

Highway Development Agreements Guidance

An overview guide for developers in Hampshire



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Purpose of This Document

This guide details the overarching processes and methodology for delivery of highways schemes being brought about by development and the adoption of any associated development roads and infrastructure by the Highway Authority. The guide is for individuals or companies implementing a change to the highway or creating new highway (developers) and their consultants and sets out the different highway [legal] agreements under the relevant sections of Highways Act [1980] and which are applicable to developments at different stages of delivery and points to other relevant policies. This document is split into two sections; Section 1 relates to works to existing highway and Section 2 to on-site works.

Context

This document is one of a set of five guidance documents developed by the Highway Development function to assist developers deliver their highway schemes to the standards required by the Highway Authority. Other documents to be aware of are:

- [Section 38 Guidance for Developers](#)
- [Section 278 Guidance for Developers](#)
- [The Advance Payments Code Guidance Note](#)
- [The Developer Portal User Guide](#)

A summary table covering key information for S278 and S38 submissions and the associated legal agreements is contained in Appendix A.

The Highway Developments Function (HD) and Contact Details

The Highway Development Function is made up of the following teams:

- Highway Development Planning (HDP), who undertake the statutory function of assessing planning submissions as the Highway Authority, highways.development.planning@hants.gov.uk.
- Highway Development Client (HDC), who have the authority to enter into S278 and S38 agreements, assist developers where required and provide a monitoring function of the Design Audit Service, highway.developmentclient@hants.gov.uk.
- Highway Development Agreements (HDA), who undertake the Design Audits and inspection services for all Section 278 and 38 submissions and provide technical support to the teams above, roadagreements@hants.gov.uk.

Additional Services

There are optional services for developers or their design consultants seeking additional support and guidance through the submission process, from either a technical or project management and coordination perspective. These services can be tailored to meet the specific needs of the developer or the development depending upon the planning status.

Full details of the services provided is included within the Highway Development Sold Service Brochure [Highway Development Coordinator Service | Hampshire County Council \(hants.gov.uk\)](#) or alternatively, for bespoke support please contact the Highway Development Client highway.developmentclient@hants.gov.uk.

Section 1: Works to Existing Highway

1. Types of Agreements and Licences

The following agreements and licences are available to individuals and developers to undertake works on the highway. Flowchart 1 sets out which licence or agreement is most likely to be appropriate, based on a series of questions, HCC will advise the appropriate licence or agreement based on scheme specifics if there is any uncertainty. Please consult early with HDC and HDA to avoid delays.

Removal or amendment of any Highway features and infrastructure (such as trees, hedges, streetlighting, drainage, bollards etc), can only be done via a Section 278 Agreement.

NOTE: It is an offence under Section 131 of the Highways Act 1980 if a person, without lawful authority or excuse causes damage to a highway or to certain highway equipment. Such an offence is punishable by a fine. **The appropriate completed licence or agreement is required prior to commencement of works as well as a road space permit.**

1.1. Section 171 Licence

This section regulates only the deposit of building materials and the making of temporary excavations in streets and only applies to developer works in very limited instances (e.g., trial pits to establish location/depth of utilities). This will be the appropriate licence for a temporary construction site access, where there is already an existing access and the geometry is not being amended (i.e. works to provide a temporary hardened surface within the footprint of an existing field access which is then reinstated as verge).

A Section 171 is suitable for an access for construction traffic only, it does not cover use for show homes, sales offices or staff working in sales offices and does not allow for the removal or amendment of Highway features and infrastructure such as trees, hedges, streetlighting, drainage, bollards etc, this can only be done via a Section 278 Agreement.

All Section 171 Licence applications are reviewed and approved by the Highway Operation Centre. Further information can be found at the following link:

[Section 171 Licence](#)

1.2. Section 184 Licence and Section 171 Licence

A Section 184 Licence is suitable for new vehicle crossings over footways and verges, normally providing dropped kerbs and strengthening the footway and verge

for vehicle use. A Section 171 Licence must also be applied for and allows a contractor to temporarily deposit materials or make an excavation in the public highway and therefore enables the delivery of permitted vehicle crossovers. (Vehicle crossover, defined as a vehicle crossing over a verge or footway within the exiting Highway Boundary).

