



Department
for Transport

Advice Note

Highway Adoptions

The adoption of roads into the public highway (1980 Highways Act)

April 2017

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Contents

FOREWORD	5
SUMMARY	6
DEVELOPMENT OF THIS DOCUMENT	6
FINAL POINTS	6
INTRODUCTION	7
SCOPE OF THIS DOCUMENT	7
PARTS OF THE ADVICE NOTE	7
1. PART 1 - THE OPERATION OF SECTION 38 AGREEMENTS	10
INTRODUCTION	10
SECTION 38 OF THE 1980 HIGHWAYS ACT	10
TECHNICAL APPROVAL	12
ROAD SAFETY AUDITS	13
ADVANCE PAYMENTS CODE (APC).....	14
ENTERING INTO A SECTION 38 AGREEMENT.....	14
PAYMENTS TO THE LOCAL AUTHORITY	14
COMMENCING DEVELOPMENT - SITE ACCESS USING VARIOUS LICENCES AND SECTION 278 AGREEMENTS	15
MAINTAINING AND ADOPTING THE ROAD.....	17
FLOW CHART FOR ADOPTIONS USING SECTION 38 OF THE 1980 HIGHWAYS ACT	19
2. PART 2 - THE OPERATION OF PRIVATE STREET WORKS CODE (PSWC) (SECTIONS 205 TO 218) AND PART 2(A) OPERATION OF SECTION 228 - ADOPTION AFTER EXECUTION OF STREET WORKS	20
INTRODUCTION	20
PROCESS.....	21
FLOW CHART TO SUPPORT THE OPERATION OF THE PRIVATE STREET WORKS CODE.....	24
PART 2 (A). ADOPTION OF A PRIVATE STREET AFTER THE EXECUTION OF STREET WORKS - SECTION 228 OF THE 1980 HIGHWAYS ACT	25
FLOW CHART OF SUPPORT THE OPERATION OF SECTION 228 OF THE 1980 HIGHWAYS ACT.....	27
3. PART 3 - HOW THE ADVANCE PAYMENT CODE (APC) WORKS SECTION 219 TO SECTION 225 OF THE 1980 HIGHWAYS ACT	28
INTRODUCTION	28
PROCESS.....	28

FLOW CHART OF THE OPERATION OF THE ADVANCE PAYMENTS CODE..... 31

4. PART 4 – ROAD ADOPTION USING SECTION 37 OF THE 1980 HIGHWAYS ACT..... 32

INTRODUCTION 32

PROCESS..... 32

FLOW CHART - ADOPTIONS USING SECTION 37 OF THE 1980 HIGHWAYS ACT 35

ANNEX A: DRAFT PLANNING CONDITIONS (AND NOTES) FOR ADOPTION OF NEW ROADS..... 38

COMPLETION OF STREETS / ESTATE STREET PHASING PLAN - CONDITIONS 39

COMPLETION OF STREETS / ESTATE STREET PHASING PLAN – NOTE 39

MANAGEMENT AND MAINTENANCE OF ESTATE STREETS – CONDITION 40

MANAGEMENT AND MAINTENANCE OF ESTATE STREETS – NOTE 40

SUBMISSION OF DETAILS – ADOPTABLE STREETS – CONDITION 40

SUBMISSION OF DETAILS – ADOPTABLE STREETS – NOTE 40

ANNEX B: FEES, CHARGES AND BONDS..... 41

FEE STRUCTURES 41

BOND VALUES 43

ANNEX C: A SHORT GUIDE FOR HOUSE BUYERS 45

GENERAL ADVICE 45

PRIVATE ROADS – THOSE NEVER INTENDED TO BE ADOPTED BY THE LOCAL AUTHORITY 45

ROAD ADOPTION ON RESIDENTIAL DEVELOPMENTS 47

IF IT GOES WRONG 48

Foreword

This Advice Note is intended to set out best practice on road adoption for all those who are involved in the development and purchase of homes. I am keen to hear from users of the document to understand whether it is helping them and what more we may need to do to help ensure that the process of roads adoption into the highway works effectively. I would like to take this opportunity to thank all those who have worked with my Department to develop the document.



Andrew Jones MP
Parliamentary Under-Secretary of State for Transport

Summary

1. This Advice Note explains how new and existing roads can be adopted by highway authorities so that they become maintainable at public expense, pursuant to the 1980 Highways Act (as amended) (the 1980 Act).
2. It should be of interest to planning authorities, local highway authorities, developers, people living in private streets, and people planning to purchase property (prospective purchasers may especially wish to note the contents of Annex C).
3. The guidance applies only to England and English local highway authorities. In unitary authority areas, planning and highways matters are managed by the same authority. In county council areas these functions are administered by two separate authorities.

Development of this document

4. The DfT sought comments from stakeholders on a draft document in April 2016. The DfT supported by the road adoption task group made textual amendments based on the comments received as well as including additional information on how to commence development (how to get on site as soon as practicable). The main additions are in 3 annexes:
 - In Annex A, we have provided the text for the draft planning conditions (and notes) for adoption of new roads that the DfT published in 2012;
 - In Annex B, we have provided information on how fees, charges and bonds are formulated; and
 - In Annex C, we provide a short guide ('handy hints') that should assist purchasers.

Final point

5. We would invite readers to work together and apply the advice provided in this note. We would welcome views by end of March 2018 on what, if anything, else may need to be considered to further support successful road adoption.

Introduction

Scope of this document

1. It should be noted that this Advice Note is provided for guidance only. It is not a substitute for independent legal advice. The potential issues that have been highlighted are common examples. Other issues may arise as any part of the process of road adoption is progressed.
2. This Advice Note is set out in 4 parts. Not all the parts will apply to everyone but, of course, everyone may benefit from reading the whole document. In order that the reader can direct their attention to the section that may be most appropriate at the right time each section, described below, starts with a suggested readership.
3. It should be noted that:
 - not all roads are suitable for, nor do all residents or developers wish or require, their roads to receive adoption into the highway to be maintained at public expense;
 - until roads are adopted the developer and / or an appointed management company remains the streets works manager;
 - until roads are adopted the buyer of any house on a 'new build' would be liable for the access ways outside their properties in respect of other users 'slips' 'trips' and 'spills' - see legislation (such as 1984 Occupiers Liability Act);
 - all roads that become highway maintained at public expense will be an on-going cost to the public purse; and
 - Since the 1980 Highways Act a "street" is defined since the in Section 48 (1) of the 1991 New Roads and Street Works Act (as amended). Where it meets this definition there is a requirement for the street to be of a specific standard as detailed in the Specification for the Reinstatement of Openings in the Highway.

Parts of the Advice Note

Part 1 - The Operation of Section 38 Agreements (between developers and local authorities)

- a) Suggested readership - expected to be of particular use to developers and local authorities. It will be of interest to house purchasers on new developments and their legal advisors. Those planning to purchase homes may wish to ask their legal advisors if a 'Section 38 Agreement' is in place.

- b) Agreements made under Section 38 of the 1980 Act are the most common method of achieving road adoption. The agreement should ensure the road is built to the required standard in order for it to be adopted into the highway network and will only be finalised once all planning requirements are in place.

Part 2 - The Private Street Works Code (PSWC) and Part 2A the adoption of a private street after the execution of works (Section 228)

- a) Suggested readership - expected to be of particular use to those individuals or groups of home owners seeking to have their private street adopted.
- b) The operation of this 'Code' enables the local authority to make up private streets so that they become highways maintained at public expense.
- c) As this Code gives the local authority the power to apportion all of the costs to each owner with a frontage (usually a person who lives on the street), the process may not be straightforward and can be expensive and time consuming. Working closely with the local authority and legal advisors is strongly recommended.
- d) Section 228 of the 1980 Act details how, in specific circumstances, new roads may be adopted when any works undertaken by the local authority (not by a statutory undertaker) have been executed in a private street. For instance, it can be used where the owner of the land is not traceable; the land is not registered; or where a developer has a right of way over the land, but does not own the land.

Part 3 - The Advance Payments Code (APC)

- a) Suggested readership - this section will be of particular value to developers and local authorities.
- b) The APC is intended to provide sums to the local authority such that, if approached via the PSWC, it can use such sums to make up the private street to facilitate adoption without or with less recourse to those with a frontage to fund such works.
- c) The operation of the APC is linked to the passing / approval of building plans submitted under the Building Regulations or 'initial notice' by an approved building regulation inspector and not planning permission.

Part 4 - Road adoption using Section 37 of the 1980 Act

- a) Suggested readership - expected to be of particular use to developers and local authorities. It will be of interest to house purchasers on new developments and their legal advisors.
- b) No agreement is made but the owner or developer can inform the local authority of their intention that they want their road to become adopted.

- c) This part covers best practice in such circumstances but it should be noted that this process can involve lengthy disputes and, where necessary, reference to court.

Early discussions between parties

- a) For all aspects of road adoption early discussions between all parties is required to help achieve a more seamless process. This is particularly important for those buying homes on new residential developments.
- b) A collaborative approach should be taken by all parties involved including planning and highway authorities whether they are unitary or two tier administrations.
- c) Communication between parties should be at the centre of the process. It will be necessary to consult / inform / seek agreement from a range of people and organisations such as landowners; developers; planning and highway authorities; parish / town councils; and those who need to agree plans related to drainage, surface water and lighting.

1. Part 1 - The Operation of Section 38 Agreements

Introduction

- 1.1** Agreements made under Section 38 of the 1980 Act are the most common method of achieving road adoption. It is mostly used where roads are planned by developers on new residential or commercial developments. The agreement should clear the way to a seamless process to achieve road adoption. The agreement will only be finalised once all highway related planning requirements are in place. However, discussions on the requirements for the agreement should, where possible, have been on-going throughout the planning stages.
- 1.2** The most common process for the adoption of existing roads, Section 37 adoption, is covered in Part 4 of this Advice Note.
- 1.3** Once roads are adopted into the highway to be maintained at the public expense we have referred to them in this Advice Note as a 'highway'. The accompanying flow chart provides an overview of the process associated with Section 38 Agreements.

