

Briefing Note: Adoption of Roads and Public Open Spaces Following the Completion of New Housing Developments

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Highways

Legal Powers and Adoption Processes

Section 38, Highways Act 1980

Wokingham Borough Council secures the adoption of highways within new developments through Section 38 of the Highways Act 1980. Under this section of the Act, developers enter into a voluntary agreement with the Council which sets out their obligations to construct the roads to an agreed standard, maintain them for an agreed maintenance period, and provide a bond to cover the cost of the works should the developer become unable to complete them. Once these obligations have been discharged, the Council will adopt the roads as publicly maintainable highway.

WBC seeks to adopt highways fronting more than five units, as these roads are considered as being of sufficient public utility. Planning approval is required prior to entering a S38 agreement, and the requirement for a S38 is secured by planning condition.

The process of completing a S38 agreement is technically rigorous, with checks, inspections and road safety audits taking place throughout to ensure each stage of construction meets Council requirements. Technical acceptance, based on plans submitted and revised in communication with an allocated S38 officer, must also be given by WBC before an agreement application can be progressed.

Once the agreement has been signed and the works substantially completed, the S38 officer will inspect the site, and, when satisfied that the highway is constructed to an acceptable standard, will issue a Provisional Certificate of Completion. This triggers a reduction in the bond and initiates a maintenance period which will last for a minimum of twelve months. During this time, the developer retains responsibility for maintaining the highway and should carry out any necessary remedial works identified by the officer. Adoption will be delayed if the developer fails to complete the remedial works adequately by the end of the formal maintenance period. Once the maintenance period is reached, any identified works are completed to a satisfactory standard, and any electrical

certificates and as built drawings are provided, a Final Certificate of Completion will be issued confirming adoption. At this stage, any remaining bond value will also be released. It is important to note that sewers must also be adopted by a local Water Authority prior to or simultaneously with the highway adoption.

For some highway items, a commuted sum may be required from the developer. This is a one-off payment towards ongoing maintenance of certain assets by WBC, e.g. structures, traffic signals, culverts, etc. Where this is necessary it will be discussed with the developer and set out in the S38 agreement.

Section 278, Highways Act 1980

The construction of new housing developments may also involve works on existing highway, for example, accesses into new developments or works on public highway to mitigate the impact of the new development during or after construction. In these cases, developers may enter into a separate Section 278 agreement or a combined S38/S278 agreement. The process for these agreements is similar to that of S38 agreements in terms of technical checks and inspections, the provision of a bond, and payment of commuted sums where needed. The requirement to undergo a maintenance period before adoption by the Council also applies. However, no S278 works on public highway may commence until the agreement is signed and the necessary Streetworks licence is applied for and approved.

Some minor highway works may instead be covered by a Minor Works Agreement or licence arrangement, if acceptable to WBC. The maintenance period for Minor Works Agreements is a minimum of twenty-four months rather than twelve.

Section 106, Town and Country Planning Act 1990

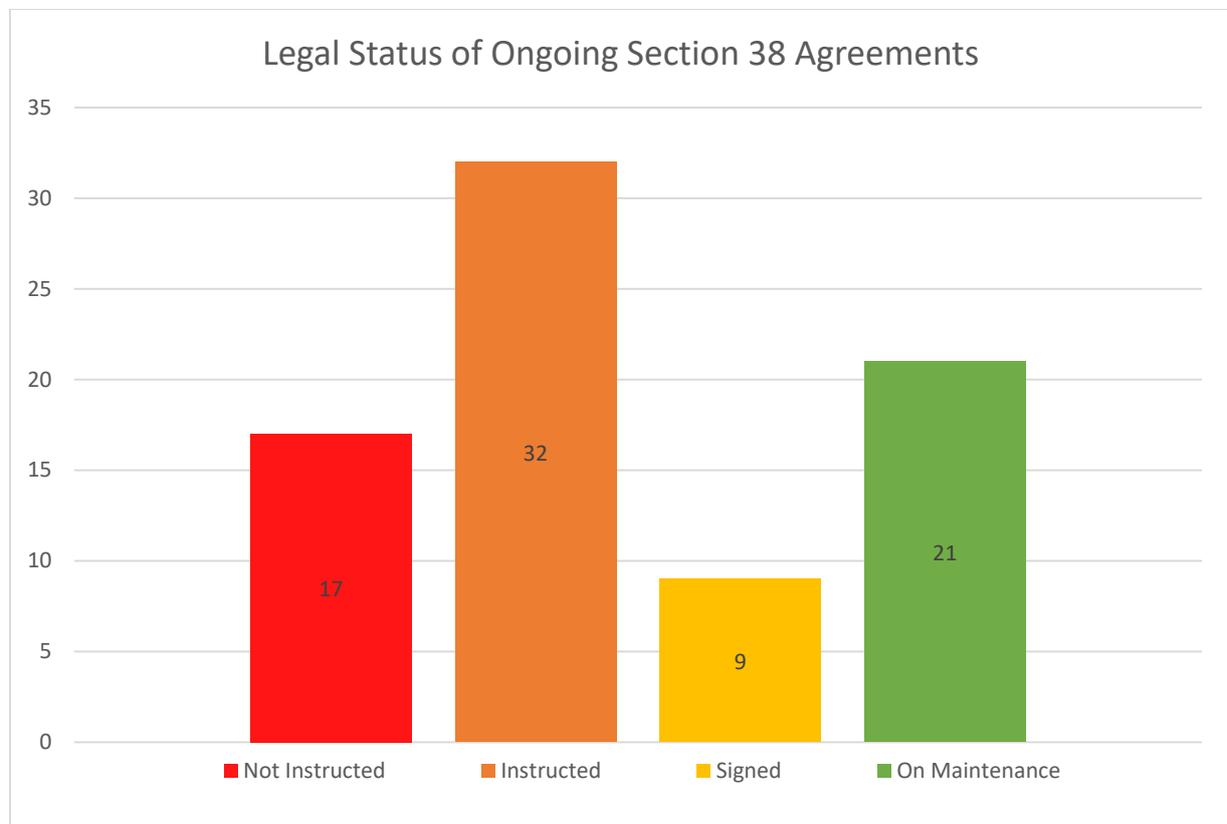
Should a developer not wish to enter into a Section 38 agreement, the Council instead secures the completion of an agreement under Section 106 of the Town and Country Planning Act 1990. This obliges the developer to construct the road to a satisfactory standard, pay for the Council to inspect the site and provide for a Management Company to be set up to manage the ongoing maintenance of the estate roads, footways and verges to an agreed maintenance regime once complete.

