsible for work on the highway
<b>Kent Permit Scheme</b>	Kent County Council's permit scheme for co-ordinating roadworks on the highway.
<b>Legal Agreement</b>	Kent County Council's current Model Agreement under Section 278 of the Highways Act 1980
<b>Performance Security</b>	A cash deposit paid to the County Council to cover the cost of the works
<b>Principal Designer</b>	The Developer's appointed Health and Safety Project Advisor under the CDM regulations.
<b>Property Group</b>	Kent County Council's Property Group and their Partnership Property Consultant
<b>Public Transport Group</b>	Kent County Council's Public Transport Group dealing with public transport matters
<b>Road Works Co-ordination Manager</b>	Kent Highway Services' Manager responsible for co-ordination of all road works in the County
<b>Stage 1</b>	Outline Design Technical Assessment and Safety Audit
<b>Stage 2</b>	Detailed Design Technical Assessment and Safety Audit
<b>Stage 3</b>	As-built Pre-Opening Assessment and Safety Audit
<b>SUDs Drainage Scheme</b>	A sustainable system of drainage for the works

## Section 1

### General Terms of the Legal Agreement to allow works on the Highway

#### Payment of Costs

1. The Developer will meet the costs of the works and fees incurred by the County Council including but not limited to:
  - i) The full cost of the highway alterations including structures, accommodation works, landscaping, drainage works, any alterations to plant required by statutory undertakers, alterations to traffic signing, street lighting, provision of traffic signals (if applicable), any temporary works and any remedial/strengthening works to the existing highway;
  - ii) The costs associated with the unencumbered transfer to the County Council of all land which will form part of the new or improved highway, including visibility splays, if not already within highway boundaries where appropriate. The developer is responsible for all land acquisition and the County Council will require the Developer to deduce Title to any land to be transferred. If any Kent County Council owned land (other than land forming part of the highway) is required for the works then the Developer shall be responsible for all costs arising from (including the value of) the County Council providing such land;
  - iii) All costs and claims incurred by the County Council in exercising their powers and dealing with claims under the Land Compensation Act 1973, including the provision of any necessary noise insulation including any compensation. (Guidance Notes in respect of LCA 1 claims are shown in Appendix 'B');
  - iv) Design checking, Project Management and Site Audit Supervision fees. The developer will be charged a fee for this work which is currently 10% of the bond value for schemes up to £0.5m. A further 3% will be charged on the balance for any scheme valued above £0.5m. These fees do not include supplementary items, for example design checks or supervision of Traffic Signals or structures and are not covered by the fixed sum Consultancy fee set out in paragraph 2;
  - v) All costs incurred by the County Council in respect of Traffic Regulation Orders. No costs associated with Traffic Regulation Orders are covered by the fixed sum Consultancy fee as set out in paragraph 2;
  - vi) All costs incurred in assessing/checking, supervising and managing Traffic Signals, Structures and Geotechnical work;
  - vii) All costs incurred by the Invicta Law Ltd in preparing and completing the Legal Agreement;
  - viii) All costs associated with assessing and approving a SUDs drainage scheme;
  - ix) The testing of materials on behalf of the County Council;
  - x) All costs associated with obtaining consents, licences or provisions required for the works and the procurement of any highway drainage and other easements;

