

APPROACH PRINCIPLES COLLABORATION DEVELOPMENT



the Kent design guide

making it happen - **technical assessment and adoption**
(section 38 agreement)

Overview

This part of making it happen includes advice and guidance about completing agreements under section 38 of the Highways Act 1980.



section 38 agreement

Ligislation

Section 38 of the Highways Act 1980 provides for us to take over and maintain at public expense (adopt), roads, footways, footpaths, cycleways and other areas constructed by a person or persons by way of agreement.

The adoption process is covered by a Section 38 agreement.

Section 38(6) of the Act says:

“An agreement under this section may contain such provisions as to the dedication as a highway of any road or way to which the agreement relates, the bearing of the expenses of the construction, maintenance or improvement of any highway, road, bridge or viaduct to which the agreement relates and other related matters as the authority making the agreement think fit.”

This section of the Act entitles us to seek payments for future maintenance and we do this through commuted sums, where appropriate.

The payment of commuted sums allows us greater flexibility to adopt non-standard materials and other items without placing undue burdens on our maintenance budget or council taxpayers.

You should be aware that where a commuted sum payment is offered, we may still resist adoption if we consider the layout or proposals to be inappropriate or unacceptable on highway safety grounds.

Procedure

If you wish to complete an Agreement for the development site under Section 38 of the Highways Act 1980, and detailed planning consent has been granted by the local District Planning Authority under the Town & Country Planning Act 1990, as amended, you should send your application to the Divisional Manager.

We require everyone entering into agreement with us to transfer the freehold of the land comprising the proposed highway works. You will need to provide evidence that normal procedural enquiries have been

made to establish the owners of the land. You must also provide evidence, where necessary, to show whether any possessory title has been granted.

In cases where the land comprising the proposed highway, or land over which the proposed highway needs to run is in ‘unknown ownership’, we will require you to provide a Defective Title Indemnity Policy. This Policy will include an indemnity sum to cover any future claims in respect of the land within the highway limits, where you are not in ownership of the land.

We have developed the following formula to determine the indemnity sum required:

Formula = L x TSCC x I where;

(L) - Length of period (12 years max) x (TSCC) - Total Site and Construction Costs (includes value of houses on current market) x (I) - 10% compound interest.

The length of time allows for the full period until title absolute is granted, however, this can be adjusted where you have proof of possessory title.

You must demonstrate a right to discharge surface water from the highway, either by way of SUDs or an existing or proposed public sewer. Further information about SUDs is included in the Drainage Systems section.

Where it is proposed to drain the new highway into a sewer, which is to be the subject of a Section 104 Agreement under the Water Industry Act 1991, then that Agreement must be completed with the Drainage Undertaker prior to the completion of the S.38 Agreement.

It may be necessary in some instances to alter the existing public highway. Where this is appropriate the works will be subject to a separate Agreement under the provisions of Section 278 of the Highways Act 1980. Further information about Section 278 agreements is included in the S. 278 agreement section.

Our standard Kent Model forms of S.278 Agreement are included in the reference section on our website. The time taken to enter into such agreements is likely to be lengthy and you should take account of this when programming your works.

If you wish to commence work on site before the Agreement is complete, you must ensure that the Advance Payout Code (APC) security is in place. Further advice about APCs is included in the advance payouts code procedure section.

The S. 38 Agreement does not cover public sewers. Additionally landscape areas that are outside agreed highway limits to be adopted by us, will not be covered by the Agreement.

Our current Model form of Agreement must be used in all cases. No variations to the Model Agreement will be permitted without the permission of the Divisional Manager or our Legal and Secretariat.

The local Parish or Town Council must be consulted over the provision of street lighting, particularly if the development is located in an area of conservation or where there is no street lighting.

Developments that incorporate vertical displacement speed restraint measures, Home Zones and shared surface arrangements usually require some kind of street lighting features. Accordingly, these types of developments should only be considered where the Parish or Town Council are happy with the concept of street lighting.

You should be aware that before the Final Certificate (Adoption) is issued, we require exclusive drainage easements in respect of all highway drainage apparatus situated outside the highway boundary. You are advised to make specific provision for this in the transfers of the affected plots, where highway drainage is situated outside the highway boundary. Reservations in the plot transfers are not acceptable.

