
Leicestershire Highway Design Guide

Technical Approvals and Highway Adoption Section 38

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Introduction

This Section comprises the council's requirements where it is the developer's intention to construct new highway, suitable for adoption and therefore maintainable at public expense, including:

- the technical details required, including standard drawings and details of any road safety audits, before the council can approve the developer's proposed roadworks for adoptable roads;
- the requirements for the completion of a Section 38 legal agreement, which provides the council to adopt a road;
- construction and maintenance of the road works by the developer before adoption; and
- The council's fees and other payments relating to the construction and adoption of the road, including the Advanced Payment Code and other sureties.

Please also refer to the Department for Transport's Advice Note "[Highways Adoption](#)"

'The Act' as mentioned in this Section, refers to the Highways Act 1980 unless otherwise stated.

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Highway Adoption Policy

Section 38 of the Highways Act (the Act) provides for the local highway authority to maintain at public expense (adopt) a road that forms part of new private development via the means of a legal agreement. This section of the Act also entitles the council to seek expenses for maintenance through commuted sums.

Developers are encouraged to approach the council at the earliest opportunity to discuss proposals and adoption requirements. A Section 38 Agreement application form must be completed before consideration of adoption can be given.

The council will consider the following policy in consideration of suitability of new roads for adoption.

LHDG Policy 5 Highway Adoption

- i. The council encourages proposals for adoption of new, highway that is designed and constructed in accordance with the relevant policies, guidance and standards, including the Leicestershire Highway Design Guide.

Implementing Policy 5

- ii. The council will adopt new roads that:
- iii. directly link to an existing adopted street (proposed Section 38 agreements will be reviewed if they connect to an existing road that is subject to a Section 38 agreement);
- iv. directly serve/front a minimum of 6 residential dwellings;
- v. serve employment and commercial sites with more than one building or a single commercial building with multiple occupancy employment;
- vi. accord with local and national policy, guidance and standards relating to environmental sustainability of new highway proposals. The Local Highway Authority may consult with planning, forestry and environment services at the council during the assessment of proposals.
- vii. meet the requirements of the council's Materials Palettes document, Specification for Highway Works and Standard Drawings. Proposals for the use of alternative materials to those within the Materials Palettes must be agreed with the council.
- viii. have been demonstrably designed and constructed to an adoptable standard, as defined in the LHDG;
- ix. are not linked by through private roads;
- x. have associated legal agreements signed by all relevant parties; and
- xi. are acceptable in all other highways and transportation respects in accordance with LHDG, other the council policies and national planning policy and guidance.

Trees and other green infrastructure provide a valuable service to communities, creating attractive places that benefit biodiversity, help mitigate and adapt to climate change and encourage participation in active travel. NPPF states that “Planning policies and decisions should ensure that new streets are tree-lined”. Developers and local planning authorities should work with highways officers and tree officers at the council to ensure that the right trees are planted in the right places, and solutions are found that are compatible with highways standards and the needs of different users.

The council promotes the use of its Value of Trees toolkit to ensure the good design and implementation of tree planting within highway.

Legislation has strengthened the duty on local authorities to not only protect but enhance the natural environment through the planning process (including biodiversity net gain). Developers are strongly encouraged to consider how highway can help deliver environmental benefits through design layouts, the choice of materials and construction methodology.

The use of environmentally sustainable materials is strongly encouraged, where it meets LHDG policy requirements. The materials included in the council’s Materials Palettes have been selected using criteria relating to their sustainability and performance. Where new or innovative materials are proposed, evidence must be provided by the developer that these same criteria are met.

In accordance with the National Design Guide, consideration should be given to the character of a location during the design process and selection of materials. The Materials Palettes document has been developed to assist with this process and includes guidance on how new or innovative materials can be approved for use by the council within new highway to be adopted.

Designers should refer to asset management best practice during scheme development including the council policy and strategy and must:

- Contribute to high-quality developments that can be efficiently maintained using cost effective practices. Whole-life costs should be considered when materials and methods of construction are considered.
- Encourage development layouts to be built to an adoptable standard wherever possible to safeguard the interests of future residents.

