

21 May 2014

Agenda Item:8

REPORT OF SERVICE DIRECTOR, HIGHWAYS

SECTION 38 AGREEMENTS – UN-ADOPTED HIGHWAYS

Purpose of the Report

1. To seek approval to trial the services of a specialist consultant to complete works in connection with selected outstanding Section 38 agreements so that highways within developments can be adopted by the Highway Authority without having to use public funds.

Information and Advice

2. The Council has powers as a Highway Authority under the Section 38 of the Highways Act 1980 to enter into agreements with developers (or other persons) to adopt highways that they build as part of their developments for future maintenance at public expense.
3. The key tests for the adoption of a highway include that it must be of sufficient public utility, constructed to agreed standards, maintained for a period of 12 months by the developer, and be used as a highway during that period.
4. Adoption of a highway would include cycle-ways, footways, verges, service strips, street lighting and highway drains where no public sewer was provided.
5. Legislation requires developers to bear the costs of the construction and maintenance of the highway and other appropriate matters. A bond is deposited to cover the cost of bringing the road up to an adoptable standard should a developer become insolvent or is otherwise unable to meet their obligations.
6. Most residents in buying a new property seek the assurance via their conveyancing solicitors that the highways will eventually be adopted through a Section 38 agreement. The existence of a Section 38 agreement and Bond is revealed on Local Land Charges Searches which are part of the conveyancing process.
7. It is prudent for the Highway Authority not to adopt a highway until a development is completed. This ensures that wear or damage through the use of the road by construction traffic is not rectified at the public expense but at that of the developers.

8. The time taken for a highway to become legally adopted and maintainable by public expense is dependent upon the developer and how long it takes for a development to be completed to the stage that the highway is of a standard that is suitable to adopt. In some cases a small development may only take a matter of months to complete and the highways may then be ready to adopt. In other cases with much larger developments it can be several years before the developer has the highways ready for adoption. In addition the economic climate can have an impact on the speed with which developments are brought to the stage when the highway is ready for adoption. Since 2008 a number of developments have in effect been 'mothballed' by developers with little or no building activity on them. As a result there are some 100 plus developments in the County where the highways have remained un-adopted for over 6 years. Fortunately with the upturn in the housing market developers are now returning to these sites and are beginning to complete their developments and the highways are being adopted.
9. In a number of instances though developers have either unfortunately ceased to trade before bringing the highways in their developments to an adoptable standard or have failed to construct the highway to a standard that is reasonable for the Highway Authority to adopt. This has resulted in concerns being raised by Members and residents who highlight that lives are blighted for those living on developments where they were informed that the highways would be adopted but through no fault of theirs they remain un-adopted.
10. The County Council in its role as the Highway Authority has recognised this important issue and has committed resources over recent years to addressing the issues of outstanding Section 38 agreements and progress has been made.
11. There are however instances when it is difficult for the Highway Authority to make progress on such matters particularly when a developer has ceased to trade, sold on their site or business, or as in one case, the Authority is involved in having to deal with a developer who is in jail. In addition with older developments the original reasonably calculated amount for the bond can be eroded by inflation meaning that there is insufficient funding in the bond for the Highway Authority to complete the necessary works to the developer's highway to bring it to adoptable standards.
12. In order to avoid such situations in the future when it is deemed that developers are failing in their obligations under the Section 38 Agreement the Highway Authority will ensure that it makes earlier contact with Bond providers to call in the sums available enabling the Council to self-resolve the outstanding issues.
13. For those existing developments where the value of a bond is insufficient to cover the necessary works or there are particular legal complexities in dealing with a developer the Highway Authority has limited options. It can enter into lengthy legal procedures with no guarantee of success, it can utilise the bond and add any additional funding necessary from existing highway maintenance funding to complete the necessary works or it can leave the highway as un-adopted. None of these options is of long-term benefit to the Authority or residents.

14. Another option open is the use of a specialist consultant to complete works on behalf of developers utilising the Bond monies. Such consultants offer their services at no cost to the County Council and arrange for the completion of works on outstanding Section 38 Agreements without having to use any public funding.
15. Such consultants are already employed by a number of other Highway Authorities including Durham, Shropshire and Worcestershire County Councils who have all reported favourably on them.
16. The consultants have expertise and experience in dealing with outstanding Section 38 Agreements that the Highway Authority would have difficulty in completing. This enables them to bring most outstanding agreements to a satisfactory conclusion with the eventual adoption of the highway and all at no public cost. The consultants cover their costs through the efficiencies that they gain in their management and procurement processes.
17. In exploring the use of such consultants in Nottinghamshire the Highway Authority has recently been approached by Bellavail Indemnity Management Services (IMS) who offer such a service. They have worked for a number of other Local Authorities and have successfully dealt with over 300 outstanding agreements over the past 6 years. In order to ascertain if the services offered by such consultants is of benefit to the County Council it is proposed to carry out a trial with Bellavail (IMS) whereby they are requested to bring a small number of sites (approximately 10 to 20) to a satisfactory state whereby the highways can be adopted. Upon completion of the trial it is proposed that the results be reported back to Committee. If the trial is deemed to be successful and the service offered is still required then a proposal will also be presented to enter into a formal agreement through normal procurement processes.

Other Options Considered

18. In considering the use of specialist consultants it has been ascertained that the County Council does not have sufficient resources and expertise available to deal with all of the outstanding Section 38 agreements.

Reason/s for Recommendation/s

19. Without the use of specialist consultants it is likely that some long standing issues with un-adopted roads on developments will continue unresolved potentially blighting the lives of residents.
20. By having a small initial trial the County Council will be able to determine the usefulness of the service offered without going to the expense of entering into a full procurement agreement (although this will be necessary should the trial prove successful and the County Council wishes to continue with the service).

Statutory and Policy Implications

21. This report has been compiled after consideration of implications in respect of crime and disorder, finance, human resources, human rights, the NHS

Constitution (Public Health only), the public sector equality duty, safeguarding of children and vulnerable adults, service users, sustainability and the environment and ways of working and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

Financial Implications

22. The use of a specialist consultant will have no financial impact on the County Council. The financial value of the bonds involved in the trial will be in the region of £150,000 to £200,000.

RECOMMENDATION/S

- 1) Approval be given to ascertain if the services offered by specialist consultants for bringing outstanding Section 38 agreements to a successful conclusion is of benefit to the County Council.
- 2) Approval be given for a trial with Bellavail (IMS) whereby they are requested to bring a small number of sites (approximately 10 to 20) to a satisfactory state whereby the highways can be adopted. Upon completion of the trial it is proposed that the results be reported back to Committee and if the trial is deemed to be successful and the service offered is still required then a proposal will also be presented to enter into a formal agreement through normal procurement processes.

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For any enquiries about this report please contact:

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Constitutional Comments [SHB 23/04/2014]

23. Committee have power to decide the Recommendation.

Financial Comments [TMR 28/04/2014]

24. The financial implications are set out in paragraph 22.

Background Papers and Published Documents

Except for previously published documents, which will be available elsewhere, the documents listed here will be available for inspection in accordance with Section 100D of the Local Government Act 1972.

- None

Electoral Division(s) and Member(s) Affected

- All