

Section 38 Agreements Developer Guidance

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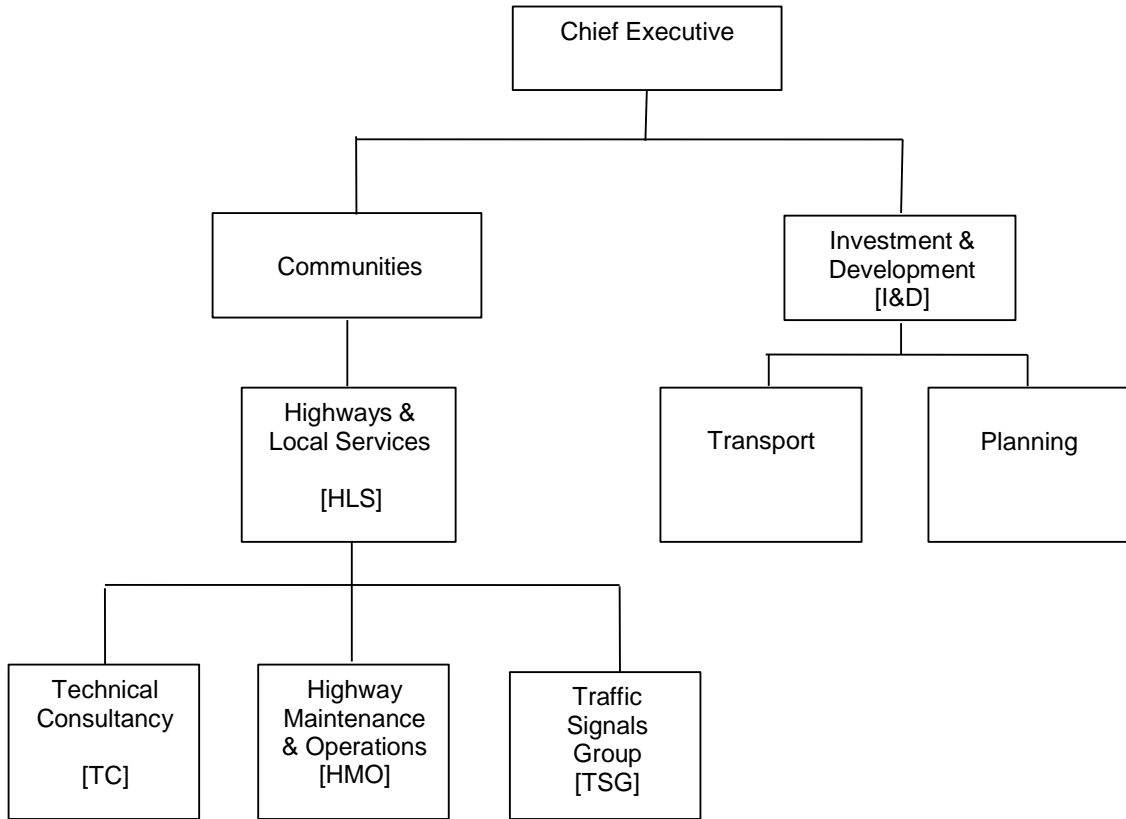
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List of Abbreviations

CBR	California Bearing Ratio Test
CDM 2015	Construction (Design and Management) Regulations 2015
HSE	Health & Safety Executive
HLS	Highways & Local Services division (see “Governance”)
HMO	Highway Maintenance & Operations section (see “Governance”)
I&D	Investment & Development directorate (see “Governance”)
NCC	Newcastle City Council
PFI	Private Finance Initiative
RSA	Road Safety Audit
S38	Section 38 of the Highways Act 1980
S50	Section 50 of the New Roads & Street Works Act 1991
S58	Section 58 of the New Roads & Street Works Act 1991
S104	Section 104 of the Water Industry Act 1991
S171	Section 171 of the Highways Act 1980
S184	Section 184 of the Highways Act 1980
S278	Section 278 of the Highways Act 1980
SSE	Southern and Scottish Electric Ltd
SUDS	Sustainable Urban Drainage System
TC	Technical Consultancy (see “Governance”)
TRO	Traffic Regulation Order
TSG	Traffic Signals Group section (see “Governance”)
TD	Transport Developments division (see “Governance”)

Newcastle City Council Governance



Section 1 – Purpose of the Document

Section 38 of the Highways Act 1980 enables Newcastle City Council (NCC) to take over and maintain at the public expense (adopt), roads, footways, footpaths, cycle lanes, cycle tracks and other areas constructed by a third party through a legal agreement.

The purpose of this document is to guide developers through the process of establishing a Section 38 Agreement (S38) with NCC, and ensure that highway works are delivered to the satisfaction of all parties. The guide outlines what Developers and NCC can expect from each other.

The Highways & Local Services division (HLS) support the process and assist with delivery.

