

Appendix C – Section 38 / 278 and S184 Agreements

Highways Act 1980 – Section 38/278 and S184 Agreements

Section 38 of the Highways Act 1980

Section 38 Agreements are made between the Local Highway Authority and developers. Using them, the LHA and developers agree that if the developer builds new roads and paths to the agreed layout and standard on land which is not currently part of the adopted highway, the council will adopt the new roads and paths as highways maintainable at the public expense. As they are made under Section 38 of the Highways Act 1980, these agreements are legally enforceable.

NYC's Section 38 Agreements allow the council to take over and complete the works required if the developer does not finish them within the time allowed. They include a bond or surety to cover the council's costs of doing this.

If a Section 38 Agreement is not in place for new residential estate roads and paths NYC are required by Section 220 of the Highways Act to secure the construction of the new roads and paths through the Advanced Payment Code.

S278 of the Highways Act 1980

Section 278 Agreements are a way of allowing developers to pay for improvements and/or alterations to existing publicly maintainable highway. As they are made under Section 278 of the Highways Act 1980, these agreements are legally enforceable. Working in the existing public highway without permission is an offence.

A Section 278 will need to be supported by a bond being a financial mechanism for ensuring delivery of the highway works identified. The works are usually linked to development and determined as necessary for planning permission to be granted. However, any organisation can offer to fund Section 278 works which pass the test set by Section 278 and fall within NYC's permitted development powers. To pass the Section 278 test NYC as highway authority must be satisfied the works "will be of benefit to the public".

The agreement is not a contract to carry out work; it is just an agreement to pay for the cost of works carried out in the highway, with the bond acting as surety should the works promoter default on their obligations.

The Highway Authority if it wishes to do so, reserves the right under S278 Agreements to undertake both the design and/or construction of S278 works within the highway at the promoter's expense.

The CIL regulations do not allow the use of Section 278 Agreements to deliver works on the CIL Regulation 123 list. Alternative mechanisms will need to be used in this case.

S184 of the Highways Act 1980

Section 184 Agreements enable the Local Highway Authority to give permission to developers, or to the occupiers of roadside properties to construct or modify a private driveway or accesses across highway land where these are the only highway works required at a site. The works

may be required by a planning permission, but on unclassified roads like housing estate roads it is possible to create an access to a property without planning permission if the highway authority has granted permission. On a classified road planning permission and S184 permission are both required to create an access.

A S184 agreement cannot be used to create new highway, so it is not suitable if the existing highway needs to be widened.

S184 Agreements are generally used on small projects, for example, where the scheme is solely to create a new private access, but may be extended to cover minor works such as relaying a short length of kerbing either side of the access, repositioning a road gully or the provision of a street light to illuminate a new access. S184 Agreements are sometimes referred to as 'bell mouth agreements.'

More commonly, S184 agreements are used by developers if a simple bell mouth access is required to afford access to a site compound or temporary site access prior to the main works under a Section 38 or 278 Agreement.

Appropriate fees will be payable to the LHA for the administration of the agreement, legal services, technical approval, site inspections and the issue of certificates. The developer is usually required to deposit a secured bond or cash with the LHA of up to 150% of the value of the highway works in respect of the developer defaulting on its obligations and a commuted sum for future maintenance may also apply.

Note:

In some cases, a developer may use more than one agreement using different sections of the Highways Act 1980. For instance, an agreement under section 184 might be used to make a temporary site access; with the permanent site access subsequently formed by a junction built using an agreement under Section 38 or 278.

When deciding which section of the Highways Act 1980 to use, the works required can be assessed using the below flow chart.

What type of Highways Agreement do I need?

Are the works on land controlled by the developer and outside the existing highway?

AND / OR

Are the works within the public highway but all in the verge or footway?

AND / OR

Are works to the existing carriageway?

AND / OR

Are the works creating new roads or streets or footways?

AND / OR

Are the works minor? e.g. putting in a dropped kerb and footway or verge crossing?

AND / OR

Are the works remote from the site?

AND / OR

Are the works part of larger works covered by an existing or proposed Section 38 Agreement?

AND / OR

Are all the works on the same side as the access?

AND / OR

Do the works include any of the following?

- Widening the carriageway
- Installing a roundabout
- New traffic signals
- New traffic islands
- Altering the route of the existing highway
- Resurfacing the carriageway

AND / OR

Are the works only required to make or improve a temporary or permanent access?

**SECTION 38
AGREEMENT
REQUIRED**

**SECTION 184
AGREEMENT
REQUIRED**

**SECTION 278
AGREEMENT
REQUIRED**