Section 38 of the 1980 Highways Act

- 1.4** Section 38 of the 1980 Act provides local authorities with the powers to enter into an agreement to take over (adopt) and thereafter maintain at public expense a newly constructed road.
- 1.5** The 'Section 38 Agreement' is made between a developer and the local authority. However a prospective purchaser is also likely to have an interest, especially in knowing that an agreement is in place for the development in which they are interested - please see Annex C.
- 1.6** The completion of the agreement may be subject to legal processes over which the local authority has no control. Such processes may relate to third party negotiations and agreements, land matters, easements, private rights, private covenants (and their removal if necessary), drainage discharge consents and agreements etc.
- 1.7** In order to ensure the agreement can be implemented as soon as possible developers should ensure they have considered, at the earliest possible stage, all other matters such as the provision of street lighting (for which a parish, town or district council may be responsible) and drainage and surface water for which separate drainage consent and permissions may be required.

- 1.8** Before entering into a Section 38 Agreement, the local authority will require that developers, or landowners where this is different, obtain full planning permission, or reserved matters consent where outline permission has been granted, for the development from the relevant planning authority.
- 1.9** A local authority may be prepared to draft the agreement and progress technical approvals, pending such planning permission. However, there are risks that such an approach may result in abortive work as layouts and some legal provisions may change prior to planning consent.
- 1.10** Any pre-planning consent technical submissions are made at the developers' risk and a local authority will act on a non-prejudicial basis prior to planning consent.
- 1.11** The local authority is likely to require that developers have absolute title to the land to be dedicated as highway, but they may choose to consider other titles. This should be discussed with the individual local authority.
- 1.12** If the developer is not the landowner, then the landowner can become party to the Section 38 Agreement for the purposes of dedicating the land required. Similarly a third party landowner may need to become party to the Section 38 Agreement to grant a deed of easement to the local authority for drainage or access purposes. Some agreements can be held up significantly due to third party landowner issues. It remains the developer's responsibility to negotiate and secure all necessary agreements, rights etc. with such third parties and pay all required fees or sums as such third parties may require for such rights or easements.
- 1.13** It should be noted that, where the developer is unable to obtain absolute title or where there are charges or difficulties with the title that are unacceptable to the local authority such that the land cannot be dedicated appropriately for highway purposes by the developer, the roads may well remain private streets (not be adopted into the public highway to be maintained at public expense). House purchasers need to be aware of this.
- 1.14** Developers are strongly advised to consider the implications of their submission of a planning application (pre-application discussion). They are strongly advised to engage with all relevant local authorities during the planning process and ensure that any plans and designs submitted are of the correct standard.
- 1.15** Planning authorities may impose specific planning conditions for the approval of details and these may include those set out in Annex A. It is recommended that all parties (including the developer, the local authority and the lead local flood authority) sit down together to discuss the way forward. The provision by the local authority of a standardised draft Section 38 Agreement would assist this process. Developers will need to ensure issues related to surface water have been considered and submitted such that appropriate advice can be given.

- 1.16** The local authority will be able to advise developers of any local design standards for new roads at an early stage along with initial / potential fees along with items that may attract commuted sums. These design standards should inform the developer's planning application submission.
- 1.17** In practice, if highway design standards are considered at an early stage in the planning process, it can save time within the process of achieving an agreement and help extinguish planning conditions such as those in Annex A. Local authorities should, therefore publish their local design standards, technical submission requirements, fee structures and commuted sum requirements to enable developers to engage earlier and in an informed manner.
- 1.18** It should be noted that a Section 38 Agreement should only be entered into where the roads concerned directly link to an existing adopted highway or other roads already covered by a Section 38 Agreement.

Technical Approval

- 1.19** Once full planning permission is obtained, and the developer decides to offer new roads for adoption by a local authority, the local authority is likely to require the provision of a 'technical submission'.
- 1.20** This is likely to comprise of a package of drawings showing how the developer intends to build the roads. It needs to be consistent with the local authorities design standards.
- 1.21** It should be noted that the granting of planning permission is not a pre-requisite for the consideration of a technical submission but it should be acknowledged that in some cases, a local authority will not wish to proceed if it considers it prejudices its position on a proposal or it considers there could be perceived by third parties to be a conflict of interest. In addition, pre permission technical submissions may not accommodate all planning requirements leading to abortive work.
- 1.22** Each local authority will have its own submission requirements, which will be in line with their legal duties; design standards; and policies for adoption. A developer is strongly advised to work with the local authority at an early stage to establish what these are and avoid abortive work.
- 1.23** A local authority will require written evidence that all appropriate permissions, easements and consents for taking prospective highway drainage have been obtained from the appropriate body. These can include the Environment Agency, the lead local flood authority, the drainage board, the landowner (riparian or otherwise) through which prospective highway water may run, or water company etc.
- 1.24** It should be noted that local authorities are very likely to charge for the costs associated with checking the proposed design, and some may require that payment upfront. Early contact with the local authority is, therefore encouraged.

- 1.25** Where the local authority does not receive the correct fee from the developer at the required time it can result in a delay.
- 1.26** The developer will require 'technical approval' from the local authority. This process can be lengthy if the submitted drawings are not of an acceptable standard and/or do not meet the design standards. Therefore, the developer is strongly advised to check that the drawings meet the local authority's requirements. A local authority is highly unlikely to enter into a Section 38 Agreement without 'technical approval'.
- 1.27** Most local authorities will require the developer to have absolute title (see paragraph 1.9 above) to the land over which the roads are proposed to run. If the developer does not own the land concerned the person who does own the land becomes party to the Section 38 Agreement for it to be “dedicated” as highway. Such land (dedicated as highway) should be retained for that purpose and not sold to adjacent or other third parties. It is possible that a local authority may, in exceptional circumstances, consider other title to the land. The required title will need to be discussed with the individual local authority.

Road Safety Audits

- 1.28** Some local authorities may seek that the design of new roads is subjected to a 'road safety audit' in accordance with HD 19/15 of the Design Manual for Roads and Bridges. Where a local authority considers a road safety audit would be required at technical submission stage, it should ensure that a stage 1/2 road safety audit is obtained at the planning stage as such audits, which form part of a quality audit as promoted by Manual for Streets, can directly influence the layout of proposed streets and junctions.
- 1.29** Road safety audits may be carried out at four stages of the design and build process:
- Preliminary design;
 - Detailed design;
 - Shortly following construction; and
 - 12 to 36 months after the roads are open to use.
- 1.30** The developer is advised to contact the relevant local authority at an early stage to establish any requirements for road safety audits.
- 1.31** It should be stressed that there is no requirement for road safety audits within the 1980 Act and they may not be needed in all cases. Any requests for such a process should be both reasonable and proportionate. They may be used to identify if the design the developer proposes will be safe for all road users. Developers will have a duty to provide a health and risk assessment, sometimes referred to as the 'health and safety file' in accordance with the 2015 Construction (Design and Management) Regulations SI 2015/51.

Advance Payments Code (APC)

- 1.32** The APC will apply if the developer applies for 'building regulation approval' and the plans are passed for the buildings on the development prior to signing the Section 38 Agreement for the adoption of the new roads within the development. For further information on the APC see Part 4 of this Advice Note.

Entering into a Section 38 Agreement

- 1.33** The developer will need to provide the local authority with certain information to allow them to draft the Section 38 Agreement for the development. This will include copies of the drawings that have received technical approval, proof of ownership of land etc. It is essential that the developer contacts the relevant local authority to obtain a copy of their standard Section 38 Agreement and list of required documents.

Payments to the local authority

- 1.34** A Section 38 Agreement is very unlikely to be completed by a local authority until such time as all fees have been paid and a 'bond' is in place to cover the full cost of constructing the new roads in the development.
- 1.35** The local authority should provide clear information on the form of bond that would be acceptable, as well as stating at what stages a percentage or the whole of the bond will be returned.
- 1.36** The bond should reflect the costs to the local authority of constructing the road(s) in accordance with the details that have received a technical approval in the event that the developer defaults on the agreement. The value of the bond may differ from the costs incurred by the developer. Most local authorities will also include the value of any commuted sums within the bond to ensure that the public purse is protected if the developer defaults prior to the payment of such sums.
- 1.37** The local authority should also provide clear information on the level and timing of fees that will be required which are likely to include, but not exclusively, costs associated with design checking, preparation of the legal agreement, and site inspection. It should be stressed that the level of costs imposed should be reasonable and proportionate. Please also refer to the information on fees provided in Annex B.
- 1.38** The developer should not begin construction of the road works unless:
- All pre-commencement planning conditions have been discharged by the planning authority that may prohibit the commencement of construction works (see also Commencing Development below);
 - the local authority has provided technical approval;

- a Section 38 Agreement is in place;
 - all fees have been paid;
 - a bond has been secured; and
 - the developer has met any other requirements specific to the local authority.
- 1.39** Any local authority requirements should not exceed those set out in the 1980 Act or other legislation or legal duties. They may include: booking of road space on the existing highway, if this is needed to allow works to be carried out; approval of the appointed contractor; as well as the need to arrange a 'pre-start meeting' etc.
- 1.40** Invariably, the developer will be responsible for the day to day supervision of the works, the accuracy of any setting out as well as the quality of the construction materials used. However, the local authority will inspect the works at various stages. These inspections are to ensure the local authority is satisfied with the workmanship, compliance with the drawings and details that have received technical approval (as may reasonably have been amended by agreement with the local authority due to site conditions and circumstances) in order to ensure that the roads are being constructed in accordance with the Section 38 Agreement.
- 1.41** Local authorities should publish guidance and ensure that agreements are clear on the developer's responsibilities in respect of works supervision and the role of the local authority's engineer on site.
- 1.42** A local authority should be clear on any features or materials that may attract commuted sums and should publish its rates for such features and rationale for requiring such sums. Most local authorities require such sums to be paid when adopting roads but will require their value to be included within the bond value.
- 1.43** All parties are encouraged to complete their respective responsibilities in a timely manner to avoid undue delay.