NCC is committed to working closely with Developers to achieve:

- The highest quality development possible;
- Efficient and effective delivery of projects for the benefit of all parties;
- Development that is not a financial burden or maintenance liability to NCC;
- The delivery of highway works constructed to adoptable standards;
- Minimal disruption to existing highways during construction;
- Delivery in accordance with relevant legislation; and
- Consistent use of acceptable materials on the publicly maintained highway.

Section 2 - Legislation

2.1 Section 38 Works

Applications to enter into a Section 38 (S38) Agreement should be made to NCC as soon as practicable during the planning process; ideally at the pre application stage. The development may be divided in to a number of phases and an Agreement completed for each phase before construction works commence.

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”.

NCC may seek payment for future maintenance of the new or revised highway from the Developer, acquiring monies through “Commuted Sums” where necessary. Commuted Sums allow greater flexibility to adopt non-standard materials and other items when development increases future maintenance liability.

An example of a S38 Agreement can be found in Appendix A. The Agreement will set out the:

- Details of the proposed highway layouts, designating which are to remain private and which are to be offered up for adoption;
- Developer’s liability;
- NCC fees and charges;
- Arrangements for dealing with statutory undertakers, connections of existing services, and grants of rights for drainage;
- Arrangements for dealing with traffic regulation orders, consultation, street lighting, traffic signals and road safety audits;
- Arrangements for dealing with all necessary notices to allow works to be undertaken on or adjacent to the Adopted Highway;
- Approach to dealing with the Construction (Design and Management) Regulations 2015;
- The need and value of the financial Bond of Surety required at inception of the S38 Agreement;
- Arrangements for design checks and technical approvals (where necessary);
- Scope of Part 1 and Part 2 works, inspection procedures, and certification;
- Developer obligation during the maintenance period.
- Approach to reporting and timing of adoption.

The highway layout agreed when planning permission is granted will only be regarded as a general arrangement and may be subject to change as a consequence of the subsequent technical and statutory consultations and the detailed design.

2.2 Section 278 Works

It may be necessary in some instances to alter the existing Adopted Highway. Where this is required, the works will be subject to either (a) a separate agreement under the provisions of Section 278 of the Highways Act 1980, or (b) a combined Section 38 and 278 agreement. Further information about Section 278 Agreements can be found in Newcastle City Council's "Section 278 Agreement – Developer Guidance" document.

Works associated with the development will not be allowed to commence on any publicly maintained highway until either the S278 Agreement or S38/S278 Combined Agreement is signed by both parties and a Bond of Surety is in place.

2.3 Developer Responsibility

Before the S38 Agreement can be signed, the Developer must provide written proof to Technical Consultancy (TC) that the Health and Safety Executive (HSE) has been informed that they are the Client for the highway works in accordance with the Construction (Design and Management) Regulations 2015 (CDM 2015) for all notifiable works.

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

The Developer must commission an external Road Safety Auditor, whose competence must be demonstrated to TC, and the same auditor should be retained for all subsequent audit stages.

2.4 Notices, Permits, Licences & Other Agreements

When any work is undertaken on the existing adopted highway it will be necessary to provide several notices to allow these works to take place, namely:

(a) Permit Scheme Notice (Traffic Management Act 2004 – Part 3) [TMA]

The Developer will need to apply for a permit from NCC to undertake any works on the Adopted Highway in advance of the works starting.

This is required to ensure that NCC can identify causes, or potential causes, of road congestion or other disruption to the movement of traffic on their road network, including the management of its own works for road purposes.

Please refer to NCC's "Section 278 Agreement – Developer Guidance" document for more information.

(b) Section 171 Licence (Highways Act 1980) [S171]

Before any works are carried out on or adjacent to the Adopted Highway the Developer is required to obtain a licence from NCC. This licence permits the Developer and his contractors to undertake works on or adjacent to the highway with the approval of NCC acting as the Highway Authority.

The licence is commonly referred to as a Section 171 Licence (S171) and is issued under Section 171 of the Highways Act 1980.

If the Adopted Highway has to be closed to vehicular traffic to undertake these works then a separate application will have to be made for a Temporary Traffic Regulation Order (TTRO) to be implemented which will take 3 months to process.

A company or contractor may apply on behalf of the land or property owner, but the licence will remain in the possession of the land or property owner.

(c) Section 184 Agreement (Highways Act 1980) [S184]

If a Developer requires the construction of a new site access, or requires alterations to an existing site access in advance of the main works under a S278 or S38 Agreement, then the Developer will be required to enter into a Section 184 Agreement to do so.

The scope of these works may, in some instances, be extended to cover other minor works like re-positioning a road gully or a street lighting column.

NCC will approve the Developer's design and inspect the S184 works.

The Developer will pay all NCC's appropriate fees for the administration of the agreement, legal services, technical approval, site inspections and issue of certificates.