The S.38 Agreement will contain an additional clause where any parts of the development involves the construction of the whole or part of a building or structure over a proposed highway. It is your responsibility to maintain the building or structure and make arrangements for future maintenance in such situations.

We also require that the Agreement contains an additional clause where any structure or foundation is constructed beneath a proposed highway. It is your responsibility to maintain the structure or foundations and make

arrangements for future maintenance in such situations.

You must transfer all highway land including visibility splays to us. We may, in appropriate circumstances following adoption, grant a discretionary licence under Section 142 of the Highways Act 1980, to the owner of the adjoining land. The licence permits a person or persons to cultivate or plant small shrubs and landscaping items in the highway visibility areas. We will exercise caution and may decide, however, not to issue a licence where the safety of the highway user is likely to be compromised.

In exceptional circumstances where you cannot transfer visibility areas to us, it may be possible for these areas to remain in private ownership. In such situations it will be necessary to include an additional clause in the Agreement ensuring that you or your successors in title agrees to maintain the visibility areas and/or to restrict all planting or vegetation below 0.6m in height.

We will not enter into the Agreement with you unless you have discussed and obtained permission for such arrangements with our Divisional Manager.

Any proposals that include or impact on highway structures, or include any other structures likely to have an impact on the highway, must be discussed with us. Further advice is included in the Highway Structures section

The Agreement will stipulate that a full Technical Appraisal (Technical Assessment and Safety Audit) is carried out on the scheme.

Technical Assessment

A technical assessment is carried out to ensure that your proposals comply with the requirements of this document. It is not part of the approval process for the design under CDM regulations.

Before carrying out the technical assessment, we will require a payment of £1000 to cover our costs for checking the design or for preparing the Section 38 Agreement. Where an Agreement is entered into, we will deduct the £1000 from our normal administration and inspection fees.

Where there is a clear intention to enter into an Agreement, and before any construction has commenced on the road works, we will require you to provide all relevant information in accordance with the Information Checklist - see Checklists section for further information.

A stage 2 safety audit must be completed and submitted with the Technical Assessment Application.

We will only issue approval after:

- all design checks have been completed;
- all stage 2 safety audits checks have been approved; and
- any additional or amended details that are required have been submitted and approved.

You must be aware that the approval alone does not mean that you can start constructing the works. Construction of any roadworks on site should not commence until the conditions described in construction works procedures (these procedures are explained in more detail later in this section) have been met.

Fees payable to us

We charge for the work involved in:

- preparing, executing and managing the Agreement;
- checking the design of the scheme, including any associated structures and highway drainage; and
- inspecting the works on site.

The charge for administration, design checking and site inspection is a fixed percentage, currently 8% of the estimated cost of the total road works, as calculated by us.

The 8% charge does not include any costs associated with checking and approving highway structures, SUDS, non-standard drainage systems or geotechnical approval or inspection.

We charge a minimum of £1000 for each agreement.

Additional charges will be made for:

- design checking and site inspection of highway structures;
- checking the design and supervision of all SUDs and 'non-standard' drainage systems;
- conducting surveys for inventory information;
- geotechnical approval or inspection;
- preparing any Traffic Regulation Orders; and
- fees associated with Traffic Signal Equipment where necessary .

You will also have to pay an additional fixed fee for each agreement plus disbursements to our Legal and Secretariat to cover legal costs. This fee is fixed by our Legal and Secretariat and is available on request. It is reviewed annually.

An additional fixed fee of £500 is required for any supplemental agreement that is required.

A fee of £250 is required for collecting highway inventory information for the first 100m of highway. This fee will increase by £50 for every 100m thereafter.

If you do not complete the roadworks before the time limit specified in the agreement, you must write to us and ask for an extension of time and explain the reasons for the extension.

We may charge you additional fees to cover our costs for the extension of time. Typically these charges will be a further 3% (minimum £500) for inspection fees and administration work, based on our estimate of the costs of the outstanding works.

Commuted Sums

We charge commuted sums to cover maintenance costs in certain circumstances.

Commuted sums allow us greater flexibility to adopt non-standard materials and other items, without placing undue burdens on our maintenance budgets or on council taxpayers.

