

# Creation of new highway – Section 38 Process

**We will consider the adoption of new roads for maintenance at public expense where they serve more than five houses. There is no legal authority to insist that any road is offered for adoption.**

Notwithstanding this, for any development of more than five units we require any new road to be constructed to an adoptable standard as per the requirements in *TDMG Section 3* or we will exempt the road from future adoption as a Land Charge via an exemption notice.

If the road under construction is proposed to be put forward for adoption, we do this by entering into a legal agreement under Section 38 of the Highways Act, 1980. This route enables the Highway Authority to take over and maintain at the public expense (i.e adopt): roads, footways, footpaths, cycle lanes, cycle tracks and other areas constructed by a third party provided all elements of the construction are built to an adoptable standard.

Whilst the Highway Authority has no power to insist that a developer enter into a S38 agreement, it is considered the most acceptable approach to achieve adoption and long term maintenance of any new road infrastructure. A S38 agreement with a private developer includes a surety or cash

deposit calculated by the Highway Authority, which is based on the estimated cost of constructing the proposed works to an adoptable standard plus Bristol City Council (BCC) tender costs. This surety or cash deposit shall be called upon if the developer enters into liquidation or otherwise defaults on their obligations of the agreement.


The adoption process involves seven key stages:

- 1) Planning Condition Discharge**
- 2) Payment of Fees and Technical Approval**
- 3) Legal Process and Payment of Surety**
- 4) Construction and Inspection**
- 5) Partial Completion to satisfactory standard – Certificate 1**
- 6) Substantial Completion and Maintenance Period – Certificate 2**
- 7) Completion of Adoption – Certificate 3 (Final)**

Each new highway adoption scheme will require close liaison between the Transport Development Management (TDM) Planning Officer and the TDM Engineer, who will be appointed to assist you in progressing the development forward through to approval, inspection and certification.



## Section 38 Process

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- Developer submits for discharge of Planning Condition B2A
  - Contact [TransportDM@bristol.gov.uk](mailto:TransportDM@bristol.gov.uk) to commence the S38 agreement
  - Developer submits detailed design to [DMEngineering@bristol.gov.uk](mailto:DMEngineering@bristol.gov.uk)
  - Submission of Stage 2 Road Safety Audit (RSA2)
  - TDM calculates surety and fees based on new infrastructure to be adopted, including roads, footways, lighting, drainage, structures, street furniture, trees and other sums
  - Developer pays fees
  - TDM commences Technical Approval Process
  - Technical Approval Issued by TDM
  - Four weeks prior to commencement, developer to advise DM Engineering of intended start on site
  - Initial Site Meeting between Developer and TDM Engineer
  - Commencement of inspections by TDM
  - Partial Completion to satisfactory standard
  - Certificate 1 issued
  - 40% of bond returned
  - Substantial Completion to satisfactory standard
  - Submission of Stage 3 Road Safety Audit (RSA3)
  - Certificate 2 issued
  - A further 50% of bond returned
  - End of 12 month maintenance period
  - Defects identified
  - Bond released
  - Defects rectified by developer & commuted sums paid
  - As built drawings and RSA4 provided
  - Certificate 3 / Final certificate issued
  - Adoption complete

## Planning Condition Discharge

It is recognised that the detailed design is a lengthy process, and developments often commence before the detailed highway layout is agreed. However, it is essential to determine particular elements of the design before development commences. Securing these elements through a pre-commencement condition reduces the risk of any design issues which would prejudice the implementation of the planning permission.

Once the condition is discharged and the developer has decided to enter into a S38 agreement, the developer or representative will need to contact Transport Development Management Engineering (TDM Engineering) via: [DMEngineering@bristol.gov.uk](mailto:DMEngineering@bristol.gov.uk), so that a S38 application package can be issued.



## Legal Process and Payment of Surety and Fees

TDM will only commence a S38 legal agreement when planning permission has been granted and we are satisfied with the Highway Works General Arrangement drawing through the highway condition discharge see *TDMG Section 2.3.1*.