A S184 Agreement is appropriate where a developer intends to construct an access on to the Adopted Highway of a higher specification than a simple dropped footway or verge crossing, such as "bell mouth" junctions or heavy duty industrial types of access - and that such works are the only works required within the highway to enable a development.

(d) Section 50 Licence (New Roads & Street Works Act 1991) [NRASWA]

If a development requires works within the Adopted Highway to excavate, or break through it to work on or install new apparatus, the Developer will need to apply for a Section 50 Licence (NRSWA).

When applying for a Section 50 Licence (S50) the Developer must be aware of the following:

- Those granted a S50 Licence become "works undertakers" (for the purposes of NRSWA), and because of that take on responsibility for carrying out the duties and responsibilities imposed by the Act and its associated Codes of Practice.
- If the Developer is unfamiliar with the NRSWA requirements they must appoint a contractor with the proper knowledge and accreditation, who can ensure that the works are conducted properly. An appointed contractor lacking the proper knowledge or accreditation will not be allowed to work within the Adopted Highway.
- Within NRSWA, as the licence holder the Developer may incur financial penalties if they do not meet the necessary statutory duties and licence conditions. This liability cannot be delegated to any other person or organisation.
- The requirement to get a S50 Licence applies to any person or organisation (other than anyone acting under a statutory right) who wishes to place, retain and subsequently inspect, maintain, adjust, repair, alter, or renew apparatus or change its position, or remove it from the highway. This includes drains, cables, ducts, sewer pipes, and water and gas pipes under, over, across, along, or upon the Adopted Highway.
- The Developer must apply for a S50 Licence prior to the proposed works start.
- The guidance given here does not describe all the requirements of the licence.

(e) Section 58 Notice (New Roads & Street Works Act 1991) [S58, NRSWA]

This notice is required to ensure that:

- recently resurfaced or reconstructed streets will not be affected by subsequent activities and works undertaken by others; and,
- activities in the same street or immediate area which may conflict are not carried out at or within a short period time of each other.

The notice should be submitted by NCC on behalf of the Developer in advance of any proposed works on the Adopted Highway. The notice will inform all Statutory Undertakers in advance of any proposed works on particular streets. Notification should be submitted as soon as the scope of the required S278 works are known. The longer the notice period the more likely any programmed SU works can be accommodated to suit the Developer's programme of delivery.

The period of time from the completion of the works when other works cannot be undertaken depends upon the classification of the street and its traffic sensitivity designation.

(f) Section 104 Agreement (Water Industry Act 1991)

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.

Section 3 - Finance

3.1 Bond of Surety

The Developer is required to deposit a Bond of Surety with NCC to cover the cost of the adoptable highway works, NCC associated fees and charges, and Commuted Sums. This Bond ensures that NCC does not incur any costs if the highway works are stalled, changed or aborted by the Developer.

If the Developer fails to perform or observe any of the Agreement's conditions, NCC can use the Bond to complete the adoptable highway works, recover NCC fees and charges, and retain the Commuted Sums to cover future maintenance costs.

The NCC fees and charges element of the Bond must be deposited with NCC prior to any services being undertaken by Technical Consultancy. The cost of the adoptable highway works and Commuted Sums must be deposited with NCC prior to any works commencing on site.

The Bond will be released back to the Developer incrementally in accordance with Table 3.1, except where 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 Value Reduced to "x" of Original Value
Part 1 Certificate	50%
Part 2 Certificate	20%
Final Certificate	0%

Table 3.1 Bond of Surety – Percentage Retained

3.2 NCC Fees and Charges

NCC incurs several costs associated with the Section 38 process which will be paid for by the Developer and will include the following:

- Preparing, executing and managing the Agreement;
- Design Checks;
- Technical Approval including Structures; and
- Inspecting the works on site.

Technical Administration

The charge for administration, design checks and site inspection is currently 7.5% of the estimated adoptable highway works costs calculated by NCC (see Appendix B) and must be paid prior to NCC commencing any S38 related activities.

The 7.5% fee does not include costs associated with checking/approving/input to:

- Highway Structures;
- Street Lighting;
- Traffic Signals (Civil & Electrical) works and equipment;
- SUDS, and non-standard surface water drainage proprietary systems;
- Geo-technical approval or inspection;
- Conducting surveys for inventory information;
- Undertaking Road Safety Audits.

Additional fees for the services above shall be based on “actual costs” incurred on a time related basis.

If more than 2 years elapses after issue of the Part 1 Certificate, without the Part 2 Certificate being issued, NCC will charge a further fixed fee (currently a minimum of £500) for additional administration and inspection work.

Legal Costs

A fee is required by NCC’s Legal Services team to cover the legal costs for dealing with each agreement, plus disbursements. The fee is recovered on a time related basis and this cost will vary subject to the complexity of the agreement and any negotiations relating to it.

Construction Costs

NCC can also construct the Section 38 works on behalf of the Developer subject to further discussions.

