The 6Cs Design Guide

Part 6: Working on existing highways - Section 278 and Section 184 procedures

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Section WEH1: Introduction

- General
- About Section 278 of the Act
- About Section 184

General

6.1 This part details our requirements for the construction of works on the existing public highway under Section 278 of the Highways Act. It covers what we will require from you in terms of:

- technical details, including safety audits and drawings, to enable us to approve your proposed highway works;
- completing a Section 278 legal agreement, to provide for the construction of your highway works
- you constructing and maintaining the highway works before we take over their maintenance; and
- our fees and other payments relating to the construction and maintenance of the road.

(Note: Please see our 'Highways Status Search' page for details of which existing roads are adopted)
* Note: If you want us to carry out design and approval work before you have completed the Section 278 legal agreement with us, we will normally ask you for an ‘abortive costs’ letter and/ or up front payment of initial fees. In this letter, you must agree to pay our costs if you do not proceed with your development proposals for any reason. We will not normally carry
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out design checking and approval unless we have received this letter or the Section 278 agreement is complete.

6.2 You should consult both us and the planning authority at an early stage of preparing your development proposals, especially if the proposed highway works are extensive and have potentially significant environmental impacts, for example removal of trees and hedges. This will give an opportunity to resolve any potential problems relating to the works before you submit any planning application.

Notes

- Wherever ‘the Act’ is mentioned in this Part, it refers to the Highways Act 1980 unless otherwise stated.

About Section 278 of the Act

6.3 Where development requires works to be carried out on the existing highway, you will need to complete an agreement with us under Section 278 of the Act.

6.4 Section 278(1) of the Act (as amended by the New Roads and Street Works Act 1991) says: “A highway authority may, if they are satisfied it will be of benefit to the public, enter into an agreement with any person -

(a) for the execution by the authority of any works which the authority are or may be authorised to execute, or

(b) for the execution by the authority of such works incorporating particular modifications, additions or features, or at a particular time or in a particular manner,

on terms that that person pays the whole or such part of the cost of the works as may be specified or determined in accordance with the agreement.”

6.5 We normally use this section of the Act to allow you, the developer, to employ a contractor and for that contractor to work on the existing public highway in the same way as if we, the highway authority, were carrying out the works instead. You are normally responsible for all aspects of the works on the public highway, from their design, through supervising construction and ensuring that the works are fully and finally completed to our satisfaction.

6.6 Section 278(3) of the Act, says: “The agreement may also provide for the making to the highway authority of payments in respect of the maintenance of the works to which the agreement relates and may contain such incidental and consequential provisions as appear to the highway authority to be necessary or expedient for the purposes of the works.”

6.7 This section of the Act entitles us to seek expenses for future maintenance and we intend to do this through commuted sums. This will allow us greater flexibility to adopt non-standard layouts and materials without placing undue burdens on our maintenance budget or Council Tax payers. However, even if you offer a commuted sum payment, we may still not approve your proposals and allow you to work on the highway if we consider them to be inappropriate or unacceptable on highway-safety grounds. (Please refer to paragraph 6.65 onwards for further details on commuted sums.)
6.8 Section 278 agreements are often used together with an agreement under Section 106 of the Town and Country Planning Act 1990. Such agreements, between a planning authority, us (where highway works are covered) and a landowner and developer, are used to regulate developments where using planning conditions would not be appropriate. Granting planning consent depends on the landowner or developer entering into a Section 106 agreement. Section 106 agreements may cover a number of matters such as securing off-site highway works, landscaping, phasing the development, paying sums of money and so on.

6.9 Both Section 278 and Section 106 agreements operate in the same way in relation to highway works. They follow the procedures involved in the approximate order they occur from initial consultations through to final completion of the highway works.

Advice for developers on Section 184 process can be found here.

Section WEH2: Completing a Section 278 agreement and providing surety

- The Section 278 agreement
- The Construction (Design and Management) Regulations
- Surety

The Section 278 agreement

6.10 Before you can enter into a Section 278 agreement you must normally obtain full planning permission for the development from the planning authority. This must include approval of any reserved matters relating to the highway works.

Note: If you want to start the Section 278 procedures before you receive planning consent, we will only consider this if you agree to refund all of our costs if planning consent is not given or the development does not proceed for any other reason.