At this stage you will need to contact TDM to initiate the process. The information that TDM will require at this stage is included in the *Section 38 Application Form* which we require you to fill in and submit to us in order for us to accurately instruct our legal department, understand your build program timescales and make the necessary contact with your civil engineering and design teams.

As well as legal costs, the developer is responsible for meeting all costs associated with the design and implementation of S38 works. The developer will be required to pay fees to the council to cover the cost of both the technical approval of the design and the inspection and of the works as they progress, whilst a returnable highway bond is held against any potential default by the developer or contractor. Confirmation of these costs is set out in section D of [BCC Highways' Schedule of Fees and Charges](#).

The approval and inspection fees payable are related to the cost of the works that BCC calculate based on the drawings associated with the agreement. TDM reserves the right to increase fees if a disproportionate number of site inspections or technical approval stages are required for example due to poor workmanship or unforeseen site conditions.

### Surety

A surety is bound to provide works or money until the works are completed and signed off, taking into account future maintenance, as opposed to a bond which is financial security against the works and not future maintenance. If commuted sums are required, these are required as a single standalone payment prior to the completion of the S38 agreement.



Bonds and sureties will either be registered with a recognised financial institution or the equivalent sum of monies lodged with BCC. The purpose of the surety deposit is to ensure that BCC will be able to complete the works to a satisfactory condition should the developer fail to do so, without consequently incurring any unreasonable future maintenance cost to the Local Authority.

The surety will be incrementally released to the developer at specific stages within the construction; the proportion of the surety retained by BCC will be reduced as follows:

- **On issue of Certificate 1 (Practical Completion Certificate):** up to 40% of surety returned by BCC
- **On issue of Certificate 2 (Final Completion Certificate):** up to a further 50% of surety returned by BCC
- **On completion of all defects and RSA recommendations:** remaining 10% of surety returned (i.e. full release of the surety)

TDM reserves the right to withhold the surety if works are not completed satisfactorily, noting that, if a commuted sum is due from the developer and this remains outstanding, the surety shall not be reduced to a value less than the commuted sum.

## Commuted Sums

Section 38 (6) of the Highways Act (1980) allows the Highway Authority, to seek payment for the future maintenance of new or revised highway from the developer via commuted sums where necessary.

BCC will seek commuted sums towards the maintenance of items that have a higher maintenance cost compared to conventional materials, or that would not be required were it not for the development. Commuted sums ensure that developments do not place an undue financial burden on the Highway Authority but will not be payable where the maintenance cost of an improved asset is equal to the existing asset.

The following list includes the types of items for which a commuted sum may be payable, although it is not exhaustive:

- Additional areas and features;
- Non-standard features on new or existing highways;
- The use of alternative materials or features on new or existing highways;
- Highway structures;
- Noise fencing;
- Illuminated signs;
- Traffic signals;
- Street lighting;
- Any new landscaping within the public highway (including trees);
- Highway drainage other than gullies and their connections.
- Sustainable Drainage Systems (SuDS): the applicant must hold discussions with all relevant parties, before submitting a planning application, thereby agreeing ownership and maintenance responsibility for the SuDS facility.



## Technical Approval

Once the package of drawings has been received and the technical approval and inspection fees have been paid, technical approval can be commenced by TDM.

The drawings required for the S38 will largely depend upon the scale and complexity of the scheme of works, but the following Technical Submission Documents and a Programme of highway works are likely to be required.