This type of licence is only appropriate for minor highway works consisting of vehicle crossovers **not exceeding 10m** in width and sewer connections and does not allow for the removal or amendment of Highway features and infrastructure such as trees, hedges, streetlighting, drainage, bollards etc, this can only be done via a Section 278 Agreement.

Further information on gaining the relevant licence agreements and how to apply can be found on Hampshire County Council's website [Section 184 Licence](#) and [Section 171 Licence](#).

There may also be instances where works are undertaken under a Section 171/184 Licence where later Section 278 works will be implemented at the same location. For example, where a construction access is situated in the same location as the permanent access. In this instance, it is in the developers' interest to make contact and request the works are inspected by the Highway Development Agreements team to avoid issues during the permanent junction construction. A S171/S184 Licence at the location of the S278 Works will only be considered and inspected if the associated S278 design submission has been received and accepted by HDA.

NOTE: Temporary site accesses may also be subject to a separate planning permission, advice and guidance should be sought from Highways Development Planning and the Local Planning Authority.

For any advice on the type of agreement required for any works contact the Highway Development Client team; highway.developmentclient@hants.gov.uk

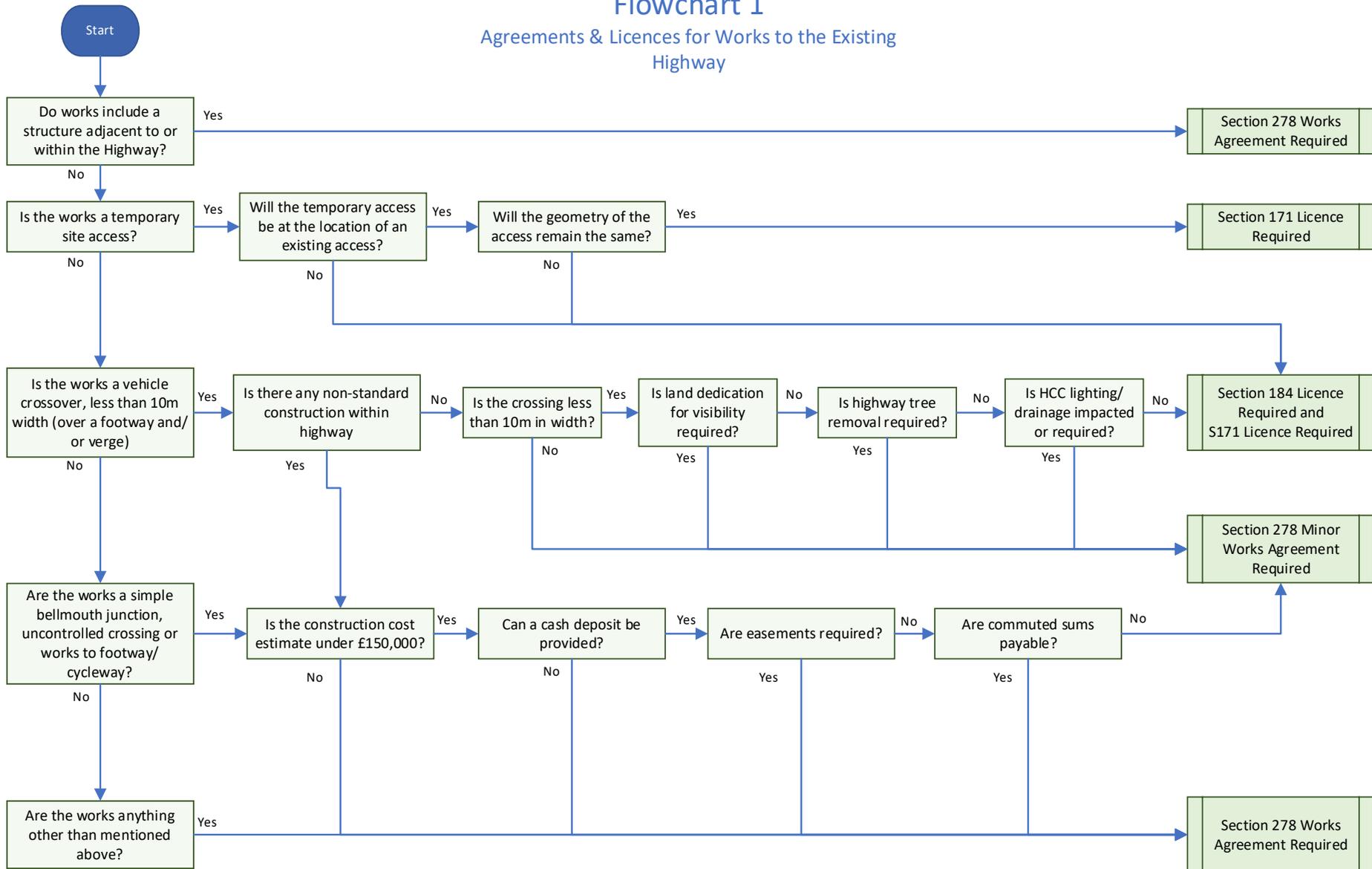
1.3. Section 278 Agreement

The legal agreement sets the requirements, standards and timescales by which the works must be constructed, defines the process, liabilities and provides for the collection of any fees incurred by the authority in association with the works and secures commuted sums for their future maintenance.

The majority of developer works will be delivered through the S278 process. In order for works to commence on the highway, a legal agreement needs to be completed. All technical submissions including relevant certificates for specialist design work must have been approved or signed off and will be included in the agreement. The rest of Section 1 of this document covers the Section 278 process.

NOTE: A Section 278 Agreement is also required for the removal of highway trees, see Section 4.3 for more information.

Flowchart 1 Agreements & Licences for Works to the Existing Highway



2. The Section 278 Process

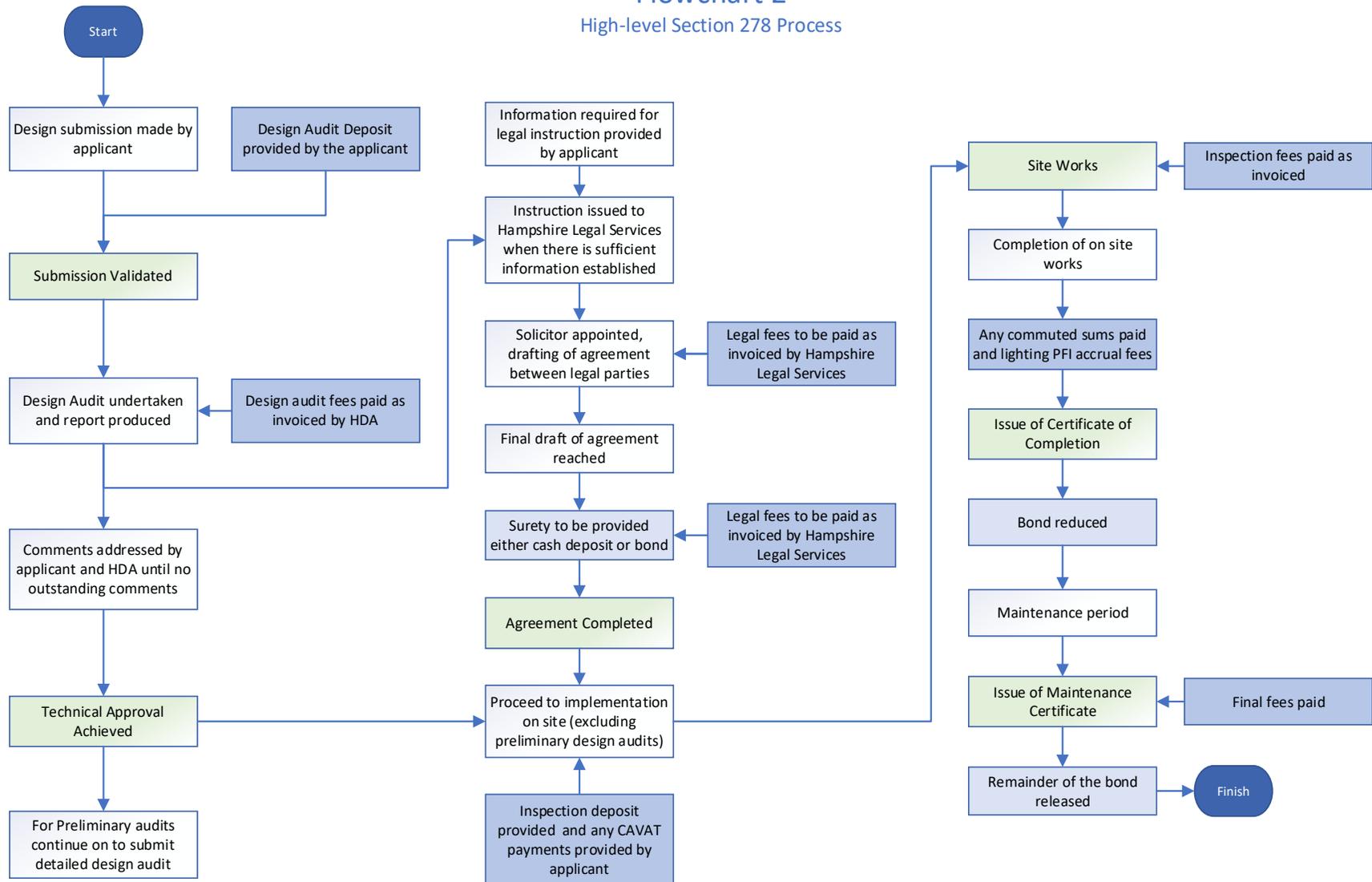
There are two principal elements to the S278 process: the design audit and the legal agreement. The technical audit ensures compliance with National and Local Technical Standards and the Legal Agreement secures the requirements of the developer and their contractor as well as the HCC. The submission of the design via the Developer Portal initiates the whole process and allows audit of the design to commence followed by the drafting of the legal agreement.