3.3 – Commuted Sums

Commuted Sums are necessary when any development increases NCC’s future maintenance liability. Typical circumstances where this may occur are:

- Maintenance costs for any construction that is not required for the safe and satisfactory functioning of the Adopted Highway (including alterations to the existing highway which are only required to serve the development) with no general benefits;
- Maintenance costs for additional features, such as highway structures, additional street lighting, traffic signal installations, non-essential street furniture/fencing/walls, public transport infrastructure and landscaping;

- Additional maintenance costs for permitted alternative materials and features, for example, higher quality paving materials, bespoke street furniture, exceeding NCC's standard specification, and
- Provision of SUDS (such as flow-attenuation devices, swales and storage areas).

Developers should discuss their requirements with NCC, ideally during pre-planning application discussions, in advance of a formal Planning Application being submitted.

Commuted Sum schedules for additional features, alternative surfaces and specifications can be found in Appendix C. The Commuted Sums schedules have been calculated on the date shown and need to be index linked to the date of the S38 Agreement.

Where items, materials or features are not covered by Appendix C, Commuted Sums will need to be calculated on a site-by-site basis by NCC and the Developer.

Commuted Sum values stated in the S38 Agreement are provisional, as development will be assessed on a case by case basis. A recalculation mechanism, based on actual quantities, and the price fluctuation factor specified in the S38 Agreement, will be used to determine the actual Commuted Sum values.

3.4 Insurance Liabilities

Design

As NCC are not designing the S38 highway works, the Developer must indemnify NCC against any claims by third parties arising from any work included in the S38 Agreement that NCC subsequently adopt.

Written evidence must be provided that the Developer's designer for the S38 highway works has a minimum of £5 million of professional indemnity insurance, with no limit on the number of claims.

Construction

Generally, NCC would not be constructing the S38 highway works, the Developer must indemnify NCC against any claims by third parties arising from any work included in the S38 Agreement that NCC subsequently adopt.

Written evidence must be provided that the Developer's contractor undertaking the S38 highway works has a minimum of £5 million of public liability insurance, with no limit on the number of claims.

If NCC were appointed to construct the S38 highway works, then no evidence of public liability insurance would be required.

Section 4 – Consultation

4.1 Informal Consultation

Informal consultation with Councillors (Ward Members and Cabinet Member “Portfolio” Holders) may occur during pre-application discussions and may cover the S38 highway works.

4.2 Formal Consultation

Formal consultation with Members will happen once the planning application is submitted. Outcomes of the consultation will be discussed internally in NCC and with the Developer, and will inform the planning decision and subsequent planning conditions or legal agreements.

TC will undertake the necessary consultation regarding the S38 highway works with all interested parties, including residents, in accordance with NCC’s standard policies and procedures. This process is undertaken in two distinct stages; a third stage may be required if objections are received at either stage which NCC are unable to resolve.

Stage 1 – Technical Consultation

Once planning permission is granted, and the developer seeks to implement their permission, TC will carry out a 4 week formal technical consultation, which may require the scheme to be re-appraised, with:

- Bus operators;
- Emergency services;
- Taxi operators;
- Haulage companies;
- Cyclists; and
- Any other interested parties.

TC will undertake a further 4 week formal consultation with local businesses and residents, and TC will analyse the responses and give to the outcomes to the Developer.

The Developer will pay all consultation costs regardless of the outcome. Please note that abortive work may result as a consequence of consultation.

Stage 2 – Statutory Consultation

Where a development requires changes to an existing Traffic Regulation Order (TRO), creation of a new TRO, or provision of a temporary TRO to facilitate the works, the Developer shall pay all associated costs, including consultation. TROs are subject to statutory procedures and the formal consultation stage can be protracted. The outcome cannot be guaranteed.

Stage 3 – Unresolved Objections to Consultation

Where either consultation stage receives objections to the proposals which NCC are unable to resolve, then these objections are formally submitted to NCC's Regulatory Appeals Sub-Committee (RASC) for further review and consideration. The RASC panel will make recommendations on how the objections must be dealt with. This may or may not uphold the development's proposals.

Advice regarding the need, timescales, and likely cost of consultation can be obtained from TC. The Developer needs to consider the implications of consultation when developing a project programme.

Section 5 - Design

5.1 General

The design of the S38 highway works must be in accordance with NCC's "Design and Construction of Roads and Accesses to Adoptable Standards" document.

The Developer must provide NCC with details of their Designer prior to the design commencing to avoid abortive works. The information provided will need to be sufficiently detailed to allow the competency of the Designer to be assessed. The design of the highway works should be carried out in accordance with the timescales stated in the S38 Agreement.

The proposed development must relate to the existing Adopted Highway boundary, NCC design standards and take into account the highway requirements. The Developer is responsible for ensuring that the development's horizontal and vertical alignments tie back in to the existing Adoptable Highway boundaries which they impact upon.