### Technical Approval Submission Requirements

The drawings and documents should be submitted electronically in CAD and PDF format with one paper set (A1 format) for initial assessment. Our *Highway Design Checklist* provides a detailed list of drawing requirements and issues to be addressed when preparing section 38 drawings, for which the key headings are summarised below:

- Location Plan, including red line boundary
- General Arrangement Plan
- Areas offered for Highway Adoption (shown pink)
- Areas proposed for Stopping up (if necessary)
- Vehicle Swept Path Analysis
- Submission of Stage 1 and 2 Road Safety Audit and Response Reports (RSA)
- Road Markings and Signs
- Kerbing Drawing
- Materials and Surface Finishes
- Landscaping
- Long Sections and Cross Sections
- Engineering Details
- Existing and Proposed Levels
- Services Location Plan
- Traffic Regulation Order (TRO) drawing
- Street Lighting columns (as a green circle) and Traffic Signal Design
- Drainage Drawing, including gullies (as a blue square) sewerage plans and evidence of Section 104 Agreement
- Highway Structures

### Road Safety Audits (RSA)

An RSA is the staged evaluation of changes to the highway during design, construction and operation. The RSA considers the road safety implications of all measures and looks to identify potential safety hazards that may affect any road user, with particular attention paid to vulnerable groups.

The RSA is a four-stage process. Stages 1 and 2 involve the evaluation of the highway design whilst stages 3 and 4 are conducted once the scheme is substantially complete or complete. These are considered later on.

As the Design Organisation, you are responsible for arranging for the audit to be undertaken and writing the audit brief. However, at each stage of the safety audit process, you are required to agree the Brief for the RSA with us. You will need to agree with us, as the Overseeing Organisation, the audit brief, and the proposed audit team.

The scope of the RSA must be agreed with us in advance, taking into account our detailed knowledge of the areas and issues in question. A RSA will not be accepted if, in our opinion, it has not satisfactorily fulfilled the brief or taken into consideration specific local circumstances.

There is a road safety audit brief template in Appendix C of GG D119.

Our Road Safety Auditors should be invited to each audit at the cost to the Developer as set out in our [Highway Fees and Charges](#).

The Stage 1 RSA will have been commissioned on completion of the preliminary design and we would expect a Stage 1 RSA to have been submitted as part of the associated planning application.

A Stage 2 RSA should be undertaken on completion of detailed design i.e. when the design has been sufficiently developed that it could be used as a basis for construction. The Stage 2 RSA considers the layout of junctions, position of signs, carriageway markings, lighting provision and other issues such as drainage, pavements, kerbing and landscaping. During the Stage 2 RSA the audit team will visit the site and examine the existing highway layout and consider where the new highway will tie in with existing infrastructure.

RSA Stage 3 will be required prior to Certificate 2 being issued.

RSA Stage 4 will be required prior to final Certificate being issued.

## Assessment of Technical Submissions

The design checking required for S38 Technical Approval is an iterative, two-way process, which can take a number of months, given the level of input TDM requires from other teams within the transport and highway department, as referenced in *TDMG Section 2.1*.

It will also be necessary to agree a construction programme with the developer that considers the needs of all stakeholders, including local businesses and residents, and takes into account the local highway network capacity.

The timescale for technical approval is largely dependent on the quality and detail of the technical submission and also the timeliness and appropriateness of the designer's responses to queries, concerns and required amendments. As referenced elsewhere in TDMG, the earlier that detail is addressed (including at planning) the more likely it is that a swift technical approval process will be realised.

Upon receipt of the initial technical submission package, BCC TDM Engineers will review the drawings/documents and aim to respond to the designer via a Design Review document

within 21 days of the initial submission and each subsequent submission thereafter, depending upon the level of detail provided. The Design Review document will include a list of each drawing within the technical submission together with the TDM Engineer's required amendments to each drawing.

Once the designer has received the Design Review document, it is their responsibility to amend the drawings as required and update the Design Review document by briefly outlining the amendments that have been made directly below each comment made by the TDM Engineer. The Design Review document, amended drawings and an updated drawing issue sheet must then be returned to the TDM for a further review.

A Stage 2 RSA will be required to consider any fixing of geometry/horizontal and vertical alignment / acceptance of tracking.