6.11 Each authority has its own standard format for Section 278 agreements. However, at times it will be necessary to make amendments, for example to allow for specific structures and commuted sums.

6.12 You will need to supply certain information before our solicitors can begin preparing the agreement. The information required is listed on guide AG1. This will include, where appropriate, a letter confirming that you will be responsible for all our costs if planning permission is not given or the development does not proceed for any other reason.

6.13 Once we have received the correct information, we will instruct our solicitors to prepare the agreement. You will be charged a fee for us preparing the agreement. Please see Section WEH7.

The Construction (Design and Management) Regulations

6.14 Before we sign the Section 278 agreement, you must provide us with written proof that you have informed the Health and Safety Executive in writing that you are appointed client for the works for the purposes of the ‘Construction (Design and Management) Regulations’ (CDM Regulations). We will not sign the agreement until you have provided this proof.

(Note: As defined in the CDM Regulations, client means any person for whom a project is carried out, whether it is carried out by another person or is carried out in-house.)
regulations go on to state: Where the person appointed [as client for the works] makes a declaration [to the HSE that he will act as client for the works for the purposes of these regulations], from the date of the receipt of the declaration by the [HSE]), such requirements and prohibitions as are imposed by these Regulations upon a client shall apply to the person so appointed (as long as he remains as such) as if he were the only client in respect of that project.” In other words, as client for the works, you will be responsible for meeting the Regulations and making sure that the works are designed and constructed in line with the Regulation. This is not our responsibility.

Surety

6.15 We must be protected against the risk of unforeseen expenditure if you leave the highway works unfinished for any reason. So you should provide us with an estimated cost of the highway works for our approval, including any highway structures, highway drainage, works to service providers equipment (for example, gas, water, cable TV). We will provide a cost for any commuted sums (where applicable). You must provide us with an appropriate surety equal to the approved cost of the highways works including commuted sums. This may be in the form of:

- a bond with a recognised financial institution; or
- the equivalent sum of monies lodged with us.

6.16 For information on the other fees we charge for highway works covered by Section 278 agreements and on commuted sums, please see Section WEH7.

Section WEH3: Designing your highway works

- General requirements
- Traffic regulation orders
- Traffic calming and other traffic management schemes
- Structures
- Traffic-signal equipment

General requirements

6.17 The works should normally be designed in line with the standards set out in this document, including Part 3, Part 4 and our Specification. Our standard conditions applying to highway works for new development provides additional advice, for example on utility equipment (such as gas, water, electricity, and so on). If you have not carried out development in the region before, you should also first read Part 1 and Part 2.

6.18 It is in everyone’s interest that the highway works are designed by reputable chartered consulting engineers with experience in designing highway works. So, we must approve the consulting engineers who you choose to design the highway works. At the appropriate time,
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you must give us details of the consultants you want to use. You can find a list of the information required on guide AP1.

6.19 We will require safety audits for all highway works covered by Section 278 agreements. They must be carried out by an accredited safety audit team that is independent from the designers. You will be responsible for commissioning and paying for all safety audits. Some authorities in the region will insist on carrying out safety audits in-house. Please see appendix D for further details on safety audits.

6.20 You must comply with all aspects of the Construction (Design and Management) Regulations 1994 and indemnify us (protect us from legal responsibility) against all claims, liabilities and actions if you fail to do so.

6.21 Feasibility stage: You should agree the need for any off-site highway works and their general nature with us before you submit a planning application. We will need to be satisfied that any proposed highway works:

- will off-set the highways and transportation impacts of your development; and
- are possible within the land constraints of the development;

before we recommend to the planning authority that the development is acceptable.

6.22 You will be required to supply key information at the feasibility stage so we can be satisfied that the proposed highway works are possible. You can find a list of the information required in guide FS1.

6.23 The preliminary design stage: When we have agreed the general scheme layout at the feasibility stage, we will need your approved consultants to submit a preliminary design. This should minimise the need for a lot of design changes at the later, detailed design stage. You can find a list of the required documentation we need on guide PD1. Once we have received confirmation that you will be responsible for all the costs if planning permission is not given or your development does not proceed for any other reason, we will check your design.