Accordingly, where we are prepared to adopt them, commuted sums are required for:

- highway structures;
- soakaways (those defined as non-structures);
- traffic signals;
- additional landscaping areas exceeding those that are required for the safe functioning of the highway;
- materials not included in our Specification;
- non-standard or additional street furniture or street lighting;
- some forms of landscaping within the proposed highway, including trees; and
- sustainable drainage systems (SUDS), for example, flow-attenuation devices, swales and storage areas.

If your proposals include the provision of a SUDS solution, you must hold discussions with all relevant parties at an early stage (and certainly before you submit your planning application) to avoid delays, expensive redesign work and to agree ownership and responsibility for the facility.

Further information and advice about SUDS is included in the Drainage Systems section.

Notification of Start of Works

We will require you to give us a minimum of three weeks' notice in writing of your intention to begin construction works.

Construction Works Procedures

Construction on site of any work to be included in the Agreement must not commence until the following conditions have been met:

- technical assessment has been approved;
- the Agreement has been signed, or Surety is secured in accordance with the APC notice. (You must not commence work on the houses until the Surety is secured);
- legal and technical fees have been paid to us; and
- our Clerk of Works or representative has received approved drawings to carry out site inspections.

If construction (of any work to be included in the Agreement) commences before all of the above conditions are met, we will not inspect any of the works.

You must not permit any building to be occupied until both pedestrian and vehicular access linking to a highway maintainable at public expense is provided. All pedestrian and vehicle accesses must be provided in accordance with the standards detailed in Part 1 of the First Schedule of the Agreement.

You must also ensure that where appropriate street lighting is erected and is working in accordance with the drawings and specification.

Contractor Approval

All road works carried out on the existing highway must be done by a contractor (including any subcontractor) who has relevant experience and competency for this kind of work. The contractor and/or subcontractor must be approved by us prior to them commencing work on the existing highway.

Your contractor or subcontractor does not need to be approved for road works included in the Section 38 Agreement, however we recommend that you consider employing only experienced and competent contractors to avoid abortive work and subsequent delays.

Our inspection staff will give advice and guidance as much as possible to help you, especially where we have experience of particular materials or methods you are using.

We are working on developing a 'Good Contractor Scheme' to recognise excellent workmanship and project management skills that we have experienced in dealing with such schemes.

This process may help you to select a suitable contractor with more confidence of their skills and abilities to work with you.

Health and Safety

You must comply with all aspects of the Construction (Design and Management) Regulations 1994 and indemnify us (protect us from legal responsibility) against all claims, liabilities and actions from third parties.

You are also required to submit to us full details of any traffic management proposals required in connection with the works.

Site Inspection

You are responsible for the day-to-day supervision of the road works. We will only inspect the works to check that they are being constructed in accordance with the approved drawings, specifications and any other requirements.

You must allow our inspection staff access to the works in progress at all times. If problems arise we will be happy to discuss possible solutions with you, but it will still be your responsibility to instruct your contractor and ensure that the works are satisfactorily completed in accordance with our requirements.

Our inspection staff visits do not absolve you from any responsibility for supervising the work and making sure that they are carried out in a proper and safe manner, and in line with the drawings, specification and any other requirements.

Public Liability Insurance

You must indemnify us (protect us from legal responsibility) against any claims by third parties arising from any work included in the Agreement.

You must also provide us with written evidence that your contractor or subcontractor has, as a minimum, £5 million public liability insurance with no limit on the number of claims.

Commencement of Works

You are responsible for arranging a 'pre-start' co-ordination meeting with us to ensure that everybody involved in the works understands the following:

- agreed drawings that have been issued;
- testing procedures;
- inspections of the works;
- traffic control procedures;
- emergency telephone numbers; and
- agreed start dates.

The 'pre-start' co-ordination meeting should, at the very least, be attended by your representative, the consultant's representative (if necessary), the contractor's representative and our representative or inspection staff.

You are advised to meet with our representative or inspection staff to take photographs of the site prior to commencement of the works, so that any damage sustained to the existing highway can be assessed where necessary.

Timescale for completing the road works

As soon as the work on site has begun it is your responsibility to complete any work included in the Agreement to our satisfaction. You must also ensure that adoption takes place within a 'reasonable' period of time to minimise any potential risks or inconvenience to residents.

The Agreement will include a time limit for completion of all work to be adopted. In order to safeguard the interests of the householders and highway users, we expect you to make every endeavour to ensure that the works are completed, either:

- within six months of all buildings fronting or served by the road works being completed; or
- within three years of the date of signing of the Agreement, whichever is sooner.

If you do not complete all works included in the Agreement within the specified time limit, and we have not agreed an extension of time, you may be charged extra fees towards additional administrative and inspection costs.

Where you do not complete the works in accordance with the Section 38 Agreement, we reserve the right to call on the surety to complete the works or determine the agreement if necessary.

Drawings Required

You must provide us with relevant drawings as part of the technical assessment process. The drawings are required for completing the Agreement, inspection of any work to be included in the agreement, checking street lighting details and for search purposes.

All land to be transferred into our ownership must be identified on the plan by a colour-wash pink. Areas of land colour-washed blue, which identifies highway drainage situated outside the highway limits, must be covered by a drainage easement.

You must be fully conversant with the boundary of the existing adopted public highway in the vicinity of the development. You are required to consult us over clarification of such highway limits.

After technical assessment has been granted a total of ten copies of the layout plan and six copies of all other drawings are required to support the Agreement. Additional copies may be necessary and you are advised to

speak to our Legal and Secretariat for the exact number required.

For large and complex developments, we recommend that the layout be divided into stages to suit your programme of works and that separate Agreements be completed for each stage, to speed up the adoption process.

Further information regarding drawing requirements is included in the checklist section.

Sealing of the Agreement

The agreement will provide for the payment to us of all legal and technical costs associated with the road works and details will be included in the agreement itself.

As part of the technical assessment we will inform you of the legal and technical fee payable, together with the amount of any commuted sums to be paid to us.

You must supply, following technical assessment approval, the necessary drawings and other information required by us, together with the details of your Solicitor and Surety, for processing the Agreement.

Our Legal and Secretariat will then prepare the Agreement in accordance with our appropriate standard Model Section 38 Agreement. We will not permit any variations to our standard Model Agreement, however, in certain exceptional cases, it may be possible to make amendments with the permission of the Divisional Manager and Legal and Secretariat.

The Agreement will include, where necessary;

- approved drawings;
- relative information on your Surety and Solicitor;
- the estimated cost of the road works;
- information relating to defective title indemnity insurance (where necessary);
- the estimated time-scale for the completion of the road works

- the legal and technical fees;
- commuted payment details (where necessary);
- deeds of grant (legal easements) for drainage purposes; and
- all additional clauses that need to be included (where necessary).

If you and/or your Surety have not executed and returned the engrossment to our Legal and Secretariat, you must not start building works on the dwellings unless a deposit or security has been made in accordance with the APC procedure.

A defective title indemnity insurance policy will be required, where you cannot prove ownership or title to any land forming the site of the estate road/s and/or the visibility splay areas to be adopted, to the satisfaction of our Legal and Secretariat.

We will determine the amount of cover required for the defective title indemnity policy.

Where you need to carry out works on the existing highway under a S.278 Agreement, the S.278 Agreement must be signed before the S.38 Agreement is entered into.

Section 38 Agreements are not revealed on local District Planning Authority searches, until all parties have executed and completed the agreement.

Where you propose to enter into an Agreement under Section 104 of the Water Industry Act 1991, with the local Drainage Undertaker for the adoption of any sewers that you propose to drain surface water into, that Agreement must be completed before the Section 38 Agreement is entered into.

You must provide us with written evidence of the completion of the Section 104 Agreement where necessary. You will be required to pay for any feasibility study undertaken by or on our behalf.

A schedule attached to the S.38 Agreement will detail the road works in two parts.

Completion Certificates and Surety

Three Certificates will be issued under the S.38 Agreement;

- **Certificate No 1;**
- **Certificate No 2;**
- **Certificate No 3.**

Certificate No 1

Following satisfactory completion of the works detailed in Part I of the Schedule to the Agreement, and after the street lighting installation has been satisfactorily checked, we will issue you with Certificate No 1.

Your Surety's obligations are reduced by 50% of the original surety value upon the issue of Certificate No 1.

Certificate No 2

Following satisfactory completion of the works detailed in Part II of the Schedule to the Agreement, we will hold a joint inspection with your representative in order to provide a definitive list, in writing, of any remedial works that are required.

We will require a Stage 3 as-built Safety Audit to be completed.

Within seven days of the joint inspection we will send you a list of all necessary remedial works that are required to be completed.

Where the works are also the subject of a Section 104 Agreement under the Water Industry Act 1991, and the sewer is situated within the highway or is an integral part of the highway drainage system, Certificate No 2 will only be issued after a 'Provisional Certificate' has been issued by the Drainage Undertaker for the works that are subject of a Section 104 Agreement. You must forward a copy of this certificate to the Divisional Manager.

Landscaping areas that are to be adopted under the Agreement must be fully established before Certificate No 2 is issued. You must maintain these

areas during the maintenance period.

Following satisfactory completion of any identified remedial works, we will issue Certificate No 2.

After Certificate No 2 has been issued, our Legal and Secretariat will initiate work on the Transfer, Deeds of Grant and any other related legal work.

When Certificate No 2 has been issued the maintenance period commences. All works included in the Agreement that are to be adopted now become highways open for the public to use.

All roads and footpaths must be clearly identified when open to the public. Temporary signs are acceptable during the maintenance period.

During the maintenance period, you remain the Street Manager for the purposes of Section 49(4) of the New Roads and Street Works Act 1991. You remain responsible for the maintenance of all work included in the Agreement, including grassed and planted areas and must carry out road sweeping and gully emptying until Certificate No 3 is issued.

You are also responsible for the removal of abandoned vehicles, rubbish or other unauthorised materials or obstructions as may be necessary, in order to facilitate use of the highway areas by residents and the public.

We remain responsible for the routine maintenance of the street lights and illuminated traffic signs during the maintenance period and will also be responsible for arranging payment of energy charges.

We will carry out site inspections during wet weather conditions to check that there are no problems with the drainage of the site.

You must ensure that the highway areas are maintained to a high standard during the maintenance period and if necessary clear snow and ice from pedestrian routes and ensure that all footways are not hazardous.

Your Surety's obligations are reduced by 75% of the original surety value upon the issue of Certificate No 2.

Certificate No 3

You must arrange a joint inspection with us, in order to agree a definitive list of any maintenance repairs deemed necessary, prior to the end of the maintenance period.

Within seven days of the joint inspection we will send you a list, in writing, of all necessary repairs to be completed before the issue of Certificate No 3.

The final certificate will only be issued when:

- all works under a Section 278 Agreement (in conjunction with the S.38 Agreement) have been satisfactorily completed and the Final Certificate has been issued for those works;
- all works under the Section 38 Agreement, including any remedial works, have been satisfactorily completed;
- all payments due under the Agreement, including any additional inspection or administration fees, have been paid to us;
- you have transferred to us all highway land shown colour-washed pink on the approved drawings;
- you have supplied us with any necessary Deeds of Grant;
- you have supplied us with the Health and Safety File, as required by the Construction (Design & Management) Regulations 1994;
- you have supplied us with two sets of the as-built plans (indicating the adoption areas coloured pink) and highway drainage, including any drainage situated outside the highway limits (coloured blue). All new works or alterations to the existing highway must be shown coloured pink and cross-hatched red;
- a Stage 3 as-built Safety Audit has been carried out and approved by us; and
- you have paid any necessary commuted sums to us.

You must also ensure that any landscaping areas that are to be adopted are fully established and planted in accordance with the specification. If more than 20% of planting needs to be replaced, adoption may be delayed until the landscaping is fully established.

Alternatively, where there are problems in establishing the landscaped areas, you may prefer to pay us a commuted sum to cover future maintenance rather than have the maintenance period extended.

Following satisfactory completion of all of the above requirements, we will issue Certificate No 3.

Your Surety will be released from all liability following the issue of Certificate No 3.

On the issue of Certificate No 3, the works included in the Agreement will become highways maintainable at the public expense.

Audit

We may at any time during the works inspect the development or carry out a safety audit of any specific part of the development to ensure compliance with this document, the Agreement and our adoption policy procedures.