- xi) All commuted sums to cover future maintenance of the highway works, structures, non-structures soakaways, SUDS drainage schemes, non-standard street lighting, non-standard surfacing, and highway landscaping and traffic system equipment constructed or supplied under the Legal Agreement. (Further details in Appendix 'A'); and
  - xii) All additional identified costs incurred by Operators of scheduled Public Transport Services in diverting operations resulting from the associated works.
2. On completion of the Legal Agreement the Developer shall pay to the County Council a fixed consultancy fee (to cover the work done by the County Council up to and including Stage 1 and Member Approval) of:
- £5,568 schemes costing up to £249,999;  
£11,135 schemes costing between £250,000 and £999,999;  
£16,703 schemes costing £1,000,000 and above.
3. Prior to the County Council commencing any work on project management or advising on/or checking the design referred to in 1(iv) and 1(v) above or instructing the Invicta Law Ltd, the Developer will pay to the County Council an advanced sum of the estimated value of the works, the sum to be agreed with the Development Agreements Manager, which will be off-set against the final fee payable. The final fee payable will be calculated by the Development Agreements Manager. A Solicitor's undertaking will be required in respect of all legal costs before any work is commenced.
4. Before commencing work the Developer will take out a bond with a Bank or other financial institution approved by the County Council for the full costs of the works, including statutory undertakers works, commuted sums, consultant's supervision costs and the cost of any other payment due to the County Council. 80% of this bond will be released following issue of the First Certificate. Alternatively the Developer may deposit with the County Council by way of security a sum for the same amount (the Performance Security).
5. If Land Compensation claims are forecast then an additional Bond will be required to cover the likely compensation and costs.

### **Design of the Works**

6. The developer must appoint, from the County Council's Approved Consultants list, a Consulting Engineer to design and supervise the works. A copy of the Approved List can be obtained from the Development Agreements Manager. Application can be submitted via <http://www.kent.gov.uk/roads-and-travel/highway-permits-and-licences/apply-to-become-a-highways-contractor>
7. The detailed design drawings, specifications and contract details shall be submitted to the Development Agreements Manager for Stage 2 approval at least 3 calendar months prior to the intended date of inviting tenders. A programme of works and a list of suppliers of materials shall be submitted for approval to the Development Agreements Manager at least ten working days prior to the intended start of construction.
8. The Developer must provide the Development Agreements Manager with details of the Planning Supervisor, including qualifications and experience, before Stage 2 Approval is issued.

9. The design of the works shall comply where appropriate with the Highway Agency's Specification for Highway Works dated March November 2009 and any subsequent amendments issued either by the County Council and/or the Highway Agency.
10. The Developer is responsible for undertaking stages 1 to 3 of the Safety Audit in accordance with HD19/03 (Road Safety Audit). This process must include the provision of a copy of the completed Safety Audit duly signed stating that it has been undertaken in accordance with HD19/03. In addition a Designer's response to the Audit must be provided and a record of the actions taken as a result of the Safety Audit and any exception reports that will need to be considered as part of the technical audit and scheme approval by the County Council. This process will apply to stages 1 to 3 of the safety audit process including a mandatory Stage 3 before the issue of the First Certificate. The First Certificate will not be issued until the recommendations of the Safety Audit have been satisfactorily completed on site unless otherwise agreed by the Development Agreements Manager.
11. The design of all highway structures is covered by the Technical Approval Procedure, which can be obtained from the Bridge Manager.
12. The Developer shall be responsible for discussions and liaison with all undertakers for the co-ordination of utility infrastructure for the development and associated works in the highway. KCC will be responsible for serving the Section 58 Notice under the New Roads and Street Works Act 1991 (NRSWA) on all relevant Undertakers.
13. The Developer is required to hold discussions at an early stage with the Road Works Co-ordination Manager to register his desired programme to carry out his works on the Highway.
14. A minimum initial period of 3 months notice is required for major works to book the time slot on the highway. The Developer's contractor will still need to follow up with a permit application prior to commencement of the works and follow the Kent Permit Scheme process. If the Developer's programme slips he may be prevented from accessing the highway and will need to re-book the space for a later date as well as potentially incur fines under the Permit Scheme.