TC will undertake all highway-related consultations in accordance with the S38 Agreement timescales (see Section 4).

5.2 Highway Design

A Road Safety Audit (RSA) Stage 1 must be procured by the Developer prior to the start of the detailed design (see Section 11).

The Developer must commission an external Road Safety Auditor, whose competence must be demonstrated to NCC, and the same auditor should be retained for all subsequent audit stages.

TC must consider the recommendations in the RSA Stage 1 report and determine the need for further consultation and information required from the Designer.

On the completion of the detailed design the Developer must commission a Road Safety Audit Stage 2 in accordance with the S38 Agreement. The Audit may recommend changes to the detailed design which the Designer will need to consider.

Once the RSA Stage 2 outcomes have been incorporated and the design completed, the Developer's Designer shall provide enough information to allow NCC to carry out a Design Check.

The S38 Agreement must be signed before TC commence the design check. If this is not practicable, the Developer must formally agree to pay all reasonable TC costs for developing the project (see Section 3).

NCC will submit a formal Design Check report highlighting any issues that need to be discussed further. Once all the issues raised by the Design Check have been addressed, NCC will write to the Developer's Designer to confirm that the design is acceptable.

5.3 Highway Structures Design

If the development includes a structure where any of the following apply:

- Structure will be offered up for adoption;
- Structure supports the Adopted Highway;
- Structure supported by the Adopted Highway.

Then structural details must be submitted to TC for Technical Approval. The approval will be undertaken in the timescales stated in the S38 Agreement.

The Developer must provide the information set out in Appendix D as required.

5.4 Street Lighting Design

The street lighting works required to illuminate the Adopted Highway can be undertaken in the following ways:

- The Developer procures Scottish and Southern Electric Contracting Ltd (SSE), NCC's Street Lighting PFI service provider, to design the street lighting works.
- The Developer procures a third party to undertake the design, which must be formally checked by SSE. The Developer is responsible for acquiring all necessary approvals.

The Developer must inform NCC which option they will use to design the Street Lighting works, and this will be included within the S38 Agreement.

SSE will undertake the Lighting Designs and Design Checks within:

- Lighting Designs in 20 working days (4 weeks).
- Design Checks in 15 working days (3 weeks).
- Rechecking - SSE will generate a report with issues arising from the original design – any resubmitted drawings and documents will require a further 15 working days (3 weeks) to re-check.

SSE programme their Lighting Designs and Design Checks from the date of receipt of all drawings and documents in an agreed format.

5.5 Traffic Signals Design

Where traffic signals are required, the design will be undertaken by NCC's Traffic Signals Group (TSG) to meet timescales stated in the S38 Agreement.

5.6 Speed Restrictions

Where 20 mph speed restrictions are required the making and processing of an order in accordance with Section 84 of the Road Traffic Regulation Act 1984 will be

undertaken by NCC's Technical Consultancy. The Developer must pay for all costs incurred by NCC in relation to this process.

5.6 Documents Required From Developer

General

For the Section 38 Agreement, 13 paper copies of the adoption layout plan shall be submitted to NCC.

For Technical Approval, the following information is required:

- 2 paper copies of the:
 - Site Layout Plan
 - Proposed Highway Adoption Plan
 - Surface Finishes Plan
 - Road Construction Details with typical cross-sections
 - Surface Water Drainage Layout
- 1 paper copy of the
 - Planning Approval (Decision Notice); and
 - Approved Planning Layout (site plan) of the proposed works or development (as requested in the Application Form).

Layout Plan

The layout plan should be drawn to 1:500 scale and incorporate a location plan, drawn to either 1:1250 or 1:2500 scale, as appropriate. The location plan should show the outline of the new roads by a broken line and the boundary of the land in the ownership of the applicant defined by red edging.

The following details should be shown on the layout plan:

- The layout of any proposed dwellings with plot numbers and driveways;
- Details of sewers and surface water drains (private and highway);
- Landscaping details;
- A typical cross section showing the construction to be used;
- Signing and road marking details;
- Retaining wall details and other highway structures;
- Carriageway and other associated dimensions;
- Junction visibility and forward visibility splays;
- Horizontal and vertical alignment; and
- Street lighting.

Road Safety Audit Report

A Road Safety Audit Stage 2 Report and Designer's response may also be required (see Section 11 for further information).

Geotechnical Report

A Geotechnical Report (including CBR test results at formation) and details of any statutory undertakers' service protection or diversion works.

Section 6 – Contractor Approval

All highway works must be carried out by a Contractor, including any sub-contractor, who has relevant experience and capabilities.

Where NCC has no previous experience of a Contractor's work, the Developer will be required to provide NCC with satisfactory references, and examples of similar work successfully completed to the satisfaction of another Highway Authority.

We recommend that the Developer only considers employing experienced and competent Contractors to avoid abortive works and subsequent delays.