Section 219 – 225, Highways Act 1980 (Advance Payments Code)

WBC also operates the Advance Payments Code (APC) under Sections 219-225 of the Highways Act 1980. Within six weeks of a developer submitting a building regulations application, the Council will serve notice on the developer requesting a bond to cover the cost of the new road works in the event that the developer cannot complete the works. This is to protect property purchasers from incurred costs in such a scenario, and applies to sites of more than five units regardless of whether the developer intends to enter into a S38 agreement or not. The obligation to secure the bond is triggered by the commencement of works to the buildings fronted by the highway. Failing to provide a bond at this point constitutes a criminal offence. The completion of a S38 agreement discharges the obligation to secure an APC bond. For roads intended to remain private, the obligation can be discharged under Section 219(4) of the Act once the Council is satisfied that the road has been constructed to the required standard.

Current Situation

As of 4th July 2019 there are 79 ongoing Section 38 agreement applications being managed by WBC. Some of these are for individual parcels within the same development e.g. Shinfield West, and Arborfield Garrison. A breakdown of the current status of S38 applications is as follows:



Not Instructed – a Section 38 application has been submitted, but the plans have not yet achieved technical acceptance and Legal Services have not been instructed to take any action.

Instructed – Legal Services have been instructed to progress with drafting the agreement and preparing engrossments in communication with the developer’s solicitors.

Signed – the S38 agreement has been signed by all parties and sealed by WBC. The works have not yet been completed to the point where a Provisional Certificate of Completion can be issued.

On Maintenance – a Provisional Certificate has been issued. The minimum twelve-month maintenance period during which the developer retains responsibility for the site is underway, or WBC is awaiting the completion of remedial works/sewer adoption/other outstanding issues requiring attention ahead of adoption.

Approaches and Best Practice

Legacy Sites

From September 2018 to March 2019, a taskforce was set up with a specific focus to progress long-outstanding S38 agreements towards highways adoption by identifying what actions needed to be taken and proceeding with them. As a result, three of these sites, with S38 agreements dating from 2004, 2009 and 2013, have now been adopted, and progress is continuing to be made with others. Issues preventing adoption have included delays to the adoption of the sewers and outstanding street lighting and remedial works.

Process Improvements

A number of measures and improvements have recently been implemented with a view to streamlining the adoption process:

1. An upfront deposit of £20,000 or 2% of the overall fee, whichever is higher, has been introduced for applicants to enter into S38 and S278 agreements, ahead of any technical review. This ensures that officer time taken to conduct these reviews has been paid for even if the agreement is later abandoned, and acts as an incentive for developers to complete agreements.
2. The application form has been updated and is continuing to be reviewed to request more details from developers. This will result in higher quality applications at the outset and save time through removing the need to go back and forth with the developer for further drawings and information.
3. All agreement applications are monitored through a regularly updated spreadsheet. This has recently been revised to include target dates to flag where parts of the process are stalling and require attention. Agreement progress is also reviewed in monthly team meetings where any issues are highlighted, discussed, and escalated where necessary.
4. A formalised APC policy with input from Legal Services has also been produced for inclusion in the upcoming Highway Design Guide. Increased emphasis on the code has already led to bonds being secured for two developments. Implementing the code also acts as a leverage tool where Section 38 agreements have stalled, as the completion of a S38 agreement discharges the obligation to provide an APC bond.

Public Open Spaces

Legal Powers and Adoption Process

Open spaces within new housing developments are adopted under the terms of an agreement made under Section 106 of the Town and Country Planning Act 1990. This provides for the construction of the scheme to WBC specification and sets out the procedure for adoption.

The developer notifies the Council when the works are completed. WBC then inspects to confirm that construction has followed planning approval and meets the obligations of the S106 agreement. If the scheme has not been built in line with planning approval or if remedial work is required, this can delay the adoption process significantly.

Once the Council is satisfied that there are no outstanding issues, an independent safety audit for Play Areas is required from the developer, and, where necessary, a water safety risk assessment for SuDs (Sustainable Drainage Systems) within the public open space. Any items flagged up by these reports then need to be addressed.

At this stage, allotments are normally transferred to the town or parish council. Once other open space schemes are deemed complete, the commencement of a twelve-month maintenance period is agreed, during which time the developer/owner remains responsible for maintaining the scheme in accordance with a planning approved landscape management plan and carrying out any necessary remedial work. At the end of the twelve months, WBC inspects again to confirm that the scheme has been adequately maintained and that no further remedial work is needed. A further safety audit is required for Play Areas at the end of the maintenance period. Once satisfied, WBC then instructs the legal transfer. At this point, a final commuted sum figure for ongoing maintenance is also confirmed. A back-to-back twelve-month maintenance phase is standard practice in landscaping contracts.

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