Commencing Development - site access using various licences and Section 278 Agreements

- 1.44** The commencement of development is controlled by the 1990 Town and Country Planning Act (as amended).
- 1.45** Whilst not recommended, a developer may commence their development in advance of a Section 38 Agreement within their land. However, the following matters may affect such a start:-
- All pre-commencement planning conditions have been discharged by the planning authority;

- An appropriate and safe means of temporary construction access is established. In most cases, this will be at the location of the permanent access but such works may be sacrificial. If a temporary construction access is in a different location, planning consent may be required and, in any event, the agreement of the local authority will be required for any works within the highway;
 - Where served, an APC notice sum should be paid, prior to commencing any works to a new building; and
 - Compliance with noticing under the 1991 New Roads and Street Works Act (as amended) or permitting under the 2004 Traffic Management Act. Some permits may limit working hours that affect the free flow of traffic.
- 1.46** No works by the developers may commence within or onto any highway without the consent of the local authority. Provision of access to the construction site needs to be discussed with and authorised, in the appropriate way, by the local authority. The authorisation of access is at the local authorities discretion and will be subject to: -
- A licence under Section 171 of the 1980 Act. Such licences enable temporary works within a highway that will subsequently be removed and reinstated. The licence may stipulate the duration and nature of access and subsequent reinstatement;
 - A licence under Section 184 of the 1980 Act. This may only be for vehicular use and can also be used for widening of an existing private means of vehicular access. The licence may stipulate the duration and nature of works;
 - An agreement under Section 278 of the 1980 Act. Such an agreement will require the submission of appropriate constructional details of the permanent access works within an existing highway compliant with national and, where appropriate, local standards and the planning consent;
 - Street works requirements under the 1991 New Roads and Street Works Act, (as amended) and 2004 Traffic Management Act (as amended); and
 - The local authority has approved the appointed contractor to work within the highway where applicable.
- 1.47** Subject to the above criteria being met, all works within a development are undertaken at the developer's risk.
- 1.48** In some cases where a Section 38 Agreement is being considered but not yet completed and subject to an appropriate fee, the local authority may agree to inspect such works on a non-prejudicial basis. Such inspections may be limited in scope and duration.

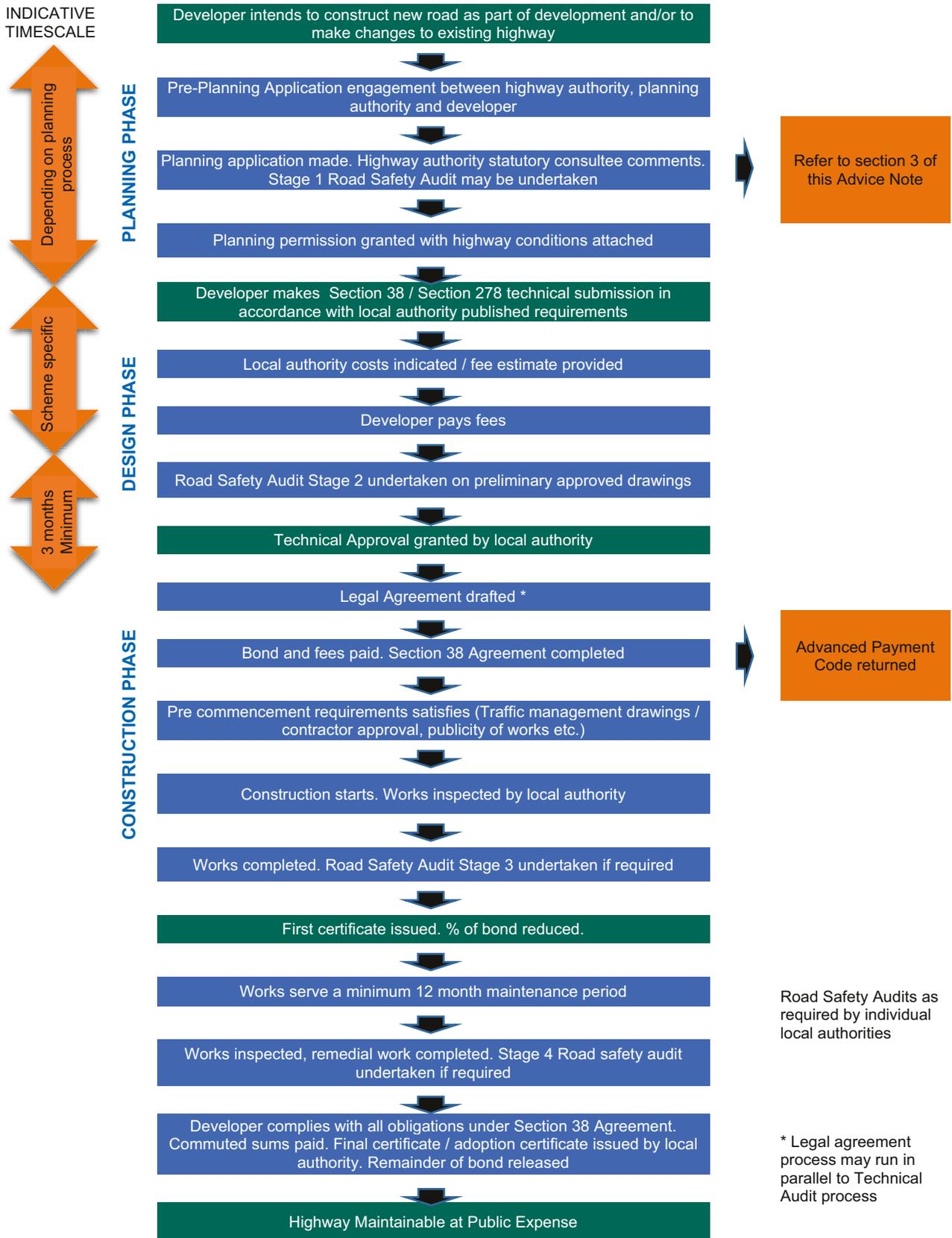
- 1.49** As and when a technical approval has been confirmed and a Section 38 Agreement is completed, it is possible that some works will need to be modified to comply with the technical approval and appropriate testing of works may be required to confirm compliance with an approved specification.
- 1.50** Some local authorities may insist on undertaking the design and construction of works within the highway themselves under Section 278 of the 1980 Act.

Maintaining and adopting the road

- 1.51** Once the construction and the layout of the roads are substantially complete, and the local authority is satisfied that they meet their standards, including the need for a stage 3 road safety audit where required, the local authority will issue the developer with a 'first certificate'. The 'first certificate' may also be referred to as "substantial completion" or a "practical completion certificates".
- 1.52** Once this stage is completed and the appropriate certificate issued, it is expected that the local authority will reduce the amount of bond held in accordance with the agreement.
- 1.53** Following issue of the appropriate certificate, the developer will be responsible for maintaining the works in good and safe repair for a minimum period. This period is known as the maintaining period, and is usually for twelve months, although some local authorities may accept shorter maintenance periods in some cases.
- 1.54** Longer maintenance periods may also be required depending upon the nature of the infrastructure involved and the development served. Local authorities should publish local guidance on their maintenance period requirements.
- 1.55** At the end of the maintenance period the developer will be required to rectify any defects in road construction identified by the local authority, and address any issues that arise out of the stage 4 road safety audits, if this is required.
- 1.56** To reach the adoption stage of the agreement the local authority will need to be sure that any defects in the proposed highway have been addressed. It will also need to be sure that any required commuted sums have been paid.
- 1.57** The developer is likely to need to provide the local authority with confirmation that the drainage / sewage have been adopted by the relevant body. Since the introduction of the 1980 Act the requirements related to dealing with surface water and drainage has changed. Current legislation in this area must be followed.
- 1.58** Similarly, the developer should provide the local authority with confirmation that all other utility services (gas, water, electricity, telecommunications etc.) have been accepted by the relevant company, such that such services would not for the foreseeable future require works to access or modify such plant).

- 1.59** Confirmation is also needed that the respective Fire and Rescue Service has checked any fire hydrant installation as being acceptable for their use.
- 1.60** It is suggested that developers consult the lead local flood authority in relation to dealing with surface water and drainage (Sustainable drainage systems (SuDS)) as well as the web site for the Department for Environment, Food & Rural Affairs (Defra):
- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415773/sustainable-drainage-technical-standards.pdf
- 1.61** The local authority should, in accordance with the Section 38 Agreement, cancel any outstanding bond and issue a 'final certificate'. This is sometimes referred to as the adoption certificate.
- 1.62** From the date of issue of the 'final certificate', the roads are adopted and become a highway maintained at public expense.

Flow chart for adoptions using Section 38 of the 1980 Highways Act



2. Part 2 - The Operation of Private Street Works Code (PSWC) (Sections 205 to 218) and Part 2(A) operation of Section 228 - adoption after execution of street works

Introduction

- 2.1** The local authority has the power to "make up" private streets under Sections 205 to 218 of the 1980 Act. That is to say they can undertake works to bring the private street up to an adoptable standard. The effective completion of action using the "Private Street Works Code" (PSWC) means that the private streets become a highway maintainable at public expense.
- 2.2** The PSWC is used in rare circumstances predominantly due to the costs and time incurred to those that ultimately benefit from the adoption of the streets concerned. It should also be noted that as ultimate adoption is via Notice served under Section 228 of the 1980 Act that adoption may fail at that point
- 2.3** The local authority has the power to apportion all (or some) of the costs to each owner with a frontage (a "frontager"). These would be someone whose property immediately faces / abuts the private street, irrespective of whether such frontage provides any benefit to the resident in terms of vehicular or pedestrian access. They also include those without a frontage but who, in the opinion of the local authority would gain benefit from the making up and adoption of the private street.
- 2.4** It will be very unlikely that the local authority will be able to provide any timing for the PSWC process. Each individual application will be different, but the flow chart for this part illustrates the process that should be followed.
- 2.5** Most local authorities do not make the decision to use the powers in Section 205 to 218 of the 1980 Act unless:-
 - They have been approached, for example, through a petition by a high proportion of those wishing to seek adoption of the private street. This is usually about 80 – 100% of frontagers;
 - There is understanding and commitment from the frontagers to fund all works, less any sum retained by a local authority for an associated APC, and associated legal, administrative and technical approval processes, irrespective of outcome;
 - Those seeking adoption have legal title to the land over which the private street runs, and the frontage property or property gaining benefit / access from the private street;

- The private street links directly to an existing adopted street (see Section 219(f) of the 1980 Act);
- The private street complies or can be made to comply with the local authority's layout and constructional adoptable standards; and
- The private street, if adopted would provide sufficient wider public benefit.

