

By: John Burr, Director of Kent Highway Services

To: Nick Chard, Cabinet Member for Environment, Highways & Waste

Subject: S278 Agreements for Developer-Funded Highway Improvements

Classification: Unrestricted

Summary: This paper provides an overview of a new Model Agreement under S278 Highways Act 1980 and requests approval from the Cabinet Member for Environment, Highways & Waste for adopting it and also for a revised charging structure for professional advice, design checks, project management, site inspections and administration. The paper includes responses from developers to a consultation report.

1. Introduction

- 1.1 When a developer obtains planning permission for a development it is often a requirement that he undertakes certain improvements to the existing highway to mitigate the impact of the development on the public road network.
- 1.2 The mechanism used to permit the developer to design and construct works on the highway is Section 278 of the Highways Act 1980. Before any works are carried out the developer must enter into an agreement with the Highway Authority [i.e. KCC] under this section.
- 1.3 The terms and conditions of the current Model S278 Highways Agreement have evolved over the last 20 years and the Agreement needed reviewing to ensure that it is still fit for purpose, reflects current standards or policies and protects the interests of KCC. Officers from Kent Highway Services have reviewed the current document assisted by the Director of Law & Governance and suggested a number of improvements.
- 1.4 The result of the review is a new Model S278 Highways Agreement which incorporates a new charging structure and is now ready for use.

2 The New Model S278 Highways Agreement

The changes to the terms and conditions are mainly re-wording and updating. They are generally no more onerous on the Developer or the County Council than past versions of the document. The three major changes are:

2.1 Land Transfer. It has been the norm within Kent for the developer to be required to transfer the land under any new highway constructed and dedicated by him. Following the decision in July 2009 on Section 38 works [for new estate roads] that the land transfer need not be a requirement, it is now proposed for the transfer of the land for Section 278 to be optional depending on the particular circumstances of the development.

This will make the processes more efficient and brings Kent into line with the majority of other local highway authorities who do not always require a land transfer.

2.2 Kent Permit Scheme. The new Model Agreement includes provisions for the developer to comply with the new Kent Permit Scheme for works on the highway. The effect of this is that there will be better early planning for developer works on the highway which will give the County Council more control over works on the public highway.

The Kent Permit Scheme covers statutory undertakers, developers and our own highway works; it is an innovatory scheme compared to those operated by other County Councils.

2.3 Fees and Charges. There are three main elements of the existing charge structure:

(i) A fixed fee for transportation advice and a recharge of actual costs for project management, design checks and periodic site inspections [plus admin]. The existing fees for transportation advice are: Bond value £0-50,000: Fee £2,200, Bond value £50,001-250,000: Fee £4,500, Bond value £250,001-£1,000,000: Fee £15,000. (ii) The developer is also currently required to pay all our fees and staff costs incurred in facilitating and managing the works on the highway. This is achieved by recording KCC staff and Jacobs time and re-charging the developer at the relevant hourly rates for each officer plus on-costs at intervals during the life of the scheme. (iii) Additional fees are charged where applicable for checking certain supplementary items, specifically: Structures, Traffic Signals, Major Geotechnical works and SUDS [sustainable drainage]. Charges are also passed on for testing materials, arranging SU diversions, making temp TROs, interest on overdue payments, indemnities, etc and there are no alterations proposed to the recharging mechanism for these items. Similarly there are no alterations proposed for recovering our legal fees.

2.4 Generating accurate and consistent statements necessitates a considerable amount of work by both engineering and finance staff involved in the process. Further time is often spent exploring with developers how these charges were calculated which is not productive for either party. Normally the money is drawn down from a deposited sum paid in advance but regular statements still need to be prepared to monitor this.

In contrast, the Section 38 works (for housing estate roads) are funded using a flat 8% of the estimated value of the works, in line with most local authorities, which is paid by the developer at the outset of the works on completion of the agreement.

2.5 As part of the review of the Model Agreement we examined the historical relationship between the actual costs to the County Council of managing these schemes and the value of the works. We also made enquiries of other local highway authorities as to their charging regimes for comparison. The Highways Act 1980 states that anyone who enters into such an agreement with the local highway authority '*will make towards the expenses incurred by the authority in executing the said works a contribution (whether by a single payment or by periodical payments) of such amount as may be so specified*'.