Both technical approval and completion of the agreement need to be achieved prior to works commencing on the highway. There are other requirements which also need to be in place prior to works commencing, with full details of these being contained within [Section 278 Guidance for Developers](#).

Flowchart 2 sets out the high level S278 process, covering submission through to issue of the maintenance certificate.

Drafting of the legal agreement can be done whilst progressing the design audit. Once both the technical approval and legal agreement is secured, road space can be booked, to allow the works to progress to site works. Site works are inspected against the agreed plans throughout the construction process. Once works are complete, and all other requirements are in place (e.g. RSA, as-builts, payment of commuted sums) a Certificate of Completion will be issued. The works then remain under the maintenance responsibility of the developer for a minimum of 12 months, once this is complete and any defects remediated the final Maintenance Certificate will be issued.

Flowchart 2
High-level Section 278 Process



3. Section 278 Design Audits

There are four types of Section 278 design audits:

- Minor Works Design Audit
- Combined Design Audit
- Preliminary Design Audit
- Detailed Design Audit

The audit types are explained further below, Flowchart 3 sets out the type of design audit which is likely to apply.

Appendix A provides a summary of useful information pertaining to each type of submission and legal agreement.

3.1. Minor Works Design Audit

A Section 278 Minor Works Design Audit is appropriate in most cases for the following works: bellmouth junction, footway/cycleways and uncontrolled crossing facilities. This type of audit is not suitable where there are alignment changes, or for works containing any ITS equipment or structures.