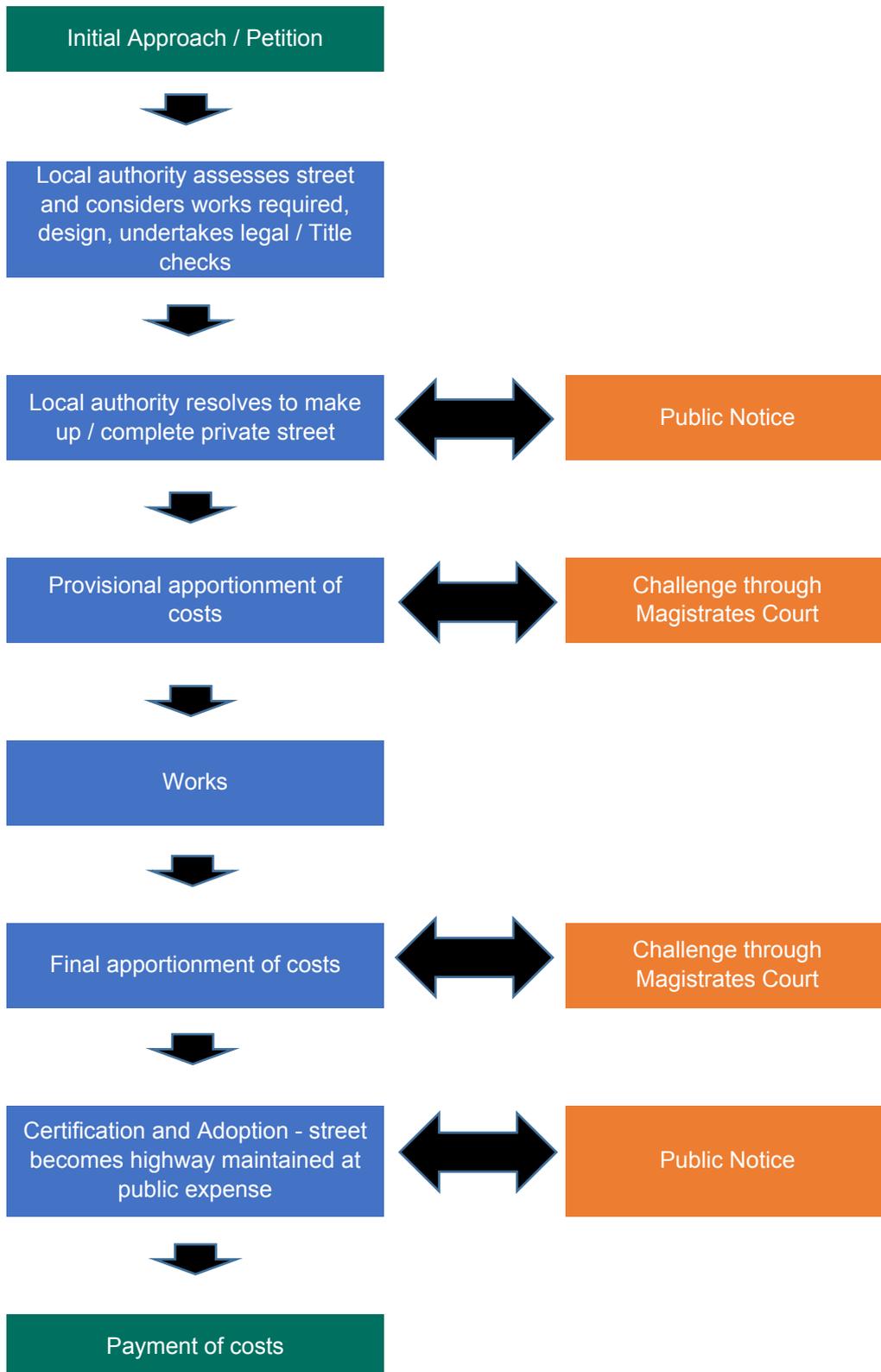
Process

- 2.6** A local authority may resolve under the section 205 of the 1980 Act to fund part or all of the works and process. This is very rare, and the local authority does not have an obligation to do so. Where they decide to do so the local authority must publish a 'notice' to confirm that they are doing this.
- 2.7** In some cases third parties may object to the action proposed or complain. In most cases, those promoting the process would be expected to resolve matters themselves, to reduce costs.
- 2.8** Frontagers may make an initial approach to a local authority because of a new or existing defect with the private street. In discussion with the local authority they may decide that the costs of making up the private street, along with the lengthy process and associated costs outweigh the costs of rectifying the defect. Many PSWC approaches are withdrawn at that stage.
- 2.9** Where the process is taken forward, delays may result from difficulties obtaining the required consents and cooperation between those promoting the adoption of the private street and others that will be affected. Applicants should be aware that this process can cause neighbour disputes and complications with rental properties. Those considering this process may want to first ensure that all those concerned understand and agree with the proposed action.
- 2.10** Where the process is to go forward the local authority will provide a provisional apportionment under Section 207 of the 1980 Act which will divide the cost of making up the private street between those who own land / property fronting a private street, irrespective of whether they benefit from the street for access, those that gain access from the private street and those that own the land over which the private street runs (if different). In some cases those gaining benefit will agree to cover apportionments of those without such benefit. Some local authorities may weight or adjust apportionments based on perceived benefit. Clearly any such weighting in favour of some would not favour others and may result in a challenge on the basis of fairness.
- 2.11** Under Section 208 of the 1980 Act an owner may challenge the provisional apportionment (within 1 month of notification) if:-
- It is not a private street;
 - There is an error in the resolution, notice, plans, sections or estimate;

- The proposed works are insufficient or unreasonable;
 - The estimate of the proposed works is excessive;
 - Any premises should be excluded from or added to the provisional apportionment. Certain premises, such as places of worship, (Section 215 of the 1980 Act), attached church yards or burial grounds, certain railways and canals (Section 216 of the 1980 Act) are exempted;
 - The provisional apportionment is wrong.
- 2.12** Where there is a challenge under Section 208 1980 Act it may be heard at the Magistrates Court (Section 209 of the 1980 Act). The judgement may adjust provisional apportionments and also add court costs to them.
- 2.13** In respect of payment for the works, (Section 212), some local authorities may agree to receive payment by instalment, others will want a lump sum they will recover them through land charges. Most local authorities will require written agreement to a specified payment mechanism before works are commissioned. If payment is made after 28 days of completion of the works it is common that interest is charged as it can take years to recover all sums. It should be noted that local authorities therefore work at financial risk in some cases.
- 2.14** On completion of the works, adoption is made by 'notice' under Section 228 of the 1980 Act. Where third party contractors undertake some or all of the works commissioned directly by those seeking adoption. To reduce costs paid to the local authority a 12 month maintenance period on such works may be required prior to such a 'notice' being made. Uncooperative owners of the land over which the private street runs can significantly delay or cause abandonment of the proposal. Early written agreement with such owners, if they can be traced, is essential.
- 2.15** The final apportionment, see Section 211 of the 1980 Act, is calculated based on the actual cost of the works and associated administrative charges and fees on the same basis as the provisional apportionment.
- 2.16** Payment can then be made in accordance with the method and timing of payments agreed before the works commenced.
- 2.17** An owner can object to the final apportionment (see Section 211 of the 1980 Act) if:-
- there has been an unreasonable departure from the specification, plans and sections;
 - the actual expenses have, without sufficient reason, exceeded the estimated expenses by more than 15%; and / or
 - the method of apportionment of the final cost has not followed exactly that of the provisional apportionment

- 2.18** If these objections cannot be resolved by discussion, they may be considered by a Magistrates Court. There is also a right of appeal against the decision of the Magistrates Court to the Crown Court (see Section 317 of the 1980 Act).
- 2.19** It is important to ensure that those promoting the adoption of a private street using this mechanism are fully aware that there can be significant costs, time delays, legal challenges and court action and uncertainties with the process.

Flow chart to support the operation of the Private Street Works Code

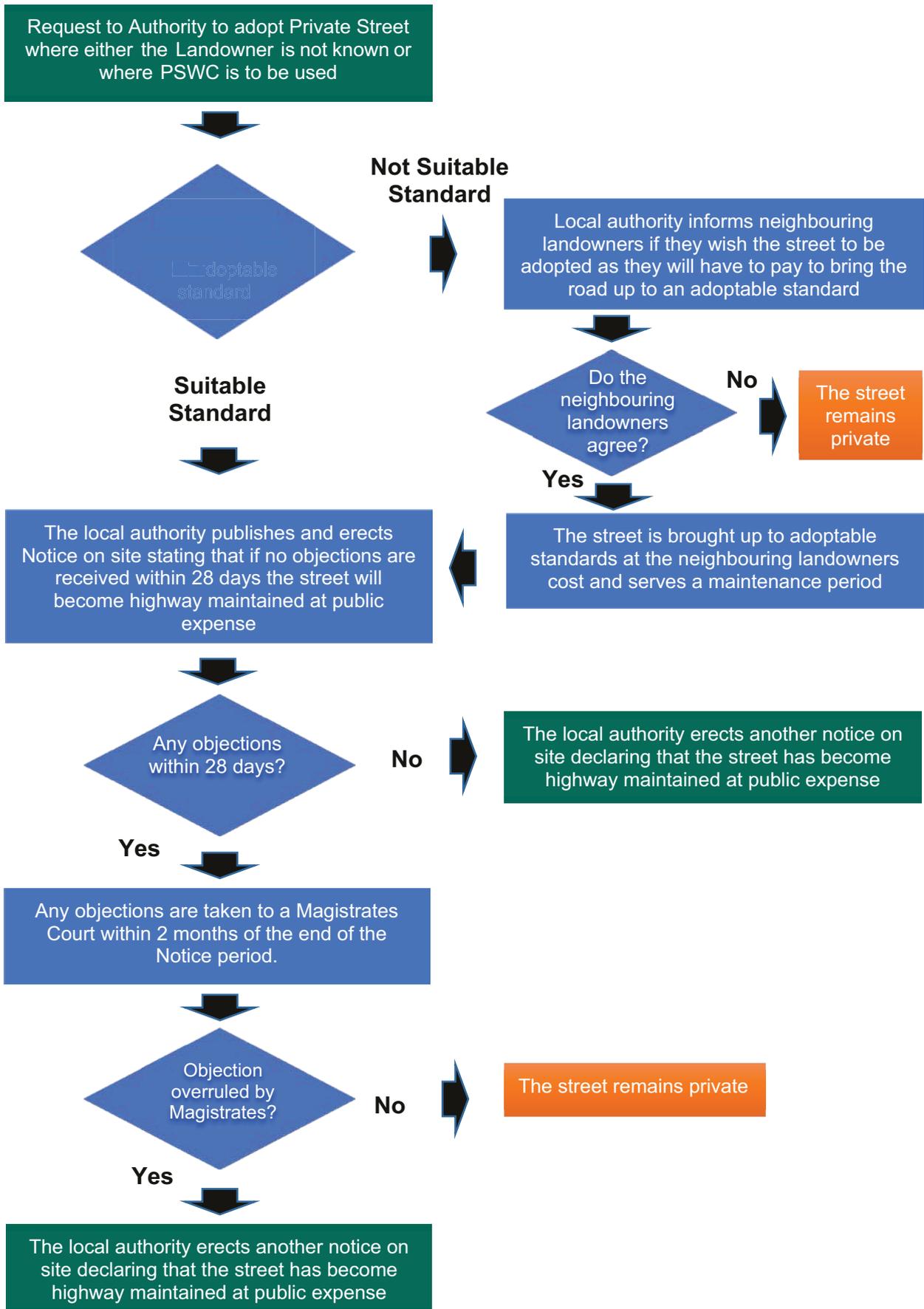


Part 2 (A). Adoption of a private street after the execution of street works - Section 228 of the 1980 Highways Act

