

S278 Agreements – New Model Agreement and Revised Charging Structure: Consultation with Developers

[Copy of email seeking developer views on the new fee:](#)

From: Bob.White@kent.gov.uk [mailto:Bob.White@kent.gov.uk]

Sent: 05 May 2010 08:52

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Subject: Section 278 Agreements: New Model Agreement and Revised Charging Structure - CONSULTATION

Dear All,

As representatives of the Kent Developers' Group and Kent Planning Officers' Group Homebuilding Industry Joint Liaison Group, I am consulting you on changes to the Section 278 Agreement.

Please find attached a report that summarises the changes to the model agreement and charging structure. You will note that the changes are not considered to be "more onerous ... than past versions of the document".

If you would like to comment on the changes, and/or seek clarification on particular issues, please reply to me by **Friday 4th June**.

Thank you

Bob White

Transport & Development Business Manager

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Responses received from developers:

(A) From: Hillreed - Sent: 19 May 2010

1 A lot of 278 works are those in association with creating new accesses for existing highways and are designed as part of our S38 works. Would it be possible to consider widening the scope of S38 agreements in cases such as this to encompass all works. This would be a substantial benefit to the industry certainly and would fit with aspirations to remove layers of administration for both sides.

2 Could we not creatively explore ways of eliminating the checking engineers and removing a layer of fees. Don't just dismiss this! Supposing for instance our design engineers were to provide a warranty to the County Council which would allow you recourse under their insurance if there were any problems. You would not then need to employ a second engineer to check the works. This could remove a massive cost element and avoid duplication.

KHS comments - 1. Agreed. We are trying to do this, especially where the 'on highway works' are merely an outward extension of the S38 schemes. We need to have further discussions with our engineers over maximum levels of flexibility, hence if you have any case studies that we could use they will act as a good focus. 'Reasonable discretion, consistently applied' comes to mind.

2. As you can imagine, initial reactions have been mixed. Are you suggesting that we should not check the detailed design or is it the site works involvement you would like to see 'self certificated'? Is there a model of this elsewhere that we could assess? As a properly made representation, we won't dismiss it, but it will provoke some interesting discussions. KCC allows developers to carry out highway improvements themselves rather than carrying out all the work as prescribed in S278 of the Highways Act. We need to take precautions to ensure the work is carried out exactly as per the design but also without adverse effect on existing highway users.

(B) From: Bovis Homes - Sent: 20 May 2010

Thanks for this. I have sought the views of colleagues here at Bovis Homes.

Our Head of Legal Services has informed me that the only relevant change from a legal point of view is the proposal for the transfer of land for Section 278 to be optional. This will simplify the process and should reduce the legal costs involved.

Our Engineering Manager broadly agrees with the proposed changes, since this will allow us to accurately assess our fees from the outset and provide more realistic costings for our budgets rather than pay fees based on hourly rates as currently used.

KHS comments - Support from Bovis for both the optional land transfers and the new fixed fee is noted.

(C) From: Bovis Homes [tel call to G. Currie] Sent: 20 May 2010

Bob, actually I had a good call from Dave Ivell at Bovis who thoroughly supported all we are proposing.

Graham

[KHS comments](#) - Further support for our proposals from Bovis noted.

(D) From: Barratt Homes - Sent: 24 May 2010

Section 2.1 Land Transfer – whilst the changes to the S38 Agreement have removed the need for land transfer and therefore should speed up the adoption process, it is still disappointing to see that under the S278 Agreement this is still optional depending on the particular circumstances of the development and I would ask for the optional element to be removed because in all cases County Councils legal departments, as we know from previous experience, make a great deal of money from carrying out these legal transfers for there is no other county in the country sees the need for land transfers to take place.

Section 2.2 Kent Permit Scheme - whilst understanding why Kent need to restrict works on the public highway with permitted leading times and having had the long drawn out experiences in dealing with the pedestrian crossing at Aylesford, a greater degree of flexibility in programming S278 works would be better as we are not always aware of longer term projects such as those of the gas board in Maidstone which cause delays to S278 works.