6.24 At this stage, you or your consultants should talk to other parties who could have an influence on the design of the works, for example utility providers (for example gas, water, cable TV) or the Environment Agency. You should then analyse any comments you receive and forward them to us (together with your response) for a decision.

6.25 In the case of traffic-calming schemes, we will carry out consultations with interested parties in accordance with paragraph 6.31. After we have received and analysed comments, we will forward our decision to you. You must incorporate any changes to the design we ask for as a result of the consultations.

6.26 The detailed design stage: When we have approved the preliminary design, we will need your consultants to submit the detailed design. You can find a full list of the requirements on guide DD1.

6.27 At this stage we will:

- serve the appropriate notices to the utility companies under the New Roads and Streetworks Act; 
- carry out noise assessments if appropriate; and
- design the street lighting.
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6.28 When we have accepted the detailed design, we will issue conditional approval.

6.29 The agreement will state that we must approve the detailed design before any construction work starts.

Traffic regulation orders

6.30 Where a development requires changes to an existing traffic regulation order (TRO) or a new order is required, you will normally be required to pay all costs associated with this, including all consultation and legal costs. TROs are subject to statutory procedures and consultations. This can be a very lengthy process and a successful outcome is not guaranteed. You should get advice on the likely timescale and take this into account when you programme your proposals.

Traffic calming and other traffic management schemes

6.31 Where the works involve traffic calming, we will consult with interested parties, such as the parish or town council and the local county councillor and residents, about the traffic-calming schemes in line with normal Council practice. This may include a public exhibition and other consultations beyond minimum statutory requirements. We also carry out consultations on other traffic management schemes, in line with our normal policies and procedures (which we will advise you of during the design process).

6.32 After we have received and analysed comments, we will forward our decision to you. You must incorporate any changes to the design we ask for as a result of the consultations.

6.33 You must pay the costs of this consultation whether or not the outcome is successful. You should remember that the consultation procedure can be lengthy which will have implications on the programme of works.

Structures

6.34 Where the highway works involve structures please refer to Part 4, Section MC15 for design requirements.

Traffic-signal equipment

6.35 Regional practices vary for the design of road layouts that require traffic-signal equipment. You are advised to contact the respective Council directly at an early stage to establish local practices.

6.36 Regional practices vary for the design, supply and installation of permanent traffic-control equipment which forms part of the highway works. You are advised to contact the appropriate Council directly at an early stage to establish local practices.

6.37 You must normally pay us a commuted sum towards the future maintenance of the traffic-signal equipment. Please also see Part 4, Section MC18 for further details on our commuted sums policy.

6.38 You must allow us access at all reasonable times to any part of the site on which cables, pipes, ducts or other apparatus associated with the traffic-signal equipment is to be installed or is located. This will enable us to carry out any works we need to do to install and maintain the cables, pipes ducts or other apparatus.
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Section WEH4: Obtaining our approval for your highway works

6.39 We will only issue a technical approval when:

- we have completed all design checks;
- the stage 1 and 2 safety audit processes have been satisfactorily completed; and
- you have supplied any amended details we require.

Section WEH5: Constructing the highway works

- Before you begin
- Health and safety
- Site inspection
- Timescale for completing the highway works

Before you begin

6.40 Where works are being carried out under a Section 278 agreement, you must not begin construction unless and until:

- we have given you technical approval;
- the Section 278 agreement has been completed and signed and an appropriate surety is set in place;
- you have provided us with written confirmation that you have notified the Health and Safety Executive that you are client for the works for the purposes of the Construction (Design and Management) Regulations (see paragraph 6.14 for further details);
- all necessary fees have been paid to us; and
- the following requirements have also been satisfactorily completed

6.41 Notification of start: You must normally give us at least five weeks’ notice in writing of your intention to begin construction work or begin it again.

6.42 Approving your contractor: Your highway works must be constructed by a contractor (including any sub-contractor) who has relevant experience and capabilities. You must not start construction of the highway works until we have approved your contractor. So, you must supply information about the contractor you want to use. You can find a list of the information we need on guide AP3.

6.43 Where you are unable to supply us with satisfactory details, or where we have previously experienced problems with a contractor (for example with quality of workmanship) we will not approve that contractor.