## Issuing of Technical Approval

The issuing of technical approval can only be given once the TDM Engineer is satisfied that the designer has addressed each of our concerns and that the revised scheme is acceptable to move forward to the construction stage. We will require confirmation of each of the following, where applicable:

- **The receipt of any further Road Safety Audits (RSAs) that satisfy all outstanding matters**
- **All statutory and non-statutory procedures have been undertaken;**
- **Written confirmation from the Developer agreeing to pay commuted sums;**
- **Written confirmation that the Developer has contacted the Health & Safety Executive (where applicable)**

Once a Technical Approval certificate has been issued, the agreement process can commence and BCC's legal department can be instructed to draft the S38 agreement.

## Works commencing on site prior to Technical Approval

Developers often start works on prospective adopted highway before Technical Approval is given for a S38 scheme. There is no legal reason why this cannot happen as the land is normally in private ownership. However, this approach carries with it considerable risk to the developer and potential long-term problems for occupiers of that development. The delay in seeking Technical Approval or commencing the section 38 process in the correct manner and at the right stage has proven in the majority of such cases to result in poor standards of construction and resulted in considerable additional officer time and substantial costs to the developer where works have proceeded unchecked and found to be unsatisfactory.

In the above case, the developer is undertaking works to a design that has not received detailed technical approval (planning approval is not technical approval). This can seriously reduce the likelihood that the new infrastructure will be adoptable by BCC as a result of the methods and materials used failing to meet our requirements. In these circumstances we will issue an exemption notice prohibiting the new streets from being adopted in the future.

Where this occurs, it is also common for the developer to have avoided the section 38 process and the payment of a bond or provision of a surety's guarantee altogether, removing the council's ability to call on that financial security to carry out the works to the requirement standard.

Developers must therefore be aware that any works that are undertaken prior to the issue of Technical Approval are at their own risk and that any amendments to the works deemed necessary by TDM to achieve Technical Approval would be carried out at the cost of the developer. We will require all works to be inspected and therefore this may require the opening up of completed

works to determine that the construction is to the appropriate standard, and following this a reconstruction if it is found that the infrastructure is unsatisfactory.

We strongly advise that all developers intending to offer new infrastructure for adoption seek and obtain technical approval and commit to the surety and fee mechanism before commencing works.

## Advanced Payments Code (APC)

The council are in the process of enabling BCC to execute powers under sections 219–225 of the *Highways Act 1980* to mandate developers to enter into s38 agreements in the correct way to deliver safe and maintainable infrastructure for adoption.