3.2. Combined Design Audit

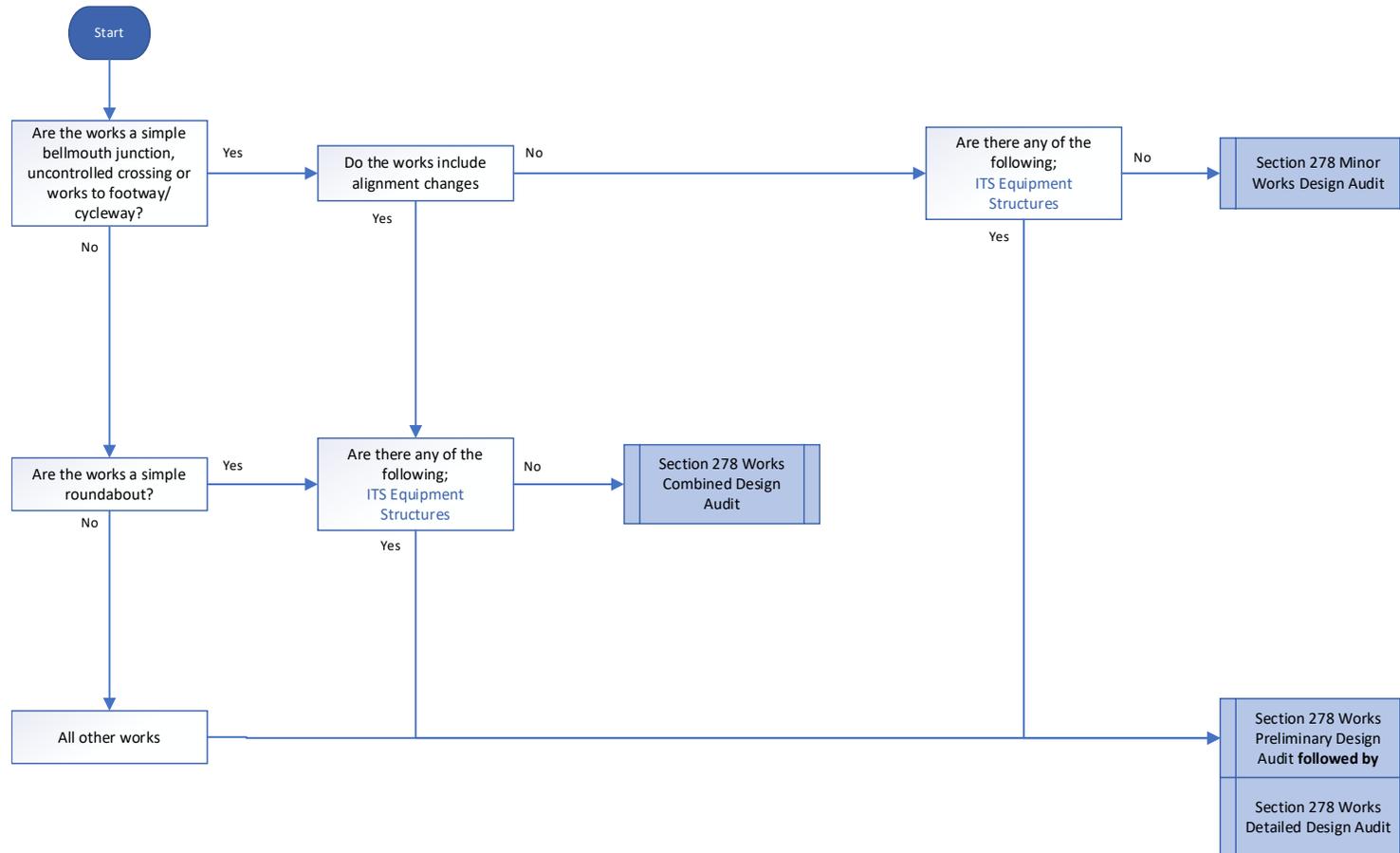
A Section 278 Combined Design Audit is applicable for works comprising simple roundabouts, (where a simple roundabout comprises of single lane entrance and exit with no more than four arms) and works entailing alignment changes but is not suitable for works with structures or ITS equipment.

3.3. Preliminary Design Audit Followed by Detailed Design Audit

A two-stage design audit process is applicable for all other works not covered by a Minor or a Combined Design Audit. This is made up of a Section 278 Preliminary Design Audit followed by a Section 278 Detailed Design Audit.

Note: The Detailed Design Audit submission cannot be made until the Preliminary Submission has achieved technical approval.