- 2.20** Section 228 of the 1980 Act can be used in specific circumstances to enable new roads and private streets to be adopted. The local authority may, by a 'notice' displayed in a prominent position in the street, declare the street to be a highway maintained at public expense.
- 2.21** This process can also be useful when works have been undertaken by a developer but the owner of the land is unknown or unregistered or where a new access road is to be constructed or made up. It can also be used where a developer has a right of way over the land but does not own it.
- 2.22** In such cases it should be noted that if used the owner has an effective veto over the adoption, subject to an application by the local authority as set out below. In such a circumstance an owner may seek ransom value from to remove their objection. As in most cases the mechanism is used to facilitate the adoption of development roads, most local authorities would look to the developer to resolve any disputes of this nature.
- 2.23** In all such cases, the developer cannot enter into a Section 38 Agreement with the local authority as they are not the landowner, but they can ask the local authority to adopt the private street on completion of the works under Section 228 of the 1980 Act.
- 2.24** The local authority will still be likely to inspect the works during construction and may seek reimbursements of any costs before action is taken to adopt, even though there can be no formal agreement in place between the parties.
- 2.25** The owner(s) of the street may be frontagers, i.e. those whose property immediately faces / abuts the street, but could also be the landowners. The title of each frontager should be checked in case they have undeclared rights or responsibilities that may affect this process.
- 2.26** If a frontager or landowner objects, the local authority can apply to the Magistrates Court for an Order overruling the objection and declaring the street to be a highway. The Magistrates Court has a wide discretion in these cases and may take into account the wider public benefit of the private street.
- 2.27** If the Magistrates Court confirm the frontager or owner's objection the road remains a private street. Where this occurs, the owner(s) is likely to have to arrange for a management company to be set up for the future maintenance of the private street. Such action may add unforeseen costs onto the owner(s) and where this is on a new private street, residents or new householders are likely to be required to pay an annual maintenance charge for the private street.

- 2.28** When works are completed, costs have been reimbursed and a maintenance period (usually 12 months) has elapsed, the actual adoption process can take place. The local authority will erect a Notice stating that, subject to no valid objections being received from landowners, the private street will become a highway maintained at public expense after a "one month" period (see Section 228 (1) of the 1980 Act).
- 2.29** Subject to no objections being received the local authority would erect a further notice on site confirming that the street is now maintained at public expense.
- 2.30** As there are a number of risks and potential challenges associated with the process, those considering this action should seek early discussion with the local authority so that the process can go forward as smoothly as possible.

Flow chart of support the operation of Section 228 of the 1980 Highways Act



3. Part 3 - How the Advance Payment Code (APC) works Section 219 to Section 225 of the 1980 Highways Act

Introduction

- 3.1** The Advance Payments Code (APC) is contained in Section 219 to Section 225 of the 1980 Act. It is intended to secure funds for a local authority to use to make up or complete a private street serving a new residential development, and to facilitate their adoption in order that it will be maintained at the public expense in the event that the private street works code (See Part 2 of this Advice Note) is pursued by frontagers. Securing funds via the APC does not guarantee that a private street will get adopted.
- 3.2** Certain buildings / developments are exempt, (Section 219(4) of the 1980 Act) for various reasons including:-
- The owner is exempt under the APC;
 - The building is within another building's curtilage;
 - The local authority does not apply the APC. The APC may not apply to all local authorities (e.g. London) and not all local authorities choose to apply the APC;
 - A Section 38 Agreement has been completed (see Part 1 of this Advice Note);
 - Where the local authority is reasonably content that they would not need to call on the sum, (Section 219 (4) (e) of the 1980 Act);
 - Where a building is to be on land belonging to certain boards, unitary, district or county councils or commissions; and / or
 - Where the building is for industrial / commercial purposes. Some local authorities have their own acts of Parliament that require them to apply APCs to industrial premises.

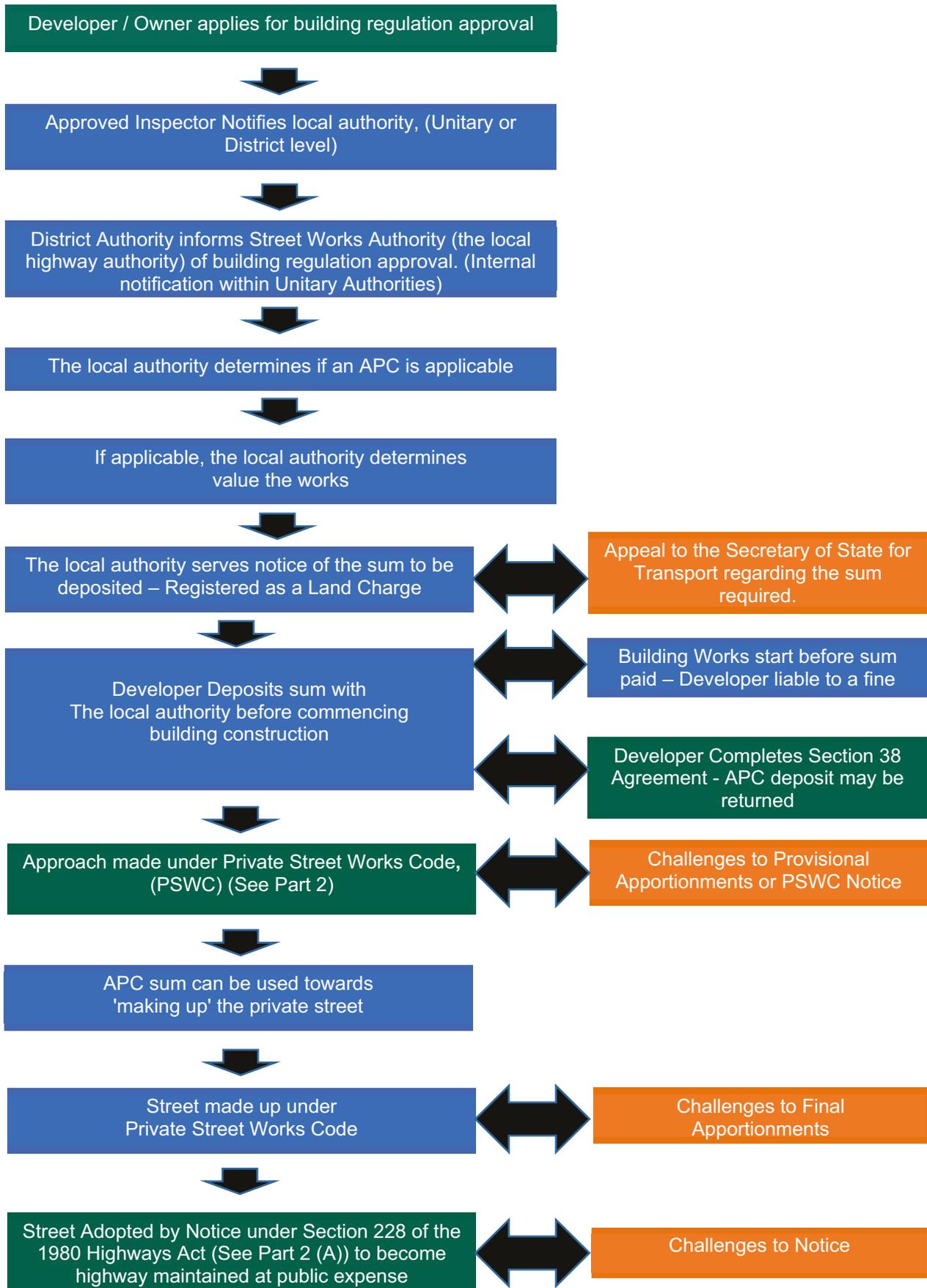
Process

- 3.3** The APC is not linked to planning permission. It is linked to the passing / approval of plans or 'initial notice' which is issued under ss47-8 of the Buildings Act 1984 by an approved inspector. The 2010 Building (Approved Inspectors etc.) Regulations (SI 2010/2215) prescribe the forms to be used and the grounds under it can be rejected by the highway authority.

- 3.4** APCs can be served on layouts or plans for development with building regulation approval, but no planning approval. In addition a developer can secure building regulation approval on land they do not own which may affect the sale of that land as a land charge will be in place.
- 3.5** It should be stressed that a district, or part of a unitary authority must 'notify' / inform the relevant authority within one week of the passing of plans or receipt of an 'initial notice'. This requirement is set out in Section 220(2) of the 1980 Act.
- 3.6** In many cases, such notification is dependent on a district authority being notified by the approved inspector. While the actual process may differ across the Country, the requirement is clear. Joint and collaborative working between all parties is essential.
- 3.7** A local authority has six weeks, (see Section 220(1) of the 1980 Act), from the "...passing of any required plans relating to the erection of a building..." to serve 'notice' on the developer, or owner of the land over which the proposed streets run / whoever submitted the plans if different, if an APC sum is required. The process links back to the preceding paragraph and the role of the approved inspector.
- 3.8** A developer, or owner of the land over which the proposed streets run if different, may appeal within one month against the value of the sum contained in the APC notice to the Secretary of State for Transport (Section 220(6) of the 1980 Act) who may then appoint someone to hear the case.
- 3.9** An APC Notice may end up being served after building works have commenced placing the developer at an immediate breach if the developer starts as soon as they receive building regulation approval.
- 3.10** Self-Build and some small infill developments entail additional complications not considered in this Advice Note.
- 3.11** As the APC is linked to the commencement of building works, a developer can complete all of the roads covered by the APC notice before starting such works.
- 3.12** If a developer commences work on a building covered by the APC notice without paying the relevant APC sum to the local authority, they are committing an offence and are liable to prosecution and a fine. The commencement of each building is a separate offence. If they continue to build, the offences increase as can the potential fines whilst still being liable to pay the APC sum.
- 3.13** The local authority has six months after a breach has occurred to take appropriate legal action. This action may be to invoice the sum and pursue payment and / or proceeding through the courts to prosecute the offence(s).
- 3.14** If an APC notice is served, it is registered as a Land Charge (Section 224 of the 1980 Act). If an APC notice is subsequently cancelled or substituted with a Section 38 Agreement (see Part 1 of this Advice Note) that change is also registered as a Land Charge.