For guidance on the layout of roads and areas that serve private residential developments/ industrial and commercial developments please refer to [Design Layouts](#) on the main consultation page.

Where appropriate, the council will seek payment from the developer for future maintenance of new adopted highway by acquiring monies through Commuted Sums. Commuted Sums allow greater flexibility to adopt non-standard materials and other items when development increases future maintenance liability. For information please refer to [Commuted Sums](#) on the main consultation page.

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Requirements for Preparing a Section 38 Agreement

The council will prepare a Section 38 agreement on receipt of an application, including the following:

- Written application requesting highway adoption through a Section 38 agreement;
- Confirmation that full planning permission has been obtained for the development from the planning authority, including any reserved matters relating to the road works;
- Evidence submitted of the title to the land to be dedicated as public highway;
- The Advanced Payment Code (APC) bond that ensures, should it become necessary, the council has the funds available to step in to construct or make up a street that forms part of new development.

The council's Section 38 agreements are prepared in a standard format. However, additional clauses are often required for 'structures', 'commuted sums' and where separate licences are required for items such as trees, benches, bins within the proposed highway extents.

To facilitate the adoption process, the preparation of the legal agreement may run in parallel to technical approval. However, the bond must be in place before any work can begin on the agreement.

The council charges fees for preparing the legal agreement. If the developer requires early preparation of an agreement, the council must be indemnified against costs incurred on abortive work.

Design Information

The council requires specific plans and design information to enable the processing of a Section 38 agreement. This includes plans indicating the areas and features proposed for adoption. Please note, the council does not accept ownership or maintenance liability of hedges, new or existing, that are outside of or mark the highway boundary.

Highway Drainage Consents

An application to the council is required for the right to discharge surface water from the highway to an existing sewer, a proposed sewer or a watercourse. Evidence must be provided of water authority approval of drainage proposals.

Approved details of all necessary easements must be provided before an agreement is signed.

If it is proposed that highway water discharges into sewers containing roof and/or yard water, the relevant water company must approve the proposals and they must be included in a Section 104 agreement of the Water Industry Act 1991.

The council will not sign a Section 38 agreement before a 'letter of intent' from the water authority has been received to evidence that the drainage proposals are suitable for including in a Section 104 agreement.

Consent must be sought from the relevant water company or other appropriate body to discharge into an existing sewer and the council as the Lead Local Flood Authority to discharge into an Ordinary Watercourse or the Environment Agency in the case of Main Rivers. Evidence will be required of this before entering into a Section 38 agreement. The council must approve proposals for highway drainage, including calculations of surface water run-off. Highway drainage will then be included within the terms of the Section 38 agreement for future adoption.

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Advance Payment Code Procedures

An Advanced Payment Code (APC) bond ensures that the council has the funds available should the council have to step in to construct or make up a street that forms part of new development.

Detailed guidance on highway adoption including APCs is available within the Department for Transport's Advice Note ["Highways Adoption The Adoption of Roads into the Public Highway \(1980 Highways Act\)"](#) (the Act). The developer should familiarise themselves with the provisions of sections 219 to 225 of Part XI of the Act and ensure any landowning parties, including all future landowners, are fully aware of their responsibilities.

The APC Assessment Notice

The council's APC process applies both to roads that are to remain private and those that are to be adopted.

The District Council must inform the Highway Authority within one week of submission that building regulation plans have been passed. At which point, unless proposals are exempted under the Act, notice will be served within six weeks on the person who deposited the plans, and the developer if known, detailing the assessed costs associated with the roads. The landowner should be informed of the notice and reminded of their legal responsibilities. It should be noted that the APC is not linked to planning approvals.

On receipt of the building regulation plans the council will calculate an estimated APC sum and serve notice. Calculations are based on the full value of works to construct a road that serves the buildings within the development to adoptable standard and includes the council's reasonable administration costs.

Certain buildings are exempted from payment under the Act or may or may not require the council to issue an exemption notice. Please refer to the relevant legislation and advice note.