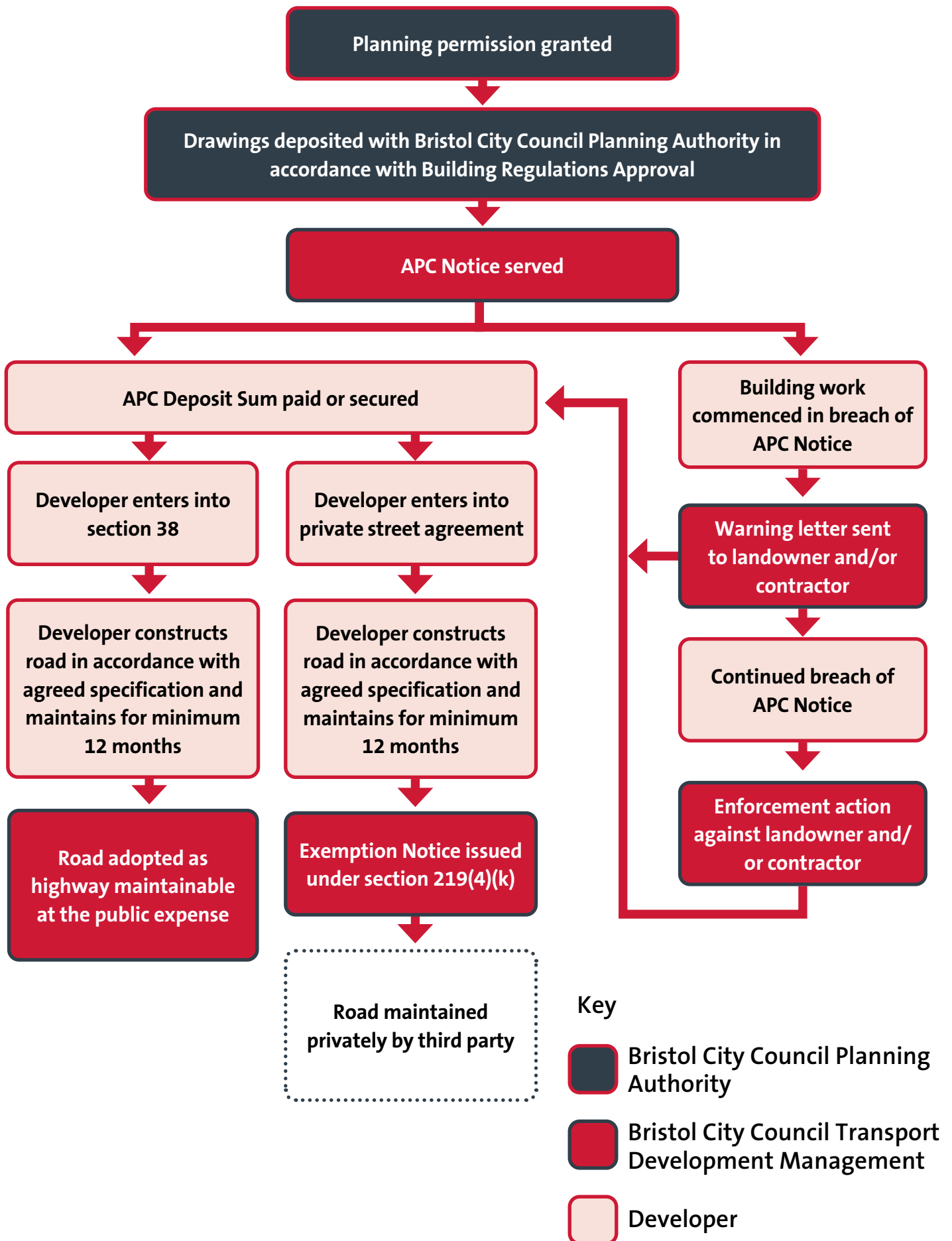
The APC procedure exists to ensure that before work commences on the erection of new buildings in private streets, money equivalent to that required to construct the roads and associated infrastructure serving the buildings is either deposited or secured via a surety. This deposit required by the APC is intended to protect any purchaser of a new building from the cost of constructing the road fronting that building if the developer fails to complete the road to a satisfactory standard or ceases to exist.

Under this mechanism, within six weeks of the receipt of building regulation approval, the developer will receive from BCC a notice under Section 220 of the Highways Act (1980) outlining charges in respect of roads and footways that the Highway Authority considers should become adopted public highway upon completion of the scheme. The developer must then in turn either pay these charges or enter into a S38 agreement **before** any work commences on the construction of any building on the site.

Commencing the construction of a building that will front a private street without complying with an APC notice is an offence liable to a fine of up to £1,000. However, this can be repeated as and when repeated breaches of the APC are made.



Fig 1: Advanced Payments Code (APC) process





Whilst it is our preference for developers to have their roads adopted, the S38 agreement process is voluntary and there may be a variety of reasons why a developer may choose not to offer the road/roads that they construct for adoption. In these cases the developer should set up a management company whereby future residents pay into the company to maintain the roads and associated infrastructure. A developer's decision to keep roads private may be driven by market forces, site-specific circumstances or a desire to use a specification or palette of materials that are unsuitable for adoption by BCC. Whichever, the council must protect the public purse from significant liability in the event that such infrastructure falls into disrepair and it is obliged to take on the ownership and maintenance of the infrastructure.

BCC will apply the APC mechanism to developments where more than five units are proposed subject to the exemptions set out in Section 219 of the Highways Act 1980 and exemptions where one of the following criteria is met:

- **It is established at planning stage that the roads are to be private and the Local Planning Authority has been advised to place appropriate conditions to secure the standard of construction and future maintenance of the road.**
- **Where an APC notice is served and the developer provides a statement confirming that their intention is to keep the road private and provides evidence to BCC to support this.**

It is in the interests of all parties to determine whether any street works will be offered for adoption at the earliest possible stage. This will allow sites to be exempted where a developer has identified that they wish to maintain the road privately. However, if a new street is to remain private, the APC would still be requested to ensure the works are to a standard in case an owner requests adoption under the street works code.