- 3.15** Use of the APC sum is linked to the use of the PSWC (see Sections 205 to 218 of the 1980 Act). If sums deposited do not meet the costs of the outstanding works third parties, (usually the residents) are required to contribute. Issues associated with legal challenge to apportionments can slow the process. If any owner, including the owner of the land over which the road runs is uncooperative then the process can be delayed or fail. See Part 2 of this Advice Note on the PSWC for further information.
- 3.16** The application of the APC is currently inconsistently applied across the England.
- 3.17** In some cases the developer may wish to keep the roads on their development as private. However this will not provide an exemption from or preclude a local authority from serving an APC Notice. Where a local authority applies the APC it should still be followed.
- 3.18** Some local authorities that apply the APC may by appropriate agreement return paid sums (see Section 221 of the 1980 Act) or in some cases determine not to serve an APC notice if a road(s) are to remain private.
- 3.19** A local authority may take such action to ensure that they may be reasonably content that the private street(s) will be suitably managed and maintained without future recourse to them such that an exemption under Section 219 (4) (e) of the 1980 Act.
- 3.20** Some local authorities that apply the APC are prepared, by appropriate agreement, to exempt developments from applying the APC. This may require a “resolution” of the local authority concerned.
- 3.21** Local authorities that are prepared to delay, and in some cases waive, the APC notice should ensure that they are still able to lawfully serve an APC notice to reserve their position and protect future resident's interests even if they are actively negotiating a Section 38 Agreement as this is not an exemption.

Flow chart of the operation of the Advance Payments Code



4. Part 4 – Road adoption using Section 37 of the 1980 Highways Act

Introduction

- 4.1 This section covers the process that the owner of the road(s) will follow where they are seeking that road(s) becomes a highway maintained at public expense using Section 37 of the 1980 Act.
- 4.2 It should be noted that the process laid down in the 1980 Act has a number of stages at which there is the potential for referral to the Magistrates Court. As such there are risks adoption of a road via this route may fail at such stages.
- 4.3 Proceedings towards potential adoption of a road via Section 37 of the 1980 Act do not provide an exemption from the serving of APCs. In addition, it should be noted that the burden of proof of compliance with a local authority's standards rests fully with the owner.

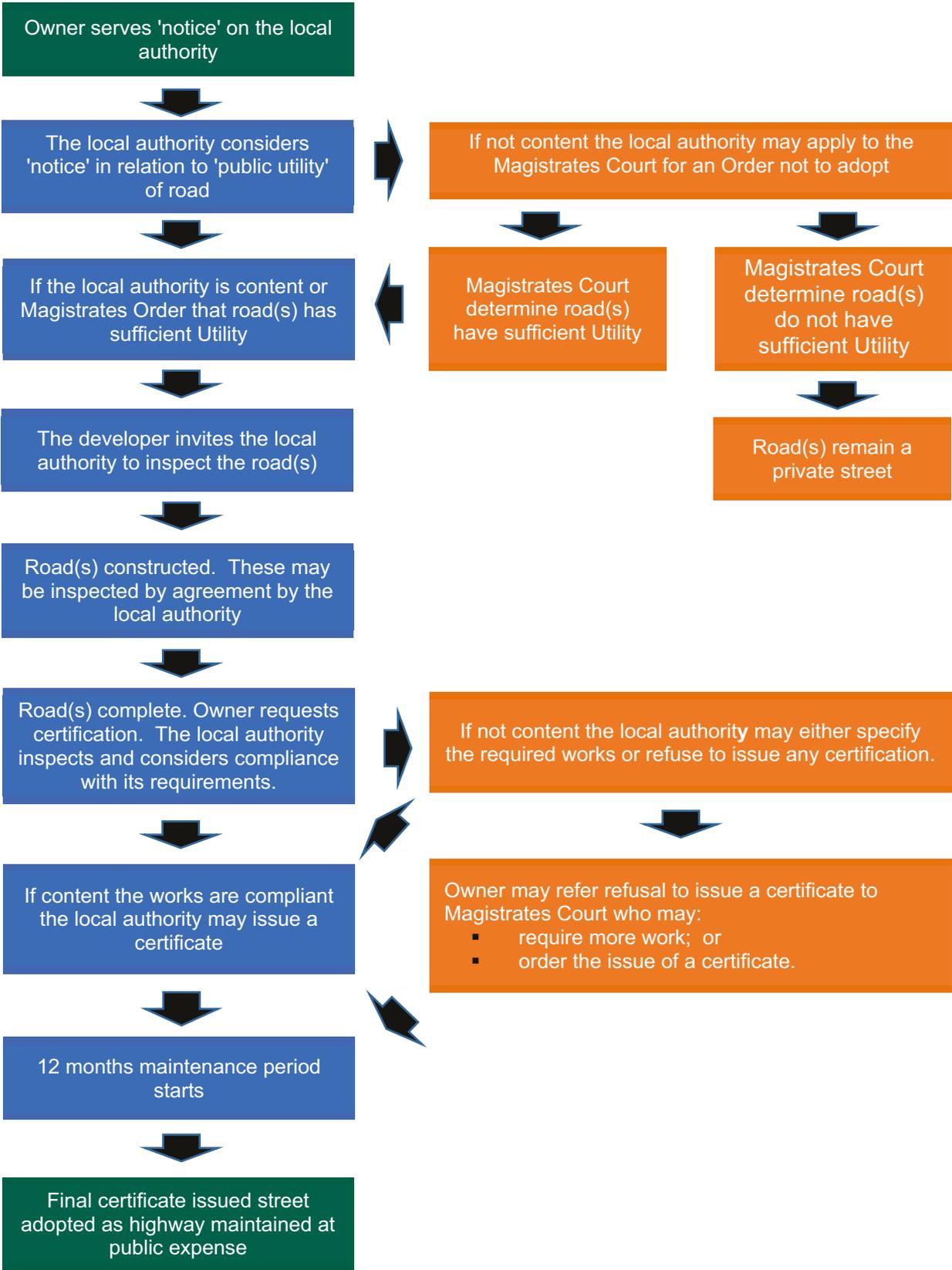
Process

- 4.4 The owner of the land over which the road(s) runs, this is usually the developer, serves a notice on the local authority declaring their intention to dedicate the road(s) as a highway. Three months is the statutory minimum notice period (see Section 37 (1) of the 1980 Act).
- 4.5 A local authority should publish its general requirements in respect of the level of information that it requires to consider a notice. Most local authorities recommend that such a notice is accompanied by a 1:500 layout plan showing the road(s) in question coloured or shaded in pink (or different colours if more than one owner involved) and a clear plan signed by the relevant owner(s) for each title affected by the road(s) declaring their intention to dedicate.
- 4.6 It is expected that the owner(s) has all the required easements and consents to drain the road(s) concerned.
- 4.7 The local authority will assess whether the road would constitute sufficient wider public benefit (public utility) to be considered for adoption. If it considers they do not have wider public benefit the local authority may apply to the Magistrates Court for an Order not to adopt (see Section 37(2) of the 1980 Act). If the Magistrates Court agree with the local authority then the road remains a private street.
- 4.8 If the local authority does consider the road(s) to be of sufficient wider public benefit, they may, after obtaining a suitable sum from the owner to cover inspection fees (including any necessary laboratory testing, traffic regulation order costs and legal title checks) arrange for the road(s) to be inspected.

- 4.9** The owner may also be requested by the local authority to provide evidence that any foul / surface water sewers under the potential highway have been adopted by the relevant body. This will include appropriate easements, discharge consents and utility adoptions.
- 4.10** The local authority will carry out checks to establish that the owner(s) have absolute title to the land over which the road(s) run. (See also Part 1 - paragraph 1.11 of this Advice Note).
- 4.11** A local authority should publish the general level and nature of information it may require to consider the constructional integrity of the road(s) involved for certification purposes. There may be site specific circumstances which require the local authority to request additional testing and other work to ensure compliance.
- 4.12** Should the owner not engage the local authority to inspect or review the works prior to requesting certification, it will be incumbent on the owner to ensure that appropriate independent constructional records and testing are kept and can be produced if required. A local authority should consider such records but may (acting reasonably) require further testing and verification.
- 4.13** It should be noted that Section 37 of the 1980 Act does not provide for the imposition of commuted sums although they may be payable by agreement.
- 4.14** When the owner considers the road(s) are complete they will invite the local authority to inspect them and request that the local authority issue a certificate. The certificate, if issued, will confirm that the road(s) are complete to the local authority's satisfaction and the terms of the notice of dedication (as either accepted by the local authority or as determined by the Magistrates Court) have been complied with.
- 4.15** If the local authority has received satisfactory results from all inspections they will issue the relevant certificate, (equivalent to a first certificate). The road(s) shall then begin a 12 month maintenance period, during which time it will be owners' responsibility to keep the road in good repair.
- 4.16** If upon request the local authority considers that, for whatever reason, the road(s) has not met their requirements or complied with the dedication notice then the owner may refer the matter to the Magistrates Court who will hear the views of both parties as to compliance and rule accordingly.
- If the Magistrates Court support the local authority's position further works may be required. When complete the owner requests certification. If compliant the local authority will issue a certificate. If not the owner may refer the matter back to the Magistrates Court. This may happen multiple times.
 - If the Magistrates Court support the owner then they may make an order such that a certificate should be issued and the maintenance period will begin.