In the council apply the following standards.

- Five or fewer new residential buildings served off a private drive are exempt.

- An APC will apply to industrial premises. A case-by-case decision where more than three-quarters of the frontage consists of, or is likely to consist of, industrial premises and the private street works code is not likely to apply.

Non-payment of APCs presents significant financial risk to the authority. If work has started on a building before the appropriate sum is secured, either the landowner or the person undertaking the construction work may be prosecuted. If convicted, a fine is liable to be paid under the Act for each separate breach. Routine site inspections are undertaken to ensure the APC process is being observed.

Construction of a building can only commence when:

- the APC has been secured, the whole assessment or the amount assessed for the plot intended to be built has been paid, or
- a Section 38 highway adoption agreement has been entered into.

Construction can begin on a *road* within the development at any time. However, the council may not exempt the APC notice and/or return the APC money or bond if the council's APC process is not followed.

Please note: the APC process does not apply to existing roads or the creation of an access within the highway. An appropriated permit or agreement must be in place with the council prior to commencement of works to existing public highway.

The APC assessment amount can be paid by cheque or cash, or a bond will be accepted in some circumstances.

Refunding Advanced Payment Code Money and Sureties

Roads that are to Remain Private:

The following process will lead to the exemption of the APC notice and return of the deposited money or surety.

- Layout and construction drawings are submitted to the council for technical approval.
- The inspection and administration fees are paid.
- A construction specification is agreed with the council for a private road that is fit for its purpose.

- The council is informed of when construction is due to start on the roads.
- The developer liaises with the council Development inspector, notifying them at each significant phase of construction to allow each phase to be inspected.

[Information about technical approval of roads that will remain private.](#)

If construction is carried out without inspection, the inspector may ask for testing, at the developer's expense, to ensure the construction is of a suitable standard. If the correct processes are not followed, the council will not serve an exemption notice and will not return any money or surety.

When the road has been constructed to a satisfactory standard, and certified by the inspector, the council will serve an exemption notice and the money will be returned in full, with interest added if applicable, or the security can be cancelled. Part refund of the money cannot be offered. Please note that completing this process does not mean that the road will be of an adoptable standard. It is the developer's responsibility to ensure that residents understand the private status of the road.

[Roads that are to be adopted:](#)

When a Section 38 agreement is entered into with the council the APC assessment will be cancelled for the plots directly served by the proposed public highway or plots on private drives serving 5 or less; the council will refund the money, with interest added if appropriate, cancel the bond or return the security. Note: private drives that serve 6 or more plots will not have the APC assessment cancelled; see above for how to exempt the APC assessment on roads that are to remain private.

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Design and Approval of New Roads Under Section 38

To be considered for adoption, road works should be designed in accordance with the “Design Layout” and “Materials and Construction” sections of the LHDG.

Additionally, the council’s “Standard Conditions” (please see LHDG Network [Management and Standard Conditions](#) on the main consultation page) provides detailed requirements relating to construction activities on roads that are intended for adoption, such as:

- Vehicular accesses within the existing highway
- Arrangement of consents or wayleaves
- Traffic safety and management
- Road closures

Where required (see [RSA Policy](#) on the main consultation page), road safety audits must be submitted prior to technical approval. A design statement must be provided by the developer for the safety auditor to support the proposed layout, which covers the aspects within the Road Safety Audit (RSA) Brief.

RSAs must be carried out by an accredited safety audit team (see Road Safety Auditor Suitability Checklist), independent from the designers. Commissioning the road safety audits is the responsibility of the developer.

Obtaining Approval for S38 Road Works

Technical approval will be issued when:

- all design checks are complete, including the review and approval of ground conditions on site;
- structural approval is obtained, where required;
- the stage 1 and 2 road safety audits have been satisfactorily completed;
- any required amendments have been provided.
- Where required, Ordinary Watercourse Consent is granted;
- existing carriageway and drainage surveys and investigations have been submitted.