6.44 The contractor’s insurance: You must indemnify us (protect us from legal responsibility) against any claims by third parties arising from the highway works. Before we
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will approve your contractor they must provide us with written evidence that they have, as a minimum, £5 million public liability insurance with no limit on the number of claims.

6.45 Pre-start meeting: You must arrange a ‘pre-start’ meeting with the appropriate area office and inform residents and the local member. You can find a list of people who should be present at the meeting, and a typical agenda, in PS1.

Health and safety

6.46 You must comply with all aspects of the Construction (Design and Management) Regulations 1994 and indemnify us (protect us from legal responsibility) against all claims, liabilities and actions if you fail to do so. You are also required to submit full details of any traffic management proposals for the construction of the highway works for approval by the appropriate officer.

Site inspection

6.47 You are responsible for the day-to-day supervision of the highway works construction. We will only inspect the works to check that they are being constructed in accordance with the approved drawings and our requirements.

6.48 It is in everyone’s interests that the works are supervised by a competent engineer who is experienced in site supervision of highway works. So we must approve the supervising engineer. The level of supervision you must provide will depend on the nature and scale of the works. For larger schemes, you must provide supervision at all times. We will discuss and agree the level of supervision you must provide at the pre-start meeting.

6.49 You must give our representatives access to the works in progress at all times. These visits do not free you from your responsibility for supervising the work and making sure that it is carried out in a proper and safe manner, and in line with the specification. The agreement will state that you must carry out the highway works to our satisfaction and you must comply with any reasonable requests made by our representatives.

Timescale for completing the highway works

6.50 Once you have begun work on site it is your responsibility to complete the highway works to our satisfaction and within a ‘reasonable’ period or as specified within the legal agreement to minimise any potential disruption to highway users.

6.51 We impose a time limit on completing highway works. Normally, the works must be completed, that is we have issued a provisional certificate, not later than 12 months after their construction started but this maybe a substantially shorter period on minor schemes.

6.52 Where you do not complete the highway works within the specified time limit and we agree an extension of time, the Authorities reserve the right to charge you extra fees towards our additional administrative and inspection costs. Please see paragraph 6.63 onwards for further details. We may call on the bond or use the surety monies that you lodged with us to complete the works.
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Section WEH6: Maintaining and adopting the highway works

- Issuing a provisional certificate
- Issuing a final certificate

Issuing a provisional certificate

6.53 We will issue a provisional certificate of completion once:

- you have substantially completed the highway works to our satisfaction;
- you have completed all street lighting to our satisfaction and provided appropriate electrical test certificates;
- any planted landscaping areas, grassed areas, trees, shrubs and so on that we are to adopt have been fully planted and established;
- the works (including any existing and new planted landscaping and so on) have been jointly inspected (that is by us, you and your contractor) and no significant defects have been identified, or where they have, you have agreed to remedy them to our satisfaction;
- the stage 3 safety audit has been completed and all changes that we require have been made satisfactorily; and
- you have supplied us with a plan showing any areas of land that are to be dedicated as highway and you must provide any highway boundary markers.

6.54 When we issue a provisional certificate the amount of bond can be reduced, usually to 40% of the original amount. The exception to this is where you are paying us a commuted sum in which case the bond cannot be reduced to a value less than the ‘provisional’ commuted sums that we have calculated.

6.55 You will then be responsible for maintaining the highway works for a minimum period, usually twelve months. Some Authorities in the region will require an extended maintenance period for soft landscaping. This allows any defects in the works to become apparent after they are brought into use.