Section 2.3 Fees and Charges – in principle I see this as a significant step forward in that it gives you far more transparency to understand Kent's professional fees whereas in the past, based upon the time charge method, we had no control over the final outcome. This was also a stumbling block when it came to final adoption and payment of their fees. Two things do come to mind, firstly that there would appear to be now a fixed fee for transportation advice and it is unclear as to at what stage advice would be charged for. The fee for professional costs whilst creeping up to 9% rather than the 8% which is charged for S38 works is a good idea, I would add a note of caution that the Bond value for both the fixed fee and professional fee costs should be based upon our costs for doing the work not KCC's costs as they are invariably inflated when they are calculating the S38 Agreements based upon their term contractors rates, which are very rarely transparent and are termed as being sensitive information.

[KHS comments](#) - 2.1 Land transfers provide greater clarity for new areas of highway land and are still considered necessary in some situations.

2.2 The permit scheme operates on a first-come first-served basis with KHS, Stat Undertakers and developers all given the same opportunity to book the road space.

2.3 The fees for transportation advice will continue to be in three tiers to reflect the likely extent of the work although the existing tiers are due to be adjusted. This charge is raised in arrears, usually when a S278 agreement is signed. The Bond figures have to be based on what it would cost KHS to complete the works in the event that the developer defaults. The support from Ward Homes for a fixed fee is noted.

(E) From: St.James' Homes - Sent: 24 May 2010

2.1 Land Transfer

I can't think of a situation where we would not want to transfer the land so providing this is optional I have no further comments. Are KCC staying they would adopt the roads without the land on which they are build being transferred?

2.2 Kent Permit Scheme

Can we see the document, my concerns are with KHS having "more control" over the works, are that this will increase timescales and cost more.

2.3 Fees and Charges

I am not in favour of a fixed fee and we would like to see how fees are built up for KHS and their consultants Jacobs for the time and works undertaken. Better control over the budget estimate and what this covers is needed with an accurate budget figure as early as possible for KHS and Jacobs inspection fees.

KHS comments - 2.1 There may be some situations where it is expedient not to insist on a land transfer which we are now acknowledging.

2.2 The new wording in the model agreement reflects the new permit scheme which KCC has recently introduced and which applies to all works carried out on the highway including our own.

2.3 Noted that Trenport do not support the fixed fee proposal. The fee has been determined by careful comparison with actual fees levied under the existing format so it is designed to be cost-neutral but reduce overhead costs for both parties in administering it. We are legally required to ensure we do not subsidise this work.

(F) From: St.James' Homes - Sent: 28 May 2010

I have consulted internally those of my colleagues on the construction side of the business who are more closely involved with this matter than I am and I attach a copy of the reply I received from Paul Morris, Trenport's Construction manager. Within Kent Paul has most recently been involved with getting the highway works undertaken by Trenport at East Hall Farm, Sittingbourne, into adoption; he will also be involved with the highway works at Peters Village in due course and on which we are currently in discussion with your in house solicitors and several members of Kent Highway Services.

The only thing I would add to Pauls comments is at 2.3 concerning explaining/justification of fees. As you will have gathered from yesterdays discussion on viability generally, for our part we never regard this as being "not productive".

KHS comments - 2.3 We are satisfied that a percentage based fee system will provide a fair recharge of the time spent by our staff and consultants on a wide range of schemes without entailing complex analysis of their time. This system has worked well for S38 sites and is widely used by other counties too.

(G) From: Moat Housing - Sent: 04 June 2010

Apologies for the late response to your suggestions. Moat is in favour of the simplification of the processes you use and is in favour with your proposals on Land Transfer and the Kent Permit Scheme.

We can also see that your current system of re-charging fees and charges can turn into a laborious process and takes time away from your staff. However, we do wonder whether there could be an element of duplication here? Developers will be using their own consultations for advice on Highways issues. We do appreciate that you need to make your own decisions, but wonder whether there is greater scope for liaison with the consultants appointed by developers in a way that would cut down costs?