The council will require an initial payment for administration, approval and inspection fees prior to commencing the design review. An indicative administration, approval and inspection fee will be calculated at the technical approval stage. However, the final administration, approval and inspection fees are calculated immediately prior to entering into the legal agreement. On entering into a Section 38 agreement, these initial payment costs will be deducted from the final administration, approval and inspection fees.

Technical Approvals are valid for 12 months from the date of the technical approval letter notification. If a legal agreement has not been signed by both parties at the point at which the technical approval expires, then the approval documents will need to be resubmitted to the council for review and the bond/fees recalculated. Additional fees will be incurred charged for any subsequent reviews of approval documents submitted following a lapse in the validation period. References may be requested for the developer's proposed consultant. LCC reserves the right to approve the design consultant.

As soon as possible after confirming the intention to enter into a Section 38 agreement, and before construction on road works has begun, all relevant information must be sent in line with the standard checklist.

All plans submitted must be in accordance with the council's asset data specification (see [LHDG Legal Agreement Applications and Plan Requirements](#) on the main consultation page).

As required under the council's Road Safety Audit (RSA) policy a stage 1 and stage 2 RSA must be submitted to the approvals team and any subsequent required amendments applied before works can be approved.

The issuing of technical approval alone does not mean that constructing the works can start. Please refer to the [Standard Conditions](#) document on the main consultation page and follow the guidance provided before commencing any works.

If, following four technical approval submissions, the design is still considered to be unacceptable or requires further amendments, then the council will charge an additional fee for each subsequent submission.

Post technical approval, changes to the design that are submitted for approval will incur an additional fee, this includes sub-division of submissions into multiple phases.

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Requirements for Completing the Section 38 Agreement

After technical approval is granted, coloured electronic and hard copies of all approved plans and details must be provided. Drawings must be provided in accordance with the council's asset data specification [\[LINK\]](#) prior to inspecting the works.

The drawings must be coloured as follows:

- carriageway – grey
- footways, footpaths, cycleways and other hard-surfaced areas – yellow
- shared-surface roads – brown
- traffic-calming features – brown
- verges – green
- The council adopted highway drainage – blue
- additional highway structures – pink
- special surfacing – purple
- private drives that have had Advance Payment Code notices served – orange.

The council will complete all documentation for the Section 38 agreement. In addition to information submitted at the preliminary stage (See [Highway Development Management](#) on the main consultation page), please ensure that the following are provided:

- proof of ownership of the land;
- proof of an intention to enter into a Section 104 agreement and any deeds of easements;
- Evidence that the [Health and Safety Executive](#) (HSE) has been notified of a construction project, where applicable, using form F10.

Surety and Fees

The Section 38 agreement must be supported by a cash deposit or institution-backed surety bond that is calculated by the council that may be called upon to complete the works if the developer goes into liquidation or otherwise defaults on their responsibilities as set out within the agreement. The council reserves the right to approve the surety provider. The Advanced Payment Code bond or payment will be returned at this point.

All the council's remaining fees, including inspection and legal fees, must be paid. For information on the council's fees charged relating to all highway works covered by Section 38 agreements, please see [Adoptions and Approvals](#) on the main consultation page.

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Constructing Section 38 Highway Works

Before Construction

To minimise risk to the council, the construction works must not start until the following conditions have been met.

Legal agreements, surety and fees

Technical approval has been given and the Section 38 agreement has been completed and signed. Commencement of works without a Section 38 signed by all relevant parties may prejudice the council entering into a Section 38 agreement and the future adoption of the roads concerned.

The council will not engage with the parties involved with the development where the appropriate surety bond or cash deposit is not in place.

Use of any existing access for construction purposes is permitted, providing no alterations to that access within the public highway are required, and planning consent has been granted (where applicable). Where alterations are required, a Section 184 agreement will need to be entered into.

Notification of start

Five weeks' notice must be given by email to the road adoptions team (road.adoptions@leics.gov.uk) of the intention to begin or restart construction work.

The council must be given the opportunity to attend all pre-construction site ground condition and testing meetings.

Contractor approval

The council will check and approve the developer's proposed contractor (including any subcontractor), who must have relevant experience and capabilities. References must be provided on request.