The Developer can appoint NCC to construct the highway works. No references will be required for NCC or their sub-contractors.

Section 7 – Construction

7.1 Notification of Start of Works

A minimum of 2 weeks notice, in writing to NCC is required, of a Developer's intention to commence construction works.

The S38 Agreement will state that the construction of any work on site must not start until the Developer has met all of the following conditions:

- Section 38 agreement signed;
- All necessary fees and charges paid to NCC;
- Written confirmation that an adequate Bond of Surety is in place;
- Written confirmation that the Developer will pay all Commuted Sums;
- Written confirmation that the Developer has notified the HSE that he is the Client for the development (see Section 9);
- Statutory procedures completed;
- Non-statutory consultation processes completed;
- Design checks satisfactorily completed;
- Technical approvals given for structures within / abutting the highway;
- Road safety audits satisfactorily completed up to, and including, RSA Stage 2;
- NCC's S38 Officer has been provided with approved construction drawings for site inspections; and
- NCC has been provided with adequate information to allow him to approve the Developer's contractor for the highway works.

NCC will not inspect any of the works until the above conditions have been met. Any works constructed before this time will be subject to retrospective inspections at the developer's expense, which may include excavations to expose construction depths and materials used.

7.2 Site Inspection

When the Developer's contractor constructs the S38 highway works, the Developer is responsible for the day-to-day supervision of the construction of these works.

NCC will inspect the S38 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 to the NCC Inspector for any item of adoptable highway work being constructed on site and requiring approval. The Inspector must be given access to the highway works at all times.

If unforeseen issues arise, the Inspector will discuss possible solutions, but it is the responsibility of the Developer to instruct the S38 highway works contractor, and make sure that the works are satisfactorily completed in accordance with NCC's requirements.

When NCC's contractor constructs the S38 highway works, NCC is responsible for the day to day supervision of the construction of the highway.

If unforeseen issues arise, NCC is responsible for instructing the contractor, and making sure that the works are satisfactorily completed in accordance with NCC's requirements.

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

7.3 Completing the Highway Works

When the Developer's contractor constructs the S38 highway works, it is the Developer's responsibility to complete any work included in the Agreement to the satisfaction of NCC.

When NCC's contractor constructs the highway works, NCC is responsible for completing any work included in the Agreement.

The Agreement will include a time limit for the completion of all S38 highway works to be adopted. This time limit is determined by NCC in discussion with the Developer as part of the formal Planning process. This guidance document and the model S38 Agreement in Appendix A refer to 24 months for completion. The Developer must ensure that adoption takes place within a reasonable period of time to minimise any potential risks or inconvenience to residents.

In order to safeguard the interests of householders and highway users, NCC expects the Developer to ensure that the highway works are completed, either:

- within 6 months after all buildings fronting or served by the highway works are completed; or
- within 24 months after completion of the S38 agreement

whichever is sooner.

Where the Developer does not complete the highway works (for either construction option) within the specified timescales, and an extension of time is agreed, NCC will charge extra fees towards additional administrative and inspection / supervision costs.

If the Developer does not complete the highway works in accordance with the Agreement (for either construction option), NCC reserves the right to use the Bond to complete the works.

Section 8 – Certification of the Highway Works

The Developer must apply to NCC separately in writing for the Part 1, Part 2 and Final Certificates.

8.1 Part 1 Certificate

The Developer shall complete the Part 1 Works within an agreed timescale stated in the Agreement. The model S38 Agreement states that this should be within 6 months of signing the Agreement for a 24 month completion period.

If NCC determine with the Developer that the completion period should be varied then the Part 1 completion timescale should also be varied to reflect this longer completion period, e.g. a completion period of 36 months would have a Part 1 completion period of 9 months.

When NCC receives an application from the Developer to issue a Part 1 Certificate for all works listed in Schedule 1 of the Agreement, NCC must inspect the works to which the application relates and provide the Developer with a definitive list of all remedial works required to be undertaken to complete the Part 1 Works within 10 working days of receipt of the application.

The Developer must carry out all the remedial works without delay and at his own cost.

NCC will inspect the works again and, subject to all remedial works being completed to its satisfaction, will issue the Developer with a Part 1 Certificate within 20 working days of the completion of the remedial works.

8.2 Part 2 Certificate

The Developer shall complete the Part 2 Works within an agreed timescale stated in the Agreement. The model S38 Agreement states that this should be within 18 months of signing the Agreement for a 24 month completion period.

If NCC determine with the Developer that the completion period should be varied then the Part 2 completion timescale should also be varied to reflect this longer completion period, e.g. a completion period of 36 months would have a Part 1 completion period of 27 months.

When NCC receives an application from the Developer to issue a Part 2 Certificate for all works listed in Schedule 2 of the Agreement, NCC must inspect the works to which the application relates and provide the Developer with a definitive list of all remedial works required to be undertaken to complete the Part 2 Works within 20 working days of receipt of the application.