### **Construction of the Works**

15. The Developer must use a Contractor or Sub-contractor from the list of approved contractors for any of the highway works.
16. The ICE Conditions of Contract or other such Conditions of Contract as agreed in writing by the Development Agreements Manager must be used for all works on the public highway or for roads that shall be adopted. In all cases the Conditions of Contract shall not be less stringent than the ICE Conditions
17. All works are subject to a minimum maintenance period of twelve months except where soft landscaping is included in the works, in which case the maintenance period will be thirty-six months.
18. Where the Developer is providing the Engineer to the Contract, the Development Agreements Manager or his representative will have unfettered access to the site at all times to ensure that the works are being carried out in compliance with the design and specification.
19. The Developer must ensure that all of the construction works are adequately supervised by an approved Consulting Engineer and that his proposed supervision regime is discussed with the

Development Agreements Engineer or his representative prior to the works commencing on site and regularly reviewed during the construction period. If adequate supervision is not provided, the Development Agreements Manager will increase the level of audit supervision required and all associated costs will be passed onto the Developer.

20. It is essential that the Developer recognises the importance of completing the works in a safe, clean and efficient manner with the minimum amount of delay and disruption to the local community and travelling public and works in partnership with the Development Agreements Manager to achieve this aim.

### **Legal Agreement**

21. A copy of the Legal Agreement may be obtained from the Development Agreements Manager on request.
22. Each scheme has a Legal Agreement individually drawn up by the Invicta Law Ltd and the draft agreement will be submitted to the Developer's solicitor when sufficient information has been provided. A minimum period of three months is required where the Legal Agreement does not involve the transfer of land and up to six months where a land transfer is involved. This is based on experience and is largely dictated by, the completeness and quality of the information provided by the Developer.

## **Section 2**

### **Stage 2 Technical Assessment and Safety Audit**

23. Before work is commenced on site and pursuant to planning consent, every scheme has to be approved by the Development Agreements Manager.
24. The Developer will be given the name of the Audit Engineer that shall be the contact for the submission of the design details. The Audit Engineer will not pass the submission through the system for comment until he/she is satisfied with the completeness and quality of the information, provided by the Consulting Engineer, to have a reasonable chance of a successful outcome. It is envisaged that this process will take some weeks to complete and experience has shown that the length of time taken to process the submission is directly related to its quality and completeness. KCC welcome pre-submission discussions with the Consultant if requested to establish a working relationship and lines of communication.
25. The requirements for a Stage 2 submission include:
- i) a plan showing land adjacent to the highway that is under the control of the Developer as well as a plan showing any land to be transferred to the County Council.
  - ii) a method of delineating the proposed highway boundary.
  - iii) a design report for the scheme that shall include;
    - a brief description of the highway scheme proposal;
    - highway design parameters used such as design speed, carriageway widths, horizontal and vertical alignments, visibility, junction type etc;
    - pavement design and standards used;
    - drainage design and standards used;
    - details relating to a SUDs drainage scheme where appropriate;
    - earthworks design and standards used;
    - signs design and standards used;
    - road lighting design and standards used;
    - listing of departures/relaxations from standards and reasons for departure/relaxation; and
    - a design certificate (as shown in Appendix C).
  - iv) all drainage proposals, including SUDs, identifying the relationship with existing drainage infra-structure together with calculations and approval of the Environment Agency/drainage undertaker for outfalls and soakaways.
  - v) all details of any traffic systems requirements.
  - vi) all visibility splays and landscaping proposals.
  - vii) a proposed construction period, programme and traffic management proposals.
  - viii) all details of Statutory Undertakers' diversions and costs.
  - ix) all details of easements for future maintenance of highway drainage, structures etc.

- x) all details of the licence/s under S.142 of the Highways Act 1980, to maintain future landscaping areas.
  - xi) a noise and air quality report to determine implications under the Land Compensation Act 1973. The County Council's policy involves offering noise compensation measures following assessment but prior to construction works commencing on site.
  - xii) a 'fully-costed' risk analysis of the total value of Land Compensation Claims that could occur 7 years after the release of the Second Certificate.
  - xiii) an estimate of the full cost of the works.
26. The Bridge Manager will carry out the Technical Approval of any structure that affects the highway.
27. The Development Agreements Manager will require two copies of the complete approved contract documentation, drawings and specification for use in the construction phase.
28. Four copies of the general scheme layout drawing will be required by the Development Agreements Manager in order to fulfil the County Council's obligations in disclosing information to District Councils for local land charge searches.