The contractor's insurance

The council must be indemnified (protected from legal responsibility) against any claims by third parties arising from the road works. Before the council approves a contractor, written evidence must be provided they hold a minimum of £10 million public liability insurance with no limit on the number of claims.

Pre-start meeting

The council will arrange a 'pre-start' meeting with the developer/designer and contractor to discuss the process and requirements.

Please see Standard Agenda for the pre-start meeting and 'Standard Conditions Applying to Construction' for further details on pre-start meetings.

The meeting should be attended by the developer's representative, the designer, the contractor for the highway works, the development inspections officer and the development approvals engineer. Other highway authority representatives may attend if required.

Health and safety

Written confirmation must be provided that the Health and Safety Executive has been notified of the Client for the works for the purposes of the Construction (Design and Management) Regulations (see [Health and Safety](#) section on the main consultation page). The legal agreement will indemnify the council against all claims, liabilities and actions.

submission is required of full details of any traffic management proposals for the construction of the road works for approval by the authority.

During Construction

Site inspection

Inspections will only be undertaken to check that works are being constructed in accordance with the approved drawings and requirements. The developer and their contractors are responsible for the day-to-day supervision of the highway works construction.

Access to the works must be given to the council's representative as required. Please contact the road adoptions team to discuss concerns regarding construction, however, satisfactory completion in accordance with the council requirements remains the responsibility of the developer.

Inspecting the construction of the highway works included in the Section 38 agreement will normally be carried out by the relevant Development Inspections staff. This information will be provided at the 'pre-start' meeting together with the Inspection Checklist.

Timescale for completing the road works

Once work has begun on site, highway works adoption should take place within a 'reasonable' period to minimise any potential risks or inconvenience to residents.

A time limit is imposed on completing highway works. Normally, works must be completed, that is the council has issued a provisional certificate, either:

- within one month of all buildings fronting or served by the works being completed; or
- within three years of the date of signing of the Section 38 agreement;

whichever is soonest.

Where highway works are not completed within the specified time limit, an extension of time may be agreed. However, additional fees will be charged towards the council's additional administrative and inspection costs. The bond or surety monies lodged with the council may be called upon to complete the works.

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Certification and Maintenance

Issuing a Provisional Certificate

A provisional certificate of completion will be issued once:

- The highway works are completed to the council's satisfaction;
- All street lighting is completed to the council's satisfaction;
- Digital as-built drawings have been submitted in accordance with the council's asset data specification;
- A construction compliance certification is provided as required under [CG300, DMRB](#);
- any new green infrastructure that is to be adopted has been appropriately planted and successfully established;
- [The Value of Trees](#) (VoT) toolkit is currently being trialed; a 10% discount from the full commuted sum is being offered to developers that employ the toolkit during scheme development. Please speak to the council's Forestry team for further information. The discount is granted following satisfactory inspection to confirm works are completed in accordance with the agreed VoT specification and guidance and issuing of the provisional certificate;
- the works (including any existing and new green infrastructure) have been jointly inspected and no significant defects have been identified;
- Where issues are identified they are promptly remedied; and
- where required, a stage 3 road safety audit has been carried out and all required changes have been completed to the council's satisfaction;
- All outstanding operational and/or safety issues have been resolved.

When a provisional certificate is issued the amount of bond excluding the commuted sums element can be reduced to 20% of the original amount. The commuted sum is retained at 100% of its original calculated value.

The developer will then be responsible for maintaining the works for a minimum period of 24 months. This allows any defects in the works to become apparent after they are brought into use.

Where minor changes to the technically approved plan(s) that form part of the completed s.38 agreement have been proposed by the Developer, these must be approved in writing (email acceptable) by the Relevant Officer within a reasonable time; the approved replacement plan(s) showing any/all minor variations to areas originally proposed for dedication as public highway, will be inserted within the completed section 38 deed packet.