KHS comments - A member of the KDG has raised the same issue about perceived duplication. From a local authority perspective, it's very much a matter of quality assurance and approval systems - KHS receives enough inadequate submissions to warrant a full and proper check. We have suggested that the KDG might wish to explore the possibility of discussions that will include their consultants, looking at the current system and any scope for making the design and approval process more efficient. It should be an interesting debate!

(H) From: Millwood Designer Homes - Sent: 03 June 2010

We have a Kent Developer Group meeting next week (10th), and the S278 consultation is on our agenda. KDG intend to submit a representation. As the deadline for consultation is the 4th, can I ask that it is extended to the 16th or preferably the 18th so that KDG can input to the process. This is quite important to us, as legal agreements relating to highways are integral to the development process.

KHS comments - I have advised my colleagues that your request is reasonable, especially in the context of efforts to establish better liaison between the KDG, KPOG and KHS. Any joint KDG response will be considered along with the individual responses received to date.

Tony's representation raised very valid issues about the quality of submissions, and I believe that he will wish to discuss these at your meeting. We will work with KDG thereafter to see if we can all benefit from better quality assurance at the design stage. It may even be that our Agreements Team managers could be part of a future face-to-face discussion on the

issues. "A thorough airing" of S278 (and S38) issues will be useful as we all try to do more with less.

(I) From: Millwood Designer Homes - Sent: 09 July 2010

Kent Developer Group response;

An extract from the Minutes of our June meeting is attached. In the event, I am afraid the subject did not generate much discussion, mainly I would suggest because the attendees are more attuned to planning policy issues rather than highway issues.

The reference to "Tony" is Tony Hillier, Chairman of Hillreed. I think Tony makes a valid point in that there must be synergy of efficiency if a s38 scheme leading to a s278 scheme is considered as one scheme from an advice / project management / design / inspection point of view.

Chris Hall represents Trenport who own significant strategic sites in Kent. His concern is one of accountability. It would be accepted that the proposed fee structure would simplify the administrative burden. It is then a matter as to whether the actual fee levels are fair and appropriate. Could we see the evidence to support these?

Millwood Designer Homes response;

MDH believe there should be more flexibility in the fee structure.

Example 1 - a relatively modest scheme of say a pedestrian refuge relating to a scheme of say less than 25 units could have bond value of only £10,000. In this case the professional fee would be £900, but the advice fee would be £5000 and that would be disproportionate.

Example 2 - A major scheme with a bond value of say £1,000,000 would attract an advice fee of £15,000 and a professional fee of £55,000. A major scheme of half that size, i.e. £500,000 would attract the same advice fee of £15,000 but have a professional fee of £45,000 - only £10,000 lower than the scheme which is twice the size.

The fees associated with the £10,000 scheme are 59%, whereas the fees associated with the £1,000,000 are 5.5%. This shows the fee structures proposed is too crude, and that to be fair and proportionate, a sliding scale should be used. That scale should start from a minimum cost which we would propose is an advice fee of £1000 and perhaps 10% professional fees.

The advice fee should be higher for the schemes in the range £250,000 +. The professional fees for schemes above £500,000 should not be as low as 2% for the amount above £500,000.

I trust the foregoing is of assistance, and would look forward to receiving a copy of the consultation response analysis.

Tony suggested that s278 and s38 be considered together as s38 where contiguous. Also, can we use only one set of engineers? Bob White's response was generally positive but not categorical. Chris Hall is also worried about fixed fee as that means Local Authority doesn't have to justify the fee.

Tony suggests that individual KDG members respond to Bob. Members have made their responses and KDG now want time to review these and discuss them with KCC further.

KHS comments - Apologies for not getting back to you again sooner. I have now considered your comments properly and will incorporate them into a summary of responses which we will present to our Portfolio Holder for decision. I am not proposing to respond in detail at this stage but with regard to the particular examples you cite, I would point out that we usually exercise some discretion with applying charges for very small schemes and I'm sure this will continue. We are aware of some steps in the proposed charge regime but this is to some extent an inevitable consequence of striving to make the structure as simple as possible.

Responses collated by James Whitehorn,
EHW Finance 29th July 2010