Early determination that a road is to remain private will enable BCC to advise purchasers through the Local Land Charges search process whether dwellings are to be served from an unadopted road. It is the responsibility of the purchaser to satisfy themselves of the implications associated with purchasing a property on a private street.

Roads or footpaths of strategic importance forming: a through-route; providing access for public transport; education; health or community facilities that are not being offered for adoption as public highway would require a separate agreement, either through s106 (Town and Country Planning Act) or s35 (Highways Act) to secure their public use for perpetuity.

Once a s38 agreement has been completed and the road is adopted, the APC monies are returned to the developers.



## Construction and Inspection

### Pre-commencement

It is strongly advised that a pre-commencement meeting takes place between TDM Engineering and the appointed project managers, consulting engineers and contractors.

This meeting will help to foster a sound working relationship whilst allowing for an understanding of identified timescales and forecasted project milestones as well as establishing other relevant highway requirements, which could include, but not be limited to the following:

- Further issuing and approval of drawings;
- Testing procedures;
- Inspecting works;
- Reserving road space;
- Site access arrangements;
- Traffic management/ control;
- Temporary Traffic Regulation Orders (TTROs)



### Inspection

The developer and/or their appointed representative will be responsible for the day-to-day supervision of the highway construction works. However, TDM should be approached to inspect the works at specific trigger points in the build. These trigger points will be determined by the scale and complexity of the scheme and should therefore be discussed at the pre-commencement meeting.

The TDM Engineer may also carry out more general and adhoc inspections periodically to ensure that those elements to be adopted by the Highway Authority are constructed in accordance with the approved drawings.

In the event of engineering problems arising on-site, TDM are prepared to discuss appropriate solutions. However, it is the responsibility of the developer and their representatives to ensure that the works are completed satisfactorily.

TDM Engineer inspections will be required at the following stages of construction. We require that engineers are given 72 hours' notice prior to any inspection request.

- **Formation level\***
- **Highway drainage before covering over**
- **Capping material†**
- **Top of capping material\***
- **Services (depth and spacing)**
- **All trenches prior to back filling**
- **Type 1 prior to laying of Sub-base†**
- **Kerbs, back edging**
- **Base course\*†**
- **Binder & Surface course\*†**

\* Dip sheets will be required

† Copies of delivery notes/tickets shall be provided including certificates of conformity if crushed on site, to ensure compliance (recycled clay, tarmac, timber etc. are not accepted as suitable fill in carriageways or shared surface developments and will be rejected).

If TDM Engineering has not been requested to inspect at the trigger points shown above, we reserve the right to request that the areas of concern are uncovered so that full construction can be viewed and approved.

We will require a full testing, laying and inspection report to be carried out submitted. This needs to be undertaken by an independent party and paid for by the developer rather than the contractor.

## Partial Completion to satisfactory standard – Certificate 1 (Occupation)

A Part 1 certificate will be issued once the following works have been completed and agreed on site:

- All highway drainage;
- All kerbing including, where appropriate, kerb lowering at vehicle and pedestrian crossings;
- Carriageway and footway sub-base, base and binder course;
- Demarcation of sight lines and clearance of visibility splays;
- Street lighting equipment installed and working;
- Provision of street lighting test certificates;
- Provision of “as laid” cable drawings;
- Where sewers are to be adopted, written confirmation that any sewer constructed beneath the highway is regulated under an agreement made pursuant to Section 104 of the Water Industry Act, 1991;
- Illuminated traffic signs and bollards (where appropriate);
- Structures (including Construction Compliance certificate)

Upon the issuing of the Part 1 Certificate the surety will be reduced as described above.