Issuing a final certificate

6.56 We will issue a final certificate of completion when the following actions have taken place.

- You must contact us at the end of the maintenance period to arrange a further joint inspection of the highway works (including any landscape planting, trees, grassed areas and so on). We will issue you with a list of any outstanding remedial works we require you to do, which you must then complete to our satisfaction.
- You must have maintained the highway works to our satisfaction during the maintenance period.
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- You must have maintained any existing or new landscape planting, trees, shrubs, grasses areas and so on to our satisfaction during the highway works’ maintenance period.
- You must pay us any commuted sums that are required.
- You must pay us any other charges that are required, for example some authorities make a charge to cover the bulk clean and lamp change for illuminated signs (see Part 4, paragraph 4.114) or to cover similar for street lighting (see Part 4, paragraph 4.129).
- Stage 4 safety audit must have been completed to our satisfaction. We will decide whether to issue the final certificate once the Stage 4 12-month report has been completed. (Please see appendix D for further information on safety audits).
- You must provide us with “as built” drawings, preferably in an electronic form on CD, for example Autocad file. See guide FC1.
- You must provide us with the health and safety file, on CD, produced in line with the Construction (Design and Management) Regulations 2007 (CDM).
- The land dedication plan must be agreed.
- Paid all staff costs.

6.57 After all of the above has been done to our satisfaction, we will:

- issue a final certificate of completion;
- inform you that the bond can be cancelled; and
- adopt any areas dedicated to us as highway to be maintained at public expense.

Section WEH7: Payments to us

- **Our fees**
- **Commuted sums**

Our fees

6.58 We make a charge for the work involved in:

- preparing and managing the Section 278 agreement;
- checking the design of the highway works, any associated structures and any highway drainage; and
- inspecting the works on site.

6.59 The charge for administration, design checking and site inspection varies across the region but is normally a fixed percentage based on the estimated cost of the total highway works, as agreed with the authority or actual cost of total highway works, as agreed with the local authority at an early stage to discuss fees.

6.60 We will make additional charges for design checking and site inspection of highway structures based on ‘actual’ costs. (Please see Part 4, Section MC15 for further details on structures.) We will also charge additional fees, based on ‘actual’ costs, for SUDS and ‘non-standard’ drainage systems. (Please see Part 4, Section MC8 for further details on drainage.)

6.61 We will also charge a separate fee of 10% of any commuted sums towards the costs of our additional administration and inspection work.
6.62 There is also an additional fixed fee for each agreement plus disbursements (money we pay on your behalf) to cover legal costs. This fee is fixed by the Legal Department and we review it every year.

6.63 If the highway works are still not complete after the time limit specified in the agreement, we will offer you an extension of up to twelve-months; however we will reassess the bond and charge you a further 3% inspection fee based on our assessment of the cost of the outstanding works, with a minimum charge of £1000.

6.64 If a period of two years or more has elapsed since we issued the provisional certificate and the final certificate has not yet been issued, we will charge you a further fixed fee of £500 for additional administration and inspection work.

Commuted sums

6.65 For some time we have normally required commuted sums to cover maintenance of such items as highway structures, noise fencing, traffic signals and ‘heritage’ street lighting where they are to be adopted as part of works carried out under a Section 278 Agreement. We have now broadened this requirement in accordance with the Adept guidance document “Commuted Sums For Maintaining Infrastructure Assets” to ensure works required to enable new development do not place undue burdens either on our budgets or on Council Tax payers.

6.66 So you will normally have to pay commuted sums on all works carried out as part of a Section 278 agreement, including:

- all materials (whether or not they are materials outside our usual Specifications);
- any street furniture;
- any signing and lining
- any new landscaping within the highway, including trees; and
- Sustainable Drainage Systems (SuDS), for example, flow-attenuation devices, swales and storage areas).

Note: Where you are proposing SuDS, you must hold discussions with all relevant parties at an early stage (and certainly before you submit your planning application) to agree ownership and responsibility for the facility.

This is not an exhaustive list. There are other occasions detailed throughout this document where we require the payment of commuted sums, for example vertical traffic calming.

6.67 Part 4, Section MC18 gives more details on commuted sums and how we calculate them.

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Section WEH8: The Land Compensation Act 1973 and the Noise Insulation Regulations 1975

6.68 Under the Land Compensation Act 1973 people can claim compensation if the value of their property is depreciated by noise and other specified physical factors arising from the use of a new or altered highway. The Noise Insulation Regulations 1975 require us to offer noise insulation or grants to occupiers of dwellings subjected to noise at or above the
specified level due to the use of a new or altered highway. The agreement contains a clause requiring you to indemnify us (protect us from legal responsibility) against the full costs of any payments we make under these regulations. We will notify you about any claim we receive and also about any offers of noise insulation we are making, if any.