- 4.17** It is suggested that at least one month before the end of the 12 month maintenance period the local authority should undertake a final inspection. Subject to the satisfactory completion of any identified remedial works the local authority may then issue a final certificate to declare that the road has become a highway maintainable at the public expense.
- 4.18** The developer / owner may engage with the local authority during the planning process to mutually agree the principle of adoption under Section 37 of the 1980 Act from the outset.
- 4.19** If the road specification is approved and routine supervision has taken place on a co-operative basis, then it may not be necessary to carry out more stringent laboratory testing (including core sampling) to establish whether the road construction is suitable.

Flow chart - Adoptions using Section 37 of the 1980 Highways Act



Appendix 1 - Glossary of terms

Absolute title - The highest class of title to land awarded by the Land Registry.

1980 Act - the 1980 Highways Act (as amended).

Adoption / Adopted – The process where new roads / private streets may in specific circumstances become highways maintained at public expense by a local authority.

Advance Payments Code (APC) – Sections 219 to 225 of the 1980 Highways Act is intended to ensure that a Highway Authority has the funds to complete works to a private street if approached to do so via the Private Street Works Code.

Bond – a form of financial surety which ensures that a local authority has the funds available to complete road works if developers fail to do so.

Building Regulations Approval – Any new or extended building requires such approval under the Building Regulations. The approval of building regulation plans or an initial notice by an approved inspector triggers the Advance Payments Code process

Commuted sums – a sum of money that a local authority may require to be paid by a developer to cover future maintenance costs of: non-standard materials; structure; or areas not necessary for the safe functioning of the public Highway.

Final Certificate – a certificate (usually in the form of a letter) issued by a local authority following a maintenance period. This may also be known as the adoption certificate.

First Certificate – certificate (usually in the form of a letter) issued by a local authority following substantial completion of the road works. This is sometimes referred to as a 'provisional certificate' or a 'certificate of substantial completion'.

Frontagers - The owners of property fronting or abutting a street irrespective of whether they gain access from it. They may also be those who benefit from the street but do not directly abut / adjoin the street.

Highway - a road or street which may include a carriageway, pedestrian / cycle route, verge etc. over which the public has the right to pass and re-pass without hindrance or obstruction. A Highway may not necessarily be maintained at public expense.

Local Authority / Authorities - this means the relevant local highway (transport) authority (County or unitary council) as set out in Section 121A of the 1984 Road Traffic Regulation Act and Part 1 Section 1 of the 1980 Highways Act.

Maintenance Period – period of time (usually no less than 12 months but may be longer) for which the developer is responsible for the maintenance of new highway (including defects or other damage howsoever caused).

Management Company (residential property) - A company who holds an interest or has been made responsible for the management and maintenance of a private street, other communal or private areas, open space, drainage and / or other amenities. They may not necessarily own structures or the land over which the private street runs. Most management companies are funded by those who benefit from the services and areas maintained via annual or monthly charges.

Pre-start meeting - meeting held prior to road works commencing on site.

Private Street Works Code (PSWC) - The process by which the local authority can make up a private street to become highway maintainable at public expense.

Road Safety Audit – An audit of an existing or proposed road during the design and construction process and at least a year after completion to identify any road safety problems and to suggest measures to address those problems.

Section 37 - The process set out in Section 37 of the 1980 Highways Act where the owner of a private street serves a Notice on the local authority declaring their intention to dedicate the roads as public highway.

Section 38 Agreement – legal agreement on mutually agreed terms under Section 38 of the 1980 Highways Act.

Technical approval – approval of a technical submission.

Technical submission – package of engineering drawings showing details of new roads.

Traffic Regulation Order - an order made by the local authority under the 1984 Road Traffic Regulation Act designed to manage traffic, including parking restrictions.

Wider Public Benefit (public utility) - It is for each local authority to illustrate to applicants how they will view this. In the main through roads and those that serve public buildings and destinations may be seen as having greater wider public benefit and residential cul-de-sacs would have limited if any such utility as they only benefit the residents who live there and no third parties or through movements.

Annex A: Draft Planning Conditions (and Notes) for Adoption of New Roads

- A.1** The draft conditions contained in this Annex were placed on the Department for Transport's website in 2012. Their purpose was to ensure that arrangements for the future management and maintenance of new roads, within residential developments, was both confirmed at the planning stage, and then completed and maintained to an appropriate standard in advance of adoption via a Section 38 Agreement (Section 38 of the 1980 Act), or until a suitable private management and maintenance company / agreement was in place. They are likely to still offer guidance in this area.
- A.2** With the objective of increasing housing delivery Government is currently considering further planning reforms, in particular the effectiveness and necessity of certain planning conditions. Those using this 'Advice Note' and/or other material planning documents should be conscious of all the guidance issued by Government related to planning conditions. It should be noted that once this document is published the planning conditions will be removed from the Department for Transport's website.
- A.3** The conditions are set out as general guidance only and any local planning authority should give proper consideration to:
- The appropriateness of using these or any other conditions having regard to the detailed policy and guidance set out in Paragraph 203 and 206 of the National Planning Policy Framework and the "Use of Planning Conditions" section of the National Planning Policy Guidance.
 - Where any local planning authority are in any doubt in seeking to use these or any other conditions they should take their own legal advice.
 - When using these draft conditions clear, precise and full reasons must be given (in decision notices) for each condition used. This is a requirement of legislation. See Article 35(1) (a) of the Town and Country Planning (Development Management Procedure) (England) Order 2015/595. The suggested reasons stated below, should be considered along with any others pertinent to each case.

Completion of Streets / Estate Street Phasing Plan - Conditions

No development shall be commenced until an estate street phasing and completion plan has been submitted to and approved in writing by the local planning authority. The estate street phasing and completion plan shall set out the development phases and the standards that estate streets serving each phase of the development will be completed.

Reason: - To ensure that the estate streets serving the development are completed and thereafter maintained to an acceptable standard in the interest of residential / highway safety; to ensure a satisfactory appearance to the highways infrastructure serving the development; and to safeguard the visual amenities of the locality and users of the highway, in accordance with Policies [X, Y and Z] of the development plan.

[No dwelling or dwellings / No dwelling or dwellings within phase 1 / No more than X number of dwellings]* shall be occupied until the estate street(s) affording access to those dwelling(s) has been completed in accordance with the Estate Street Development Plan.

* delete as applicable

Reasons: - To ensure that the estate streets serving the development are completed and maintained to the approved standard, and are available for use by the occupants, and other users of the development, in the interest of highway safety; to ensure a satisfactory appearance to the highways infrastructure serving the approved development; and to safeguard the visual amenities of the locality and users of the highway, in accordance with Policies X, Y and Z of the Development Plan.

Completion of Streets / Estate Street Phasing Plan – Note

The applicant is advised to obtain the written approval of the local highway authority for the details required under condition X, prior to the submission of such details to the local planning authority in seeking to discharge the said condition. Such details, as may be submitted to the local highway authority, could be subject to technical and safety assessments / audits, which may result in changes to the layouts and alignments as shown on any indicative layout(s) approved by virtue of the planning permission. The applicant is advised that the local planning authority may reject details submitted to them for the discharge of the condition without evidence of technical approval from the local highway authority.

Management and Maintenance of Estate Streets – Condition

No development shall be commenced until details of the proposed arrangements for future management and maintenance of the proposed streets within the development have been submitted to and approved by the local planning authority. [The streets shall thereafter be maintained in accordance with the approved management and maintenance details until such time as an agreement has been entered into under Section 38 of the Highways Act 1980 or a private management and maintenance company has been established].

Management and Maintenance of Estate Streets – Note

The applicant is advised that to discharge condition X that the local planning authority requires a copy of a completed agreement between the applicant and the local highway authority under Section 38 of the Highways Act 1980 or the constitution and details of a private management and maintenance company confirming funding, management and maintenance regimes.

Submission of Details – Adoptable Streets – Condition

No development shall be commenced until full engineering, drainage, street lighting and constructional details of the streets proposed for adoption have been submitted to and approved in writing by the local planning authority. The development shall, thereafter, be constructed in accordance with the approved details, unless otherwise agreed in writing with the local planning authority.

Reason: - In the interest of highway safety; to ensure a satisfactory appearance to the highways infrastructure serving the approved development; and to safeguard the visual amenities of the locality and users of the highway in accordance with Policies [X, Y and Z] of the Development Plan.

Submission of Details – Adoptable Streets – Note

The applicant is advised to obtain a technical approval for all estate street details from the local highway authority prior to the submission of such approved details to the local planning authority to discharge condition X of this consent.

Annex B: Fees, Charges and Bonds

Fee Structures

- B.1** Fee structures may vary between local authorities. However, all such fees, charges and the basis calculations used, should be published.
- B.2** Fee structures may also vary between different forms of agreement, for example under Section 278 or Section 38 of the 1980 Act. Where this occurs, the fee structure for each form of agreement should be published.
- B.3** A local authority may charge an initial and non-returnable fee to consider and process an agreement. Such a fee should cover initial costs incurred by the local authority. Any initial fee charged should be credited against the final fee for an agreement payable when the agreement is completed. In addition, a local authority may require an abortive costs undertaking such that if, for whatever reason the agreement is abandoned prior to the completion of an agreement that a local authority's reasonable costs incurred to that point can be recovered.
- B.4** An initial fee should include:-
- Validation of an agreement application and technical submission;
 - Initial technical submission feedback and at least one subsequent iteration; and
 - General technical and procedural advice.
- B.5** Additional fees for site specific technical considerations may be charged. Such elements may include geotechnical, traffic signals, structures, specialist drainage such as SuDS etc. In such cases a clear fee proposal should be issued to the developer with clarity on what the local authority expects in terms of the quality and content of a specialist submission and what the developer may expect in terms of feedback for such a specific fee.
- B.6** Some features or schemes may require traffic regulation orders or notices. Fees for such processes should be published.
- B.7** Some local authorities may offer their services to undertake design and construction of highway works. In such cases individual site specific fee proposals should be considered.