### **Section 3: Construction Phase**

29. No work will be commenced until the Development Agreements Manager gives approval to do so. For approval to be given the following shall be in place amongst other things:
- i) A signed and sealed Section 278 Agreement completed by the County Council;
  - ii) The bond or performance security has been completed or deposited.
  - iii) The correct periods of notices have been given to the Development Agreements Manager under the terms of the Legal Agreement;
  - iv) NRSWA notices have been served on the correct bodies;
  - v) The Road Works Co-ordination Manager responsible for co-ordination of highway works has agreed to the timing of the works and has issued a permit to work on the highway and the correct notices have been served by the Developer;
  - vi) Where temporary signals are required, then the correct permits shall have been obtained from the Road Works Co-ordination Manager;
  - vii) Approved Stage 2 Technical Assessment and Safety Audit.
  - viii.) The Audit Engineer is satisfied that all the required information about the contract has been provided, including the Developer's proposed arrangements for the supervision of the works and the construction phase health and safety plan has been submitted and approved by the Development Agreements Manager.
  - ix.) All necessary traffic management arrangements are agreed including any required diversions.
  - x.) The emergency out of hours contact list has been provided to the Audit Engineer, local Police and the Road Works Co-ordination Manager.
30. The works will be audit supervised by the Agreements Project Manager or his representative.
31. Ten working days before commencement of the works the Developer shall deliver a letter to the Parish Council, the Traders' Association, local residents and businesses in the vicinity of the works giving information about the scheme, which shall include:-
- i) A brief description of the work involved including a plan, the location and duration.
  - ii) The name of the Contractor and contact address/telephone numbers.
  - iii) The Audit Engineer's contact name and telephone number.
  - iv) Traffic Management arrangements.
- In addition the following is necessary:-
- v) Advance roadworks signage shall be erected
  - vii) The Public Transport Group must be consulted about the impact of the scheme on bus services.
  - viii) The Developer will provide the Development Agreements Manager with full details of contact telephone numbers, and the site responsibilities as specified by the Development Agreements Project Manager.

32. During the course of the works the Developer shall ensure that those listed in point 31 above are kept fully informed of significant changes to the scheme programme. If road closures or diversions are necessary the Police and emergency services must be informed accordingly.

### First Certificate

33. The Developer must arrange a Stage 3 Safety Audit of the scheme prior to the First Certificate being issued and must act upon the recommendations made by the safety audit engineer as agreed with the Development Agreements Manager.
34. Before the First Certificate is issued, the Developer shall provide two full size paper sets and one copy of .pdf computer files on disk of highway adoption drawings coloured in the following manner, to comply with adoption procedures:
- i) Pink - All new highway land.
  - ii) Pink (Hatched Red) - Any highway land which has a change of use i.e. verge to carriageway.
  - iii) Blue dotted - All existing drainage systems.
  - iv) Blue solid - All new drainage systems (including SUDs).
  - iv) Red Line depicting the new Highway Boundary.
35. The Developer shall provide two copies of the Health and Safety File together with two full size paper sets and one copy of .pdf computer files on disk of the as-built drawings (2 if structures are involved) before the First Certificate is issued. If there are any changes to the Health and Safety File or the as-built drawings during the Maintenance Period, the Developer must ensure that the amended copies are provided before the Second Certificate is issued,
36. The Health and Safety File shall include a report summarising the construction phase of the project. It should highlight any significant problems encountered and how they were overcome. It should also give details of the design options selected by the contractor, any significant design changes together with the reasons for them. A section should describe all the materials used, their source of supply and their level of performance together with the name and address of the manufacturer for any future contacts or supply. The H&S File must include details of any latent risks which might affect methods of future maintenance– eg deep chambers.
37. The Health and Safety File shall include a report summarising details of the hand over site inspection with the Development Agreements Manager. The report shall include details of the date of the meeting, all attendees and any issues raised and actions taken.
38. The Health and Safety File shall include the as-built drawings which must bear the legend "AS-BUILT".