The council defines a minor change to s.38 plans as an inconsequential variation to the extents of features already included in the original plans. Where new features have been included, or where features have been entirely removed from plans, then a supplemental agreement may be required. The council retains the right to request a supplemental agreement on a case-by-case basis.

Issuing a Final Certificate

A final certificate of completion will be issued when the following actions have taken place.

- At the end of the maintenance period a further joint inspection of the works is carried out to ensure works have been completed and maintained. A list of any outstanding remedial works must be submitted, which must be completed to the council's satisfaction;
- A copy of the provisional certificate of adoption for the drainage and sewers is provided, as issued by the relevant water company;
- All commuted sums are paid;
- Where the highway works are subject to an RSA, and where required by DMRB GG119, a stage 4 Audit (providing 12 months of validated post highway scheme-opening road traffic collision data) has been completed to the council's satisfaction. (Please refer to the [LHDG Road Safety Audit Policy](#) on the main consultation page);
- Provision of the health and safety file, in electronic format, in accordance with the current Construction (Design and Management) Regulations (CDM).

After issue of final certificate, the council will:

- confirm that the remaining bond can be released;
- adopt all areas dedicated within the Section 38 agreement as highway to be maintained at public expense.

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Technical Approval of Roads to Remain Private

Note: For technical approval of roads that are to be adopted, please refer to:

- Adopting New Roads - [Design and Approval of New Roads Under Section 38](#)
- Working on the Existing Highway (Section 278s) - [Technical Approvals and Highway Adoption Section 278s](#) on the main consultation page

For further detail on the council's standards for private drives please refer to sections:

- [Design Layouts](#) – 'Residential developments served by private drives and areas' on the main consultation page;
- [Design Layouts](#) 'Employment and commercial developments served by private drives and areas' on the main consultation page.

The council charges for the work involved in checking and approving the development plans and inspecting the works on site. Please refer to 'Fees and Charges'.

The following drawings and specification details are required for the assessment of all private roads/drives. An approval will be issued on submission of the required information. Approval does not mean the roads are of an adoptable standard.

A layout plan showing (1:500 preferred)

- Details of access on to the highway including gradients;
- Clearly defined delineation details showing the boundary and extent of the public highway (The highway boundary must be clearly marked on-site with a row of edgings or similar.);
- Suitable street signs and nameplates proposed and located in a prominent position with the words 'Private Road';
- Gates for vehicles are set back, normally at least five metres, behind the highway boundary and are hung so they open inwards only.
- Cross sections and long sections (if available)

- Gradients of the access drives must not normally be more than 1:20 for the first five metres behind the highway boundary but the maximum gradient of 1:10 may be permitted in particularly difficult situations (such as on a steep site);
- Drainage is provided within the site which makes sure surface water does not drain into the public highway.

Construction specification

- CBR values have been provided, and a suitable subbase and capping layer thickness is proposed.

Depending on the development the following information may also be required:

- Evidence that all planning conditions have been applied within the design.
- Evidence, including copies of the sale deeds and sales literature, that purchasers and residents have been informed about the private status of the road and of their maintenance responsibilities.
- Evidence of who is to maintain any street lighting that forms part of the development.
- Evidence of signed contract documents with a management company or correspondence from a solicitor that gives details of the arrangements regarding the maintenance of private assets.

Note: Technical approval will be given to the construction specification only.

The proposed road is not to be adopted and so the council will assess the geometric layout through the planning process and recommend the attachment of conditions where appropriate.

The council must be indemnified against any future petition to adopt the road under Section 37 of the Act by inclusion of a covenant in the deeds of sale to each plot fronting the private road before an exemption of the Advanced Payment Code assessment can be granted. The council's Legal Services team must approve the wording of the proposed covenant.

Inspecting the Works

The development inspections team must be contacted to arrange for an inspector to visit the site. The inspector will not attend until layout plan has been received and the fees paid. A standardised inspection checklist will be provided setting out our requirements. Generally, our inspector would need to witness the construction at the following stages.

- Subgrade (to assess any capping requirements from CBR test results);
- Sub-base level;
- Base level;
- Binder course level; and
- Surface course or blockwork level.

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