

Gateshead Council Transport Technical Appendices

Section 38 Agreements

1. Introduction

1.1 Where new roads, footways etc. are built by private developers the intention is that they will usually eventually be adopted by Gateshead Council in its role as Highway Authority. This means that the Council will be responsible for their repair and maintenance in the longer term, and will assume the legal and other liabilities associated with them.

1.2 The means by which new highways are adopted is through Section 38 of the Highways Act 1980. This provision allows for legal agreements (known as Section 38 Agreements) to be made between the Council and developer which set out the works to be adopted and any associated processes, procedures and payments.

1.3 This document outlines the Council's requirements in respect of the process for establishing a Section 38 Agreement, and the provisions it should contain. It contains the following sections:

- Preparing the agreement;
- Content;
- Costs:
 - o Bond of surety;
 - o Other payments to the Council;
- Relationship with planning approval;
- Advance payment code;
- Extent of adopted areas;
- Design;
- Inspection of highway works;
- Completion of works;
- Certification of works;
- Other requirements;
- Contact details.

2. Preparing the agreement

2.1 Discussion about a Section 38 Agreement should commence with the Council's Highways & Flood Risk Management Team as soon as practical during the development process. As a formal legal document its preparation is an exacting task which relies on the prompt submission of information. Adequate preparatory time should be allowed if possible delays to the development or the adoption process are to be avoided.

3. Content

3.1 The content of the Agreement will be agreed with relevant Council officers, but will typically include:

- Details of the proposed highways, including all street lighting, drainage, signage and other fittings as well as any Traffic Regulation Orders associated with the development (a separate [checklist](#) of material likely to be required is available);
- Developer's liability;

- Arrangements for connections of existing services;
- Gateshead Council access requirements;
- Scope of Part 1 and Part 2 works, inspection procedures, and certification;
- Developer obligations during the maintenance period.
- Grants of rights of drainage;
- Timing of adoption;
- Gateshead Council fees and charges; and
- Bond of surety
- Commuted sum payments for longer term maintenance of non-standard items.

4. Costs

Bond of surety

4.1 As part of the s38 Agreement developers are required to deposit a Bond of Surety with Gateshead Council to cover the cost of the adoptable highway works. This ensures that the Council does not incur any costs if the highway works are stalled, changed or aborted by the developer.

4.2 If the developer fails to perform or observe any of the Agreement's conditions, the Council can use the Bond to complete the highway works, recover fees and charges, and retain any commuted sums to cover future maintenance costs.

4.3 The Bond will be released back to the developer incrementally in accordance with the table below. If a commuted sum is due from the developer as part of the S38 Agreement – if this remains outstanding, the Bond shall not be reduced to a value less than the Commuted Sum.

Stage	Bond* reduced to x % of original value:
Part 1 Certificate	50%
Part 2 Certificate	20%
Final Certificate	0%

*value of works, excluding all fees and charges and any commuted sums.

Other payments to the Council

4.4 Payments is also required to cover the costs to the Council of preparing and monitoring s38 Agreements. These are explained in '*transport costs associated with development*'.

5. Relationship with planning approval

5.1 The granting of planning approval for new development does not give any rights or presumptions in terms of the s38 Agreement. Ideally, in order to ensure consistency, preparation of the Agreement should take place at the same time as discussions around planning permission. Where this is not possible the risk of inconsistency arises, with the potential for delays, increased costs and abortive works.

5.2 It is the developer's responsibility to ensure that agents or consultants appointed to deal with the s38 Agreement are fully conversant with the requirements of any planning approval(s), and vice versa, and that any plans and approvals obtained are consistent with each other. The Council does not employ staff to undertake any cross checking of this kind and problems (including delays or additional costs) arising from any such inconsistency are wholly the developer's responsibility.

6. Advance payment code

6.1 Where construction is to start on site prior to finalising the s38 Agreement the developer is required to comply with the Advance Payment Code. In response to the serving of the relevant notice (known as a Section 220 Notice) there is a need to provide appropriate security against any default on highway works. This is required prior to commencement of any (not just highway) construction works on the site.

6.2 The security is needed to protect purchasers of any property from the cost of constructing the road fronting that building to adoption standard. This can only be provided in the form of a cash deposit.

7. Extent of adopted areas

7.1 Parallel parking spaces for visitors that are within or contiguous with the public highway will normally be accepted for adoption. Communal parking courts or other off-street parking for residents will not be adopted and will therefore require some other private arrangement for maintenance.

7.2 In shared surfaces where footways are not provided, a publicly adopted verge not less than 1.8m wide must be provided adjacent to the carriageway. These verges, or service strips, will be included as adoptable public highway in the Section 38 Agreement though, in all probability, they would in practical terms be maintained by householders or private maintenance arrangements. The developer should inform purchasers of properties fronting onto such service strips that they have licence to cultivate them as part of their front garden, but are prohibited from the building of walls and fences and the planting of trees and shrubs on the strip. The Public Utilities may excavate their service at any time and are not responsible for reinstating the ground to any better standard than cultivated grass.