The as-built drawings must include:-

- i) All departures from the approved Stage 2 contract drawings;
- ii) The position of all statutory undertakers apparatus;
- iii)
- iv) The location of any private apparatus or services which require licences under Section 50 of the new Roads and Street Works Act 1991;
- v) Any additional levels, borehole records or other information which is considered useful.

v) Separate titled drawings outlining:

- a) A drainage plan (including SUDs schemes) showing the location, direction of flow and construction material of all new and existing drainage, ditches and the location of outfalls or soakaways;
- b) All street lighting, illuminated signs and cables. Private cables shall be shown separately from Seeboard supplies. All items shall indicate cypher reference nos;
- d) Landscape plan showing shrub areas and grass areas including area measurements and indicating the date for the maintenance expiration. In addition contact names and telephone numbers for maintenance issues;
- e) A plan showing structures separately from those walls and/or structures and/or bridges that shall be maintained by or on behalf of the County Council, and those permanently maintained by or on behalf of the Developer;
- f) Signs and road markings plan showing location and sign face details;
- g) A plan detailing all the completed finishes on the highway i.e. high friction surfacing, wearing course, tactile paving, carriageway and footway surfacing and materials, kerb types etc. A full set of as-built records for all structures as stated in the Technical Approval Procedure; and
- h) A full set of as-built records for all structures as stated in the County Council's Technical Approval Procedure

Second Certificate

- 39. The Developer shall maintain the works for a minimum period of 12 months or until the Second Certificate has been issued – whichever is the later.
- 40. The Developer shall transfer the land identified in the S278 Agreement following the issue of the First Certificate.
- 41. When the Developer has transferred the land, paid any sums outstanding to the County Council, the works will be inspected and a remedial list prepared. The Developer shall arrange for any identified or outstanding remedial works to be completed to the satisfaction of the Development Agreements Manager.
- 42. Once the above items have been completed to the satisfaction off the Development Agreements Manager he shall issue the Second Certificate to the Developer and arrange for the release of the remainder of the Bond or Performance Security (unless additional Bonds are held for landscaping and LCA issues).

## Appendix 'A'

### Commuted Sums

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The level of Commuted Sums and charges are set by County Members annually. The Development Agreements Manager can provide the current charges on request for the following:

#### Items

##### Structures (including soakaways >1.5 metres in diameter)

Cost of inspection, maintenance and eventual replacement after 120 years.

Amount determined on a site specific basis.

##### Non-Structures Soakaways (including soakaways <1.5 metres in diameter)

Cost of inspection and maintenance over 30 years.

Amount determined on a site specific basis

##### Special surfacing & street furniture

Cost of inspection and maintenance for 30 years for non-standard higher cost materials

Amount determined on a site specific basis

##### Landscaping

Cost of inspection and maintenance for 30 years.

Amount determined on a site specific basis

##### Street Lighting

Cost of inspection and maintenance for 30 years.

Amount determined on a site specific basis

##### Traffic Signals

Cost of inspection and maintenance for 30 years.

Amount determined on a site specific basis

##### Other traffic/signage system equipment

Cost of inspection and maintenance for 30 years.

Amount determined on a site specific basis

##### Other electronic equipment

Cost of inspection and maintenance for 10 years.

Amount determined on a site specific basis

## Appendix 'B'

### Guidance Notes on Land Compensation Act Part 1 Claims in respect of Agreements under S.278 of the Highways Act 1980.

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#### Introduction

1. Developers have an obligation to indemnify and reimburse Kent County Council (KCC) against Land Compensation Act 1973 Part 1 claims (LCA Part 1), when carrying out schemes under Section 278 of the Highways Act 1980.