- B.8** Some local authorities may offer their services to undertake specific elements of a design or process such as signals, structures, street lighting, and where required a road safety audit etc. In such cases individual site specific fee proposals should be considered.
- B.9** The number of iterations and the extent of the comments between the local authority and the developer on the technical submission will be entirely dependent on its quality and compliance with all the appropriate design standards and local authority technical audit requirements.
- B.10** It is recommended that a developer ensures that technical details are complete and that they have satisfied themselves that such submissions comply with national and local standards. The reasons for any departures from national or local standards should also be clearly set out.
- B.11** Where a developer intends to commence the development prior to the provision of technical approval and an agreement for works on roads not affecting an existing highway, a local authority may agree to inspect such works on the roads on a non-prejudicial basis, subject to an initial inspection fee. Such a fee should be agreed between the developer and the local authority. The fee may be the final fee in anticipation of the completion of an agreement or partial “inspection only” fee. The scope and duration of such inspections should be clear prior to them being undertaken.
- B.12** Legal fees may be charged separately. A local authority may require a deposit of full fees or seek to recover the balance at completion of the any agreement (Section 38 or Section 278 of the 1980 Act). It should be noted that where legal challenges are made, most likely where adoption using s37 (part 4 of this note) or using the Private Street Works Code (part 2 of the note) is sought it would involve the applicant paying court fees and the eventual loser costs.
- B.13** Final fees upon completion of an agreement (Section 38 or Section 278 of the 1980 Act) shall be all inclusive of reasonable costs incurred by a local authority in preparing and completing an agreement including:
- Technical audit costs incurred prior to issue of a technical approval;
 - Technical advice / support and administrative costs incurred in preparing the agreement;
 - Legal fees incurred by the local authority; and
 - Inspection fees to ensure that upon completion of the works that it is content that the works comply with the technical audit and that any on site variations are agreed and acceptable.
- B.14** A local authority should also offer and publish a sliding of fees such that value of fees does not become disproportionate or unreasonable as works value increase.

- B.15** It should be noted that in respect of inspection fees the local authority takes on a considerable risk as it cannot necessarily anticipate or control when works may finish and it may be a number of years before a site is suitable for adoption.
- B.16** Most local authorities will charge their full fees calculated as a percentage of the bond (exclusive of commuted sums). Where this occurs the percentage should be published along with what services the sum includes and, where appropriate excludes.
- B.17** Where a developer, for whatever reason, amends their proposals after technical approval has been given then an additional fee proposal should be calculated by the local authority for such amendments. Where such amendments trigger the need for a deed of variation to a completed, the deed may secure such additional fees.

Bond Values

- B.18** Most local authorities determine the value of the bond required to complete an agreement or on which to serve an APC notice upon a standardised linear rate schedule. Such rates should be refreshed periodically to ensure that the public purse is not at risk. All rates used should be published.
- B.19** Where a linear rate approach is used it should be clear as to what is and is not presumed to be included in such rates.
- B.20** In general such rates will be higher than tendered rates that a developer may enjoy. It should be noted that such rates will include elements to cover technical and administrative support required to call in the bond in the event of default by the developer. In addition elements associated with inflation and other risks may be included as the securities may only be required at some point in the future. Some local authorities may calculate the value of the bond on their linear rates and add a percentage to accommodate the risks and liabilities they inherit. Such percentages should be published.
- B.21** If presented with a set of tendered rates for a specific development, the local authority should be prepared consider such submissions and adapt its approach accordingly. In addition where site specific criteria or layouts are proposed up to date linear or site based rates should be calculated.
- B.22** A bond may be in the form of a cash deposit or institution backed surety provider. In most cases the value of any commuted sums will be added to a linear rate to ensure that in the event of default the public purse is not threatened.
- B.23** A local authority may make provision within an agreement to review the value of the bond retained as works progress. Such a review should include how and when works are undertaken towards completion. It is suggested that in any event as and when the works are deemed to be completed sufficiently to commence a maintenance period or at the point where a local authority is

prepared to issue a first certificate that the bond should be reduced significantly. Many local authorities reduce to 25% of the full costs of works although other reductions may be locally agreed.

B.24 A local authority may also offer to review the value of the bond at other key triggers which need to be locally agreed. It is suggested that a mechanism should be built into any agreement to allow the developer to apply to have the value of the bond reviewed when they can provide evidence that works have been completed to a satisfactory standard to trigger such a review.

B.25 If a road has been substantially completed prior to the completion of an agreement, a local authority should consider a bond proportionate to the value of the outstanding works which are required to bring the street up to adoptable standards.

Annex C: A Short Guide for House Buyers

General Advice

- C.1** This Advice Note is provided for guidance only. It is not a substitute for independent legal advice. The potential issues that have been highlighted are common examples and other issues may arise.
- C.2** When buying your new home the standard processes include local authority searches. One of the standard questions a local authority is asked to answer concerns the status of the road / street abutting the property from which it gains access. You or your solicitor will need to specify the road(s) / street(s) concerned.
- C.3** The status may reveal that: -
- The road / street specified is a highway maintained at public expense;
 - The road / street is to be adopted and is subject to an agreement under Section 38 of the 1980 Act (see Part 1 of this Advice Note);
 - The road / street is not subject to any adoption agreement;
 - The property / road / street is not subject to any adoption agreement but is subject to an Advance Payment Code notice (see Part 3 of this Advice Note);
 - The property is subject to a charge payable to the local authority for making up the street to become highway maintained at public expense via the Private Street Works Code (see Part 2 of this Advice Note).
- C.4** You may wish to take legal advice on the interpretation of the actual responses given by the local authority to the standard questions. This may generate further questions which may be covered in this Annex, but it is incumbent upon you to ensure that you gain sufficient professional advice so that you make an informed decision in your property purchase.

Private Roads – those never intended to be adopted by the local authority

- C.5** Your prospective home maybe on a development where there is no intention for the road / street to be adopted by the local authority.

- C.6** Roads / streets may remain private, (most commonly but not exhaustively): -
- on 'gated' developments;
 - where a local authority does not consider adoption of the private street would have a wider public benefit;
 - where the number of houses falls below the threshold applied by the local authority to consider adoption; and / or
 - where the developer and / or residents have decided that the roads / streets should remain private for technical, security, legal or other reasons
- C.7** If the road is not adopted by the local authority and is not intended by the developer to be adopted by the local authority, it is likely to mean that each purchaser may be liable for on-going maintenance costs as well as other on-going costs and liabilities.
- C.8** Such liabilities may relate to utilities and services including drainage (property and road including gullies etc.), street lighting and 'slips and trips'. This may be covered either through private covenant responsibilities and obligations or more likely via charges paid to a management company. It is important, therefore to check the proposed title documentation and take independent legal advice on the implications.
- C.9** For example with sewerage and drainage you are likely (but this should be confirmed) to have a right to use the drains and sewer, but that right is likely to come with an obligation to maintain and repair it at your cost or part cost shared with your neighbours / others. In these circumstances you may want to have a drainage survey done to ensure it will meet the requirements of the property.
- C.10** There may also be on-going issues with other utilities and services as some local authorities may not provide rubbish collection or street-cleaning services and public transport operators may not serve private roads and estates. This could mean that you need to carry or move your bins to the nearest adopted highway for collection, which may be some distance.
- C.11** You should also ensure that you actually have appropriate rights of access to your property, for example can you access your property on foot and also by wheeled access. You should also understand who also has a right of access or easement for utility access etc. this may restrict what you do with your property in the future. Third parties such as utilities may have rights to enter your property / garden without notice to access their plant.
- C.12** It is suggested that you make sure you are aware of exactly what your responsibilities (financially and other) will be to maintain the roads, pathways and any communal areas and services on the development. It is suggested that you seek independent legal advice as soon as possible on these issues.

- C.13** Your property search may reveal that there may be an outstanding notice under the APC (see Part 3 of this Advice Note), which may affect your property even if the road is to remain a private street.
- C.14** Mechanisms to seek adoption of a road that may not have been intended to be adopted by a local authority are explained in this Advice Note (Please refer to Part 2 of this Advice Note). The requirements for this process are detailed and specific and it is, with all aspects of such a significant purchase, that you seek independent legal advice.

Road adoption on residential developments

- C.15** In most cases developers are likely to intend that the roads and pathways will be adopted by the local authority to be highways maintained at public expense. It will be important for you to know what arrangements have been made between the seller or developer for the adoption of roads and services. However, at the time of sale there may be no legal agreement in place that the roads and pathways will actually get adopted. As such there should be no presumption that a road will be adopted by a local authority to be a highway maintained at public expense.
- C.16** You should also ensure that you have appropriate rights of access to your property and understand who also has rights of access or easements (for utility access etc.) that may affect what you can do with your property in the future.
- C.17** Mechanisms for the adoption of private streets and new roads are covered in this Advice Note. Agreements for the adoption of a road are usually under Section 38 of the 1980 Act.
- C.18** Access from an existing road may be subject to an agreement under Section 278 of the 1980 Act (please see Part 1 of this Advice Note). It is suggested that where these agreements are not in place or are not being progressed, for example where the developer says adoption will take place via Section 37 of the 1980 Act, that the implications for your purchase are clearly understood (please see Part 4 of this Advice Note).
- C.19** It is suggested that independent legal advice is sought to ensure the level of the retention of purchase price is sufficient to protect your interests in the event that the developer fails to complete the roads, or fails to secure adoption by the local authority for the roads to become a highway maintained at public expense.
- C.20** It is important to know the circumstances under which the appropriate body will be responsible for the drains if that is proposed. Where such transfers are proposed you should satisfy yourself and take appropriate legal advice that appropriate legal agreements are or will be in place. It is also important to understand whether the lack of any agreement for an appropriate body to take on the drainage needs to be reflected in any retention of the purchase price until the drains have been transferred (if that is proposed).

If it goes wrong

- C.21** It should be noted that there is a risk, even where the correct agreements have been signed, that there may be significant delays before adoption by the local authority. In addition it should also be noted that in some cases circumstances may arise where it may not be possible for the local authority to adopt the road. There are several reasons why this may happen. The most likely reasons are that the road is incomplete; not built to the required standard; or the drainage is not yet adopted by an appropriate body.
- C.22** An agreement via Section 38 of the 1980 Act provides the local authority with a right to step in if a developer defaults on the agreement in some manner. However the local authority does not have any obligation to do so, and any decision is at the discretion of the local authority.
- C.23** You should be aware that if the property is purchased before road adoption takes place that you will be liable for the access ways outside your properties in respect of other users 'slips' 'trips' and 'spills' (see such legislation as 1984 Occupiers Liability Act), until the road is adopted to be maintained at public expense. In addition, depending on your property title and extents you may also have responsibilities for the road, which could include the pavement.
- C.24** Where road adoption does not go forward you may want to consider seeking adoption using the Private Street Works Code (please see Part 2 and Part 2 (A) of this Advice Note. The requirements for this process are detailed and specific and it is, with all aspects of such a significant purchase, that you seek independent legal advice.