

Highway robbery

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Dave Mitchell discusses issues related to section 38 of the Highways Act 1980

The *Highways Act* 1980 deals with the management and operation of the road network in England and Wales, and it consolidates several pieces of legislation that date from earlier periods.

When dealing with residential developments, it is usual for a local authority's highways department to enter into an agreement under section 38 of the act to secure the formal adoption of any newly constructed roads.

The local authority agrees to adopt the street as a highway maintainable at the public expense once all the street works have been carried out to its satisfaction. As part of the process, it is customary for the developer to commit to the provision of a bond, based on the highway authority's estimated cost for the works.

This bond is effectively held by the local authority and protects it against losses should the developer fail to meet its obligation to provide the necessary infrastructure, in accordance with the authority's specification and standard.

Complex process

The adoption process has been in place since the *Highways Act* 1959 became statute ? section 40 of that act being the forerunner of section 38 of the 1980 Act ? and it has hardly changed since the original legislative requirements were drawn up.

From a relatively straightforward highway environment in 1980, the processes involved in local authority adoption of roads under section 38 of the 1980 act have increasingly been of concern for developers.

Back in 2008, I took part in extensive discussions with the [Department for Transport](#) regarding the need for a better, more modern approach to the adoptions process at a time when authorities were imposing increasingly onerous demands.

Since then, the whole process has become increasingly expensive and bureaucratic, causing delay and unnecessary additional costs for builders. We have reached the point where action to address these concerns needs to be taken. While not the case everywhere, this experience has become more and more prevalent for builders, in particular over the last 25 years.

Planning

Highway departments are statutory consultees for planning applications, yet they increasingly go their own way and impose additional standards after planning consent has been granted, despite having established design standards in place.

We need to find a way whereby final designs are agreed as early in the process and as quickly as possible. Doing so would reduce delays and the potential need to consider late changes to scheme design. Pre-application discussions would seem to be the way forward, but developers' experiences suggest that highway authorities are reluctant to enter into such early-stage discussions.

Designs, adoption and approval

In many cases it can take significant time to get designs approved by the local authority. We need to consider implementing a time limit for highway departments to approve designs that mimics the planning system, to speed up the process and cut delays to the commencement of work.

There is currently no incentive for local authorities to adopt roads in a timely manner, and in many instances the adoption process can take much longer than the date specified in the section 38 agreement. Until roads are adopted, local authorities will not be responsible for the cost of their maintenance, a situation that presents developers with ongoing, open-ended costs that are difficult to factor in to budgets.

This is compounded by the bonds provided by builders having to be held for longer than is necessary, thus locking up capital and adding to costs. These in turn have direct cost implications for the developer, with the bond provider usually imposing overrun charges on bonds that should have been cancelled.

We would like to see a time limit imposed from the point when a developer has applied for adoption. Doing so would provide certainty for all parties and reduce costs. On large developments that can take a number of years to complete, it would be sensible to see phased adoptions agreed between the developer and local authority.

We are also keen to avoid unreasonable pre-adoption remedial lists, which developers are given following the statutory one-year maintenance period. These sometimes get changed, even when the works are carried out to the highway department's satisfaction, and can add a further 6 to 12 months to the adoption process. Similarly, we also experience widespread delays in processing legal agreements, which can take six to nine months to be executed and put in place.

Clearly, developers do appreciate the acute challenges that local authorities are facing, with budgetary constraints and pressures applied by central government. But ultimately, we are wholly reliant on local authorities' service provision and are desperate to see action taken to improve the service for which we are paying. One solution to this could be to introduce private-sector competition into the process.

Commuted sums

In recent years, the commuted sums demanded by local authorities have increased significantly and are now often in excess of the actual cost of constructing the road. It is difficult to fathom, however, why legislation that has largely remained unchanged since 1959 should now be used to demand such payments when previously this has not been the case.

Yet as a result, the inspection fees levied by local authorities ? which are percentages of the commuted sum ? have risen accordingly. It is mainly as a result of these costs that we are increasingly seeing developers favouring the section 37 route to adoption over section 38.

In the former case, the developer notifies the local authority of its intention to proceed to adoption by way of the section 37 approach at the time of technical approval submission. A specific request should be made for the local authority to confirm the key-stage inspections that will be required and the evidence that will need to be presented to demonstrate compliance.

While the local authority is not obliged to inspect, records will need to be kept of the dates and times when inspections were requested, together with the response(s) from the local authority.

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Supervision and verification of compliance with the local authority's construction specification will need to be undertaken at the developer's cost ? a competent or accredited highway or civil engineer will need to be retained for this. These costs are not recoverable.

On completion of the work, including installation of streetlights, a formal request for adoption is submitted to the local authority. Any refusal to adopt can be immediately referred to the Magistrates' Court. If there is still a refusal to adopt, the matter can be referred to the Secretary of State for their determination.

Although a real alternative to section 38, this route is arguably not ideal for either party. The local authority does not receive an inspection fee, and it also causes uncertainty for the developer. More generally, it makes the process much more adversarial. Given this, its increased use is itself symptomatic of the wider failings of the current system for road adoptions.

Of course, with the whole section 38 process (as indeed more generally), some local authorities are better than others and do deliver a good service. But we should not be hostage to the performance of individual authorities, and we need to find a way of ensuring the effectiveness of the adoption process is not a postcode lottery.

Setting targets or encouraging local authorities to perform to best practice standards could help.

NHBC Foundation report

An NHBC Foundation report published in 2011, [Ground-related requirements for new housing](#) , provided a clear overview of the problems with section 38 ? and these issues are just as applicable today, with the added caveat that demands for commuted sum payments are now far more frequent and more costly.

The report's findings include the following observations.

- There have been few occasions when developers have encountered planners and highway authorities working effectively together. This is often accompanied by an inconsistent interpretation and application of existing design guidance, for example, the Manual for streets.
- Developers want standardised highway design guidance instead of the more than 150 variants that exist at present for the design and construction of simple residential estate roads.
- The approval process for safety audits and section 38 technical submissions takes far too long.
- Highway authorities are not proactive in terms of getting roads maintained or formally adopted. Publication of the levels of adoptions on an authority-by-authority basis would be helpful and support the localism agenda. In addition, agreed key performance indicators would greatly assist matters.
- Developers continue to encounter hold-ups in satisfying highway-related planning conditions. This has the potential to delay a start on site, with the unintended consequence of a potential for late delivery of much-needed new housing.

My view is that the time has come for a root-and-branch review of the 1980 act. We now need a more practical piece of legislation fit for the 21st century that allows for a less adversarial approach to the current, out-of-date process that developers can use where necessary.

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Further information

- Related competencies include [Legal/Regulatory compliance](#)
- This feature is taken from the RICS *Building control journal* (June/July 2016)