2.6 The intention is to retain a fixed fee for transportation advice but move to a single up-front payment of the fee for our professional costs based on a percentage of the bond value of the developer's highway works, i.e. the estimated cost of the project.

3. Proposed New Fees

3.1 The proposed new charging structure is as follows:

Fixed fee for transportation advice: [Provided prior to the signing of a S278 Agreement]

Bond value up to £249k	Fee £5,000
Bond value £250k - £999k	Fee £10,000
Bond value £1m and above	Fee £15,000

Fee for professional costs: [Project management, design checks, periodic site inspections]

Bond value up to £499k	9%
Bond value £0.5m and above	9% of first £0.5m, plus 2% of the balance

3.2 Both these fees plus the Council's legal costs in preparation and completion of the Agreement will be payable upon the execution of the agreement. Many S278 agreements are currently in place and it will take several years before the benefits of introducing the new percentage based fee will have full effect. In the meantime for existing agreements it is proposed to continue basing our charges for professional fees on actual time but at an average hourly rate. The intention is that this will be reviewed and adjusted as necessary each year to reflect our actual costs for the staff working on S278 schemes.

4. Consultation with Developers

4.1 During the preparation of this report an earlier draft was circulated in May to a number of developers for consultation purposes. The full results of the responses and our comments on these are appended to this report. Responses were received from: Hillreed, Bovis, Barrett, St James's, Moat, Trenport and Millwood on behalf of the Kent Developer Group.

4.2 Land Transfer. The points made relating to this relaxation of the requirement to transfer land to KCC were entirely supportive.

4.3 Kent Permit Scheme. There was some concern that the permit scheme is not flexible enough and creates problems with booking a slot for construction, but it is of course intended to provide a fair mechanism for use of the highway with many competing demands on the road space. The new Model Agreement merely confirms that developers' schemes will have to compete with KCC's own schemes and those of Statutory Undertakers.

4.4 Fees and Charges. There was support in principle from several developers for a fixed percentage based fee paid up-front because it creates more certainty. However there was

also a concern that the fee might not be fair and appropriate and it was not accepted that justifying fees should be considered non-productive work. Several developers thought there was scope for removing some of the duplication between the work done by their consultants and ours, especially site supervision. This can be explored further without jeopardising the current proposals, although it has to be recognised that there are different interests being represented and there has to be clarity over the roles. The Kent Developer Group highlighted two examples where more flexibility was needed in the fee structure: a small scheme with a disproportionately high transportation advice fee, and a large £1m scheme with a relatively low fixed fee compared to a scheme half this size. However in practice, depending on their impact on the existing highway, it is quite common for small schemes to be allowed to proceed on the basis of a simple letter of agreement, in which case the transportation fee is not levied at all; similarly for very large schemes over £1m there are invariably some aspects which are negotiable. It should be noted that the vast majority of S278 schemes have bond values in the £50-500k range; schemes over £1m are rare.

5. Conclusions

5.1 There do not appear to be any good reasons to amend our proposals for land transfer or the permit scheme or the new fees and charges in light of the views expressed during the consultation with developers.

6. Views of the Environment, Highways & Waste Policy Overview & Scrutiny Committee

At its meeting on 14 September 2010 the Environment, Highways & Waste POSC supported the proposal for recommendation to the Cabinet Member for Environment, Highways and Waste as set out in paragraph 7. below.

7. Recommendations

The CABINET MEMBER is requested to endorse::

- (i) The introduction of a new Model S278 Highways Agreement for use in accordance with the Highways Act 1980 with immediate effect.
- (ii) The change to the existing fixed sum consultancy fee for transportation advice on new S278 highway works, as set out in the report.
- (iii) Implementing a percentage-based fee structure for professional costs incurred by Kent Highway Services with respect to new S278 highway works, as set out in the report.
- (iiii) For existing S278 Highways Agreements, the charges for professional costs incurred by Kent Highway Services continuing to be based on actual time, but at an average hourly rate, as set out in the report.

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Background papers

Proposed new MODEL S278 HIGHWAYS AGREEMENT

Report to Developers' Representatives – Unrestricted for Consultation