The Developer must carry out all the remedial works without delay and at his own cost.

NCC will inspect the works again and, subject to all remedial works being completed to its satisfaction, will issue the Developer with a Part 2 Certificate within 20 working days of the completion of the remedial works.

In addition, where the Works are also subject to a Section 104 Agreement of the Water Industry Act 1991, and the sewer is situated within the highway or is an integral part of the highway drainage system, the Part 2 Certificate will only be issued after a "Provisional Certificate" has been issued by the drainage Statutory Undertaker.

If the Developer's contractor has constructed the highway works, the 12 Month Maintenance Period commences on issue of the Part 2 Certificate. When NCC's contractor has constructed the highway works, the 12 Month Maintenance Period is not required.

NCC will require a Road Safety Audit Stage 3 to be commissioned by the Developer at this stage (see Section 11).

All works included in the Agreement that are to be adopted become highway open for public use (but not maintainable at the public's expense).

8.3 Maintenance Period Responsibility

When the Developer's contractor has constructed the highway works, the following applies:

- The Developer remains the Street Manager for the purposes of Section 49(4) of the New Roads and Street Works Act 1991.
- The Developer is responsible for the maintenance of all work included in the Agreement, including highway verges, and must carry out road sweeping and gully emptying to the NCC published current standards and maintenance regimes until the Final Certificate is issued.
- The Developer is responsible for the removal of abandoned vehicles, rubbish or other unauthorized materials or obstructions as may be necessary, in order to facilitate the use of highway areas by residents and the public.
- The Developer is responsible for the routine maintenance of the street lights and illuminated traffic signs, and will pay for all associated energy charges, during the Maintenance Period.
- The Developer must ensure that the highway areas are maintained to a high standard during the Maintenance Period and are completely safe to use by all pedestrians.

Site inspections will be carried out during wet weather conditions to check that there are no problems with surface water drainage.

If NCC's contractor has constructed the S38 highway works, the 12 Month Maintenance Period is not imposed, and NCC are responsible for all the issues stated above, on behalf of the Developer.

8.4 Final Certificate

The Developer must arrange a joint inspection with NCC, in order to agree a definitive list of maintenance repairs deemed necessary, prior to the end of the 12 Month Maintenance Period (if the Developer's contractor constructs the highway works), or on issue of the Part 2 Certificate (if NCC's contractor constructs the highway works).

Within 7 days of the joint inspection, NCC will send the Developer a list, in writing of all necessary repairs to be completed before the issue of the Final Certificate.

The Final Certificate will only be issued when:

- All S38 works, including remedial works, are satisfactorily completed;
- All payments under the Agreement, including any additional inspections and administration fees, have been paid to NCC;
- The Developer has supplied NCC with the Health & Safety File, as stipulated in Construction (Design and Management) Regulations 2015;
- The Developer has supplied NCC with two (2) sets of "As Built" drawings, including highway surface water drainage and any drainage situated outside the highway limits;
- An Road Safety Audit Stage 3 has been completed, and approved by NCC; and
- The Developer has paid any necessary Commuted Sums to NCC.

Following satisfactory completion of all the above requirements, NCC will issue the Final Certificate and the works included in the Agreement will become maintainable at the public expense.

Section 9 – Health & Safety

The Developer must provide written proof to TC that the Health and Safety Executive (HSE) has been informed that he is the Client for the highway works when the works are notifiable in accordance with the Construction (Design & Management) Regulations 2015 (CDM 2015).

The Developer must agree to undertake all the Client's obligations and ensure that the Works are carried out in accordance with CDM 2015. The Client's role and responsibilities are laid out in Appendix E.

The Developer must ensure compliance with the CDM 2015 and indemnify NCC against all claims, liabilities and actions.

The Developer must create and maintain a Health and Safety File (HSF) for the highway works and allow NCC access to the HSF during the delivery of the highway works. The Developer must subsequently provide NCC with an electronic copy of the HSF on completion of, and prior to, the formal adoption of the highway works.

The remaining Bond of Surety will not be released until the highway works are undertaken to the satisfaction of NCC and the HSF is provided.

Section 10 – Street Lighting - Inspection

10.1 - Inspection

1. Routine maintenance of the street lights and illuminated traffic signs during the maintenance period and until a development is adopted, will be the responsibility of the Developer including the payment of energy charges.
2. The inspection of an installation would fall into 2 categories.

If the installation has been carried out by SSE, when the Part 2 Certificate is issued by the Section 38 Officer, SSE will accrue the equipment on to the street lighting data base. No further inspections are required but the street lights and any illuminated traffic signs remain the responsibility of the Developer.

If the installation has been carried out by a third party (not SSE), the installation will have to be inspected by SSE. It is the Developers responsibility to gain all necessary approvals. SSE will require an Official Order from the Developer to carry out the inspection works.