## Substantial Completion & Maintenance Period – Certificate 2

BCC will issue a Part 2 Certificate once the following highway works have been completed on site:

- **The civils works have been substantially completed and found to be satisfactory by TDM Engineering;**
- **All outstanding works relating to street lighting and illuminated traffic signs are completed to the satisfaction of both BCC TDM Engineering and Street Lighting teams;**
- **Any new planted landscaping areas, grassed areas, trees, shrubs etc. that the Highway Authority have agreed to adopt are fully planted and established;**
- **Any variations to the areas originally dedicated as highway maintainable at public expense in the S38 Agreement are included in a supplemental agreement and on a plan;**
- **A Stage 3 Road Safety Audit (RSA) has been completed and submitted as soon as practicable after the defects have been undertaken and the issuing of the Part 2 Certificate;**
- **Street name plates erected;**
- **Road markings completed;**
- **Street furniture installed;**
- **Traffic Regulation Orders completed and associated measures installed correctly.**

A site inspection of the works will be undertaken at substantial completion to establish that the standard of highway work completed to date is of a satisfactory standard. This inspection should involve both the TDM Engineer and the developer.

A defects report will be issued to the developer once the site inspection has been completed. This document will include both a description of the defect as well as photographic evidence. All remedial works will need to be completed before any certificate is issued.

## Maintenance Period

Following the issue of the Part 2 certificate the developer will be responsible for maintaining the works for a minimum of twelve months or until the issue of the Final Certificate, whichever is later.

This maintenance period allows for any further defects in the construction works to become evident. During the maintenance period the developer, at their expense, must ensure that the entire proposed adoptable highway is maintained and managed in a safe state for use by the public. This includes any grassed and planted areas that BCC have agreed to adopt.

Management of the streets including parking will have to be managed by the developer / agent to ensure safe passage for the public. The Developer will remain Street Manager for the development until formal adoption by BCC is completed at the end of the maintenance and defects period.

Routine maintenance shall include any sweeping, gully emptying and snow clearance as well as repairing any areas of damage. The developer shall also, at their own expense, clear all abandoned vehicles, rubbish or other unauthorised materials as necessary from the highway

All appropriate insurances, indemnifying BCC, as required by the Section 38, should be maintained by the developer throughout this period.

## Completion of Adoption – Certificate 3

We will issue a Final Certificate of completion when the following actions have taken place:

- **The developer has contacted TDM Engineering engineer at the end of the maintenance period to arrange an inspection of the works;**
- **The developer has satisfactorily completed any remedial works identified by TDM Engineering;**
- **A stage 4 road safety audit has been completed and any remedial measures undertaken to BCC's satisfaction.**

The developer is also required to provide the following:

- **A copy of the certificate of adoption for the drainage and sewers, as issued by the relevant water company (Wessex Water)**
- **The Health and Safety file, electronically, produced in accordance with the Construction (Design and Management) Regulations 2015. (Appendix D of the Regulations contains a sample H&S file inclusion list)**
- **Payment of any outstanding fees or commuted sums due under the S38 agreement.**

As built drawings in CAD format must be submitted as part of the S38 application pack. The plans shall show the as-built layout of the new roads and sewers on which the following should be accurately marked:

- **Roads, footways and verges to be adopted and materials used – shaded pink**
- **Highway drainage including soakaways to be adopted – blue line**
- **Highway gullies – blue square**
- **Lighting columns to be adopted – green circle**
- **Where columns are set back in 1 metre square lighting plinths shall be adopted – this area is to be shaded pink**
- **All street furniture to be adopted**
- **Boundary of developers ownership – red line**
- **Any structures for adoption including- walls and their foundations, bridges, outfalls etc.**
- **Any other assets that will be maintainable at the public expense, i.e. signal ducting, chambers, street tree, landscaped areas etc.**
- **A copy of a Construction Compliance Certificate for all structures being offered for adoption.**

Once TDM Engineering has issued the final certificate, the council will release the final 10% held of the surety as well as ensuring the formal adoption of the works.