Flowchart 3
Section 278 Design Audits



3.4. Section 278 Design Audit Submissions

All design audit submissions are to be made through HCC's Developer Portal. You will be able to track your application and you must invite other users (such as the developer or other consultants) to each individual application so that you can all instantly see the latest status, share the progress and work together to progress the application promptly. Further information can be found at:

[Section 278 Guidance for Developers](#)

The portal enables communications and messages to be recorded in one location which is then accessible to all parties involved in the application. Refer to the following guides for further information:

[Developer Portal User Guide](#)

NOTE: HCC cannot add others to the application, please ensure that the party who makes the application invites other interested parties (who can then also invite others).

Each type of submission has a minimum level of information which is required before it can be submitted to HCC for review, this submission checklist is available at the following links:

[S278 Minor Works Submission Checklist.](#)

[S278 Combined Design Submission Checklist.](#)

[S278 Preliminary Design Submission Checklist](#)

[S278 Detailed Design Submission Checklist.](#)

3.5. Section 278 Design Audit Timescales

The target timescales for returning the initial design audit report to the applicant, from the date the application is validated (all items received and deposit paid), are shown within the table below. If it is not possible to return the report within these timescales, the HDA Engineer will contact you in advance and advise of revised timescales.

Each subsequent iteration of the report, where there are outstanding comments, is aimed to be issued as per the below table, after return to the HDA Engineer via the Portal.

Design Audit Type	1st Design Audit Report Target Timescales	2nd Design Audit Report Target Timescales	Further Design Audit Report Target Timescales
Minor Works	3 weeks	2 weeks	2 weeks
Combined	6 weeks	3 weeks	
Preliminary			
Detailed			

3.6. Section 278 Design Audit Outcome

A report will be drafted by an Engineer from the HDA team, which will then be uploaded onto the Developer Portal along with any subsequent iterations of the report until there are no further comments and the report is signed off (by the Chief Engineer). Once the design is approved, the agreement can be signed and can progress to implementation.

If the design is not approved, the scheme cannot be progressed in the proposed form. The report shall include details of why the design is not approved and whether any changes are possible to make the design acceptable to the Highway Authority. It is advised that the developer engage with the Highway Authority on the required changes prior to re-submitting. If after three rounds of iterations the report outcome is "Not Approved", a new submission will need to be made and all outstanding fees paid. Please note, the new submission will require a new initial fee deposit.

4. Section 278 Legal Agreement

The agreement secures the requirements of all parties to the agreement, the scope of works, the standard of construction, extent of any land to be adopted, easement requirements, the certification requirements, surety provision and also provides for the collection of any moneys payable in terms of fees, commuted sums, CAVAT payments or streetlighting accrual fees.

There are two types of Section 278 agreement in Hampshire:

- **Minor Works Agreement:** A Section 278 **Minor Works Agreement** is applicable for **simple bellmouth junctions, uncontrolled crossings or works to a footway or cycleway**. The construction works cost needs to be equal to or less than £150,000, with no easements or commuted sums payable. If any of these are required, then a Section 278 Agreement will be applicable. No amendments are accepted under this form of agreement, if amendments are required to the terms of the agreement this needs to be dealt with through a full agreement.

Additionally, a bond cannot be secured with a minor works agreement, only a cash deposit. If a bond is required then a full agreement must be used.

- Section 278 Agreement: A **Section 278 Agreement** is applicable for **all other forms of works to existing highway** where one of the afore-mentioned licences or agreements is not applicable. It covers works where the cost is greater than £150,000, where a cash deposit cannot be provided, an easement is required, and when commuted sums are payable.

When there is sufficient information, HDC officers will instruct a solicitor from Hampshire Legal Services (at the appropriate point in parallel with the design audit process), a solicitor will then be appointed. They will contact the solicitor appointed on behalf of the developer and request an undertaking. Once the undertaking is received, they will circulate a draft agreement and communicate with the developer's solicitor until a final draft is agreed. This draft will then be recommended for authority to produce engrossments and be completed to the HDC Team Leader.

NOTE: Instruction to Hampshire Legal Services cannot be given until all the required information is received.

NOTE: Hampshire Solicitors cannot commence work on the draft until an undertaking is received, which could delay the start of works. Please instruct your solicitor accordingly to avoid delays.

4.1. Section 278 Surety (Bond or Cash Deposit)

Either a cash deposit or bond is to be deposited or provided with HCC prior to the signing of the agreement and the works commencing on site. This secures the ability of HCC as the Highway Authority to complete the works or re-instate the highway to an appropriate standard if the developer defaults. A Minor Works Agreement can only be completed with a **cash deposit**. If a cash deposit cannot be provided, a bond will have to be provided, meaning that a "full" S278 Agreement will be required.

For both agreement types, the value of surety required is the tendered value (provided by the applicant) of the works (checked by HCC), plus the cost of any unpaid statutory undertakers works, plus 10%.

Upon completion of the works and issue of the Certificate of Completion the surety value will be reduced to 30% of the original surety value or £10,000, whichever is the greater.

The issue of the Certificate of Completion triggers the start of the developer maintenance period. The remainder of the bond or surety is released upon issue of the Certificate of Maintenance.

4.2. Commuted Sums

In many cases highway works required as part of a development constitute an increased maintenance liability on the County Council that would not have been present without the construction of these works. It is therefore required, that the developer pay commuted sums for these elements of works, in accordance with HCC's adopted [Commuted Sums Policy](#). If commuted sums are known about prior to construction then a full agreement is required. The commuted sums are payable prior to issue of the Certificate of Completion. If items which incur a commuted sum, are added during the maintenance period, these will be payable prior to the issue of the Certificate of Maintenance.

For minor works agreements, in the rare occurrence an item may be required later (e.g. as a result of an RSA 3 or 4), this will be taken as a payment at time of installation.

4.3. Payments for Loss of Highway Trees CAVAT

HCC recognises trees on highway land as public capital assets, playing a key role in the conservation of Hampshire's biodiversity as well as enhancing the environment for residents. Where tree removal is necessary, HCC requires compensating for the loss of this asset. Hampshire [policy](#) in place covering how this compensation is to be calculated, is the CAVAT (Capital Asset Value of Amenity Trees) policy. Payment is due prior to completion of the Section 278 Agreement and no work in the highway, including tree removal, can be carried out without a completed S278 in place, it is an offence to do so. Further information on this can be found within [Technical Guidance Note TG15](#).

4.4. Streetlighting and Illuminated Signs

HCC's streetlighting is managed by SSE under a PFI Contract lasting 25 years (from April 2010). A flat rate charge per illuminated unit added to the inventory will be payable by the developer prior to the issue of the Certificate of Completion. The current rate is £200. Further information on streetlighting can be found within [Technical Guidance Note TG13](#).

5. Construction of the Works

Once technical approval is granted, the legal agreement is completed road space for the scheme will be booked. Prior to commencement all other forms of consents and licences are required.

5.1. Road Space

Under the Traffic Management Act 2004, Hampshire County Council has a duty to manage road works on its network. The aim of the legislation, along with a number of other acts such as the New Roads and Street Works Act 1991, is to ensure that public highways are managed for the benefit of all road users, and specifically that Streetworks on its Network are proactively managed to reduce disruption. The following guidance provides further information;

[Hampshire County Permit Scheme \(HCPS\) | Hampshire County Council \(hants.gov.uk\)](https://www.hants.gov.uk/transport-and-roads/hants-permit-scheme)

[TG22 - Temporary Traffic Management \(hants.gov.uk\)](https://www.hants.gov.uk/transport-and-roads/tg22)

There are national notification timescales that Hampshire County Council is required to provide on behalf of the developer, this needs to be considered early on in the programming of your development.

- Any works including a duration of more than two weeks of positive traffic management are deemed “major works” three months notification is required.
- Works durations of less than two weeks are deemed as minor works, two weeks notification is required.
- If the works require a closure of ANY duration, three months notification is required and a Temporary Traffic regulation must be applied for taking six weeks to process, but can run concurrently with the 3 month permitting notification mentioned above.

For minor works permits, application will not be considered until Technical Approved is achieved, the pre-start meeting has been held, and the S278 agreement is completed and any outstanding payments made.

For major work permits, application will not be considered until Technical Approval has been achieved, and there is confidence that the S278 agreement will be completed and outstanding payments made prior to the proposed start date has been reached.

5.2. Communication

It