The inspection will include the following process:

- A visual check would be carried out to check the actual location of the lighting columns against the design and that the equipment used met the Authority's specification and had been installed correctly.
- If the visual inspection failed the Section 38 Officer would be notified and issued with a defects list from SSE.
- If the installation passes the visual check the following works would be carried out by SSE and paid for by the Developer.
- Column reference numbers would be supplied and fixed by SSE.
- An electrical test would then be carried out on each lighting column.
- Following a successful electrical test a Part 2 Certificate could be issued. Normally the Developer would be responsible for the maintenance and energy of the lighting columns for the next 12 months or until a development is adopted. However the proposal to be considered is that following the issue of the Part 2 certificate the Developer would pay an agreed charge that would allow SSE to cover the maintenance period.

As advised by SSE, visual inspections are to be carried out in 15 working days (3 weeks) – if the visual inspection is accepted at the first visit, the numbering and electrical testing would be carried out in the same time period.

If the visual inspection initially fails, following any remedial works any subsequent retests will be on the same 15 working day notification.

The timescales are based on the date of order receipt at SSE with all of the necessary drawings and proposed equipment details in an agreed format (i.e. AutoCAD drawings) and any subsequent retests would require written notification to restart the 15 day process.

Section 11 – Road Safety Audit

11.1 Application

A Road Safety Audit (RSA) process may be required, subject to the scope and scale of the proposed highway infrastructure being offered up for formal adoption.

A RSA will be required when any of the proposed highway infrastructure incorporates the provision of any of the following:-

- Principal Roads;
- Classified Roads;
- Local Distributor Roads;
- Collector Streets (Residential Streets incorporating Bus Routes);
- Any Residential Street, Shared Surface Street or Home Zone that requires the creation of a new access or formal junction off any of the above street types; and
- The development is creating more than eight (8) new residential units/properties.

The need for a RSA will be determined at the pre-application stage as part of the discussions with the Planning and Transportation Developments officers.

11.2 Definition

A Road Safety Audit (RSA) is the staged evaluation of changes to the highway during design, construction and operation. It looks to identify potential safety hazards that may affect any road user.

- Stages 1 and 2 evaluate the design;
- Stage 3 is carried out as soon as possible after measures become operational; and
- Stage 4 is carried out approximately 12 months after the measures became operational.

A RSA considers the road safety implications of all measures and their impact on the highway network – the effects on all road users are considered. Particular attention is paid to the effects on vulnerable groups, for example the very young, the elderly, people with a disability and more generally pedestrians, cyclists and riders of powered two-wheeled vehicles.

A RSA may be applicable to a particular junction or section of the network. However, it is important that the road safety implications of the measures being proposed are considered, along with any impact on adjacent or other parts of the network.

A RSA does not consider non-road safety related issues and is not a technical check. However, in order to clearly explain a safety problem or make a recommendation to resolve a problem, the audit may make reference to a design standard.

A RSA is not to be used:

- As a means of selecting between various design options under consideration;
- To query why other measures are not being proposed; nor
- To comment on the effectiveness of the proposals where there are no adverse safety implications.

10.2 Audit Stages

A RSA shall be undertaken after the completion of four specific stages of project development, which are:

Stage 1

A Stage 1 RSA must be commissioned by the Developer as soon as possible after completion of the preliminary design. The design should be sufficiently progressed so that all significant features are clearly shown. This is likely to have been undertaken prior to defining the scope of the S278 works. The Developer will provide TC with the Stage 1 report prior to the start of detailed design.

Stage 2

The Developer must commission a Stage 2 RSA upon substantial completion of the detailed design and before the preparation of works orders or tender documents. The design should be sufficiently progressed so that it could be constructed with the information produced to that point. Once the Developer has provided TC with the Stage 2 report, the detailed design can be completed in line with recommendations.

Stage 3

A Stage 3 RSA must be commissioned by the Developer just before or just after the issue of the Practical Completion Certificate depending upon what is most appropriate. The timing will be dictated by the earliest opportunity to observe actual road user behaviour.

On occasions it may be necessary to carry out an RSA before the road is (re)opened to traffic, so that any identified issues can be addressed prior to (re)opening. The need for this will be discussed with the Developer and should be included in the Section 278 Agreement where possible.

Stage 4

The Developer must commission a Stage 4 RSA just before or just after the issue of the Final Completion Certificate depending upon what is most appropriate. The RSA should take account of actual road user behaviour and the following data will be analysed:

- Locations at which personal injury collisions occurred;

- Personal injury collisions that appear to have similar causes or show common factors;
- How the scheme may have affected collision patterns and rates.

Section 12 - Appendices

- A - Model S38 Agreement
- B - TC Fees and Charges
- C - Commuted Sums
- D - Design Checks and Technical Approval Information Required
- E - Client Roles & Responsibilities under CDM 2015 (HSE document)