#### Summary of LCA Part 1 provisions

2. LCA Part 1 allows owner occupiers of mainly residential properties to make a claim against KCC if they consider the value of their property has been depreciated as a consequence of the adverse impact of physical factors arising from use of a new or modified road.
3. The physical factors are:
  - Noise
  - Vibration
  - Smell
  - Fumes
  - Smoke
  - Artificial light
  - Discharge onto the land of any solid or liquid substance

Noise, and to a lesser extent artificial light, are the most likely reasons for a claim.

4. Claims can be made within a 6-year period commencing 1 year after the date of opening to traffic of the new road – known as the 'Relevant Date'. The Legal Agreement requires KCC to be reimbursed for all costs in relation to these LCA claims for the full 6-year period.

#### Process for dealing with claims.

5. When a claim is received a copy is sent for information to the Developer. The process for dealing with claims is as follows:
  - KCC will acknowledge and keep a record of all claims on a database. The Developer is sent a copy of the claim to ensure that they are aware of the potential claim.
  - KCC commission their consultant (by scheme) to negotiate the claim or reject the claim if no increase in the physical factors.
  - Bruton Knowles need to reach agreement on compensation with claimant's Agent and submit a Report and Valuation to KCC for financial commitment purposes and to the Legal Advisor for processing.
  - The Legal Advisor carry's out checks such as, was claimant the owner at the Relevant Date, are there any prior calls e.g. mortgage company to compensation, implications of divorce etc.
  - The Legal Advisor issues KCC with a cheque request for compensation and interest and Agent's fees.
  - The Legal Advisor makes payment to the Claimant and the Agent.
  - KCC advise Developer of details of the settled claim.

6. KCC will recharge the Developer at 6 monthly intervals – normally April and October or more frequently if the accrued costs become high.
7. The Developer bears all the costs incurred that will include:
  - Compensation
  - Interest
  - Agent's fees
  - TMU costs
  - Consultants' fees
  - All costs and fees incurred by Kent County Council

### **Further information**

- The Developer shall undertake a survey as part of the outline design process to establish the potential risks from future LCA Part 1 claims once the scheme has been completed. In the past there have been instances where LCA claims have significantly increased the scheme costs.
- Most claims are submitted by Agents who specialise in this type of work and lobby residents for business.
- The assessment of physical factors considers possible intensification over a 15- year period.
- Claimants and Agents often have an inflated view of the depreciation that has been caused that can lead to lengthy negotiations.
- Compensation is normally assessed as a % depreciation that is then applied to a valuation of the property at the Relevant Date. This requires all properties to be viewed rather than applying a standard valuation.
- Where agreement cannot be reached, the Claimant can refer the matter to the Lands Tribunal.

**Appendix 'C'**

**Design Certificate (Specimen)**

**Road Design**

**Scheme Title:**

1. I certify that reasonable skill, care and diligence have been used in the preparation of the road design aspects of the scheme described in the attached Annexes 1-8 and listed below, with a view to securing that:
  - i. The road design is in accordance with the standards and criteria listed on the annexes, with exceptions noted ( if there are departures), all of which have been discussed and agreed with the Highway Authority.
  - ii. The road design has been accurately translated into Contract drawings and documents all of which have been checked. The unique numbers of these drawings and documents are listed on the annexes.
  
2. Annexes:
  1. Road geometry design
  2. Drainage design
  3. Pavement design
  4. Safety fences and barriers design
  5. Traffic systems design
  6. Road markings and traffic signs design
  7. Road lighting design
  8. Communications design

**Note**

Design certificates for any highway structures are dealt with separately along with highway structure TA approval.

Signed..... Partner/Director  
..... Consulting Engineers  
.....Address  
.....Date