7.3 Public open space will not be accepted as highway for adoption. Any areas of public open space should be offered to the Council separately.

8. Design

8.1 Designs are to be submitted along with payment of the design checking fee (see fees and charges) for engineering approval to Gateshead Council's Highway and Flood Risk Management team.

8.2 The design of highway works must be in accordance with:

- any requirements of the planning permission;
- The Council's published design advice, including the Supplementary Planning Document '*Making it happen*' (residential development only) and its *technical appendices*.

8.3 A Scheme Audit may be required, subject to the scope and scale of the S38 works. If an audit is required then the developer must procure the Stage 1 Audit prior to the start of the detailed design.

8.4 If the s38 Agreement includes any structure which:-

- forms part of the highway being offered up for adoption; or
- supports the highway; or
- Is supported by the publicly maintained highway.

Details of the structural design will be required as part of the technical approval process.

9. Inspection of works

9.1 The Council will inspect highway works to check that they are being constructed in accordance with the approved drawings and to the appropriate specification. Sufficient advance notice must be given for the inspection of any item of adoptable highway work requiring approval. The Council must be given access to the highway works at all times.

9.2 It is the responsibility of the developer's contractor to provide, at their own expense, detailed laboratory reports or material analysis as requested by the Council's inspector. The developer's contractor must be able to prove the technical suitability of any proposed construction material.

10. Completion of works

10.1 The s38 Agreement will include a time limit for the completion of all highway works to be adopted. The developer must ensure that adoption takes place within a reasonable period of time to minimise any potential risks or inconvenience to residents, usually no more than 6 months from completion of all building fronting or served by the highway works.

10.2 Where the developer does not complete the highway works within the specified timescales, and an extension of time is agreed, the Council may charge extra fees towards additional administrative and inspection/supervision costs.

10.3 If the developer does not complete the highway works in accordance with the Agreement, the Council reserves the right to use the Bond to complete the works.

11. Certification of works

11.1 The adoption process under Section 38 is split into three stages, referred to as Parts 1, 2 and Final. Certificates are issued on completion of each stage.

Part 1 certificate: substantial completion

11.2 The certificate will be issued when the works and maintenance defects items listed on the Schedule Part 1 of the Section 38 Agreement are completed to the Council's satisfaction. Developed buildings should not be occupied prior to the issue of the Part 1 certificate if they are accessed from the works which are subject to that S38 Agreement.

11.3 On issue of the Part 1 certificate, the works subject to that agreement will become dedicated highway maintainable at the developer's expense.

Part 2 certificate: completion

11.4 The certificate will be issued when the items listed on the Schedule Part 2 of the S38 agreement are completed to the satisfaction of the Council.

11.5 A minimum twelve month maintenance period commences with the issue of the Part 2 certificate. During the maintenance period, the developer remains fully responsible for all maintenance of the works including any damage, however caused, and may choose to take out appropriate insurance against such risks.

Final certificate

11.6 The developer shall contact the council in writing with a view to undertaking the final inspection no later than two months prior to the end of the maintenance period. In addition to completing all remedial works identified in the final inspection, the following is required prior to the completion of the adoption process:

- issue of the Health & Safety file, including a detailed topographic 'as built' survey drawings of the adopted highway
- detailed asset records of all highway features, using standard templates
- street lighting and traffic signal testing and inspection certificates
- CCTV as built survey of highway drainage
- Confirmation that all drainage covered by the Section 104 Agreement has been fully adopted by the Public Water Authority.
- Proof that any Traffic Regulation Orders connected with the works are in place (at the developers cost)
- Confirmation that all necessary scheme audits have been undertaken, and any works arising from these completed.

11.7 On full and satisfactory completion of these requirements, the council will:

- issue the final certificate
- release the S38 Bond
- take over the maintenance of the works

12. Other requirements

12.1 Proof of land ownership is required to ensure that all parties with freehold or leasehold interests in the land enter into a S38 Agreement and consent to its terms.

12.2 The developer must demonstrate a right to discharge surface water from the highway, either by way of a Sustainable Drainage System (SUDS) or an existing or proposed public sewer. Where it is proposed to drain the new highway into an existing sewer (subject to a Section 104 Agreement under the Water Industry Act 1991), the agreement must be completed with the drainage Statutory Undertaker prior to the completion of the S38 Agreement.

12.3 Before the S38 Agreement can be signed, the developer must provide written proof to the Council that the Health and Safety Executive has been informed that they are the client for the highway works in accordance with the Construction (Design and Management) Regulations 2015 (CDM Regs).

12.4 The developer must indemnify the Council against any claims by third parties arising from any work included in the s38 Agreement.

Contact details

Tel: 0191 433 3073

E-mail: jamesyoung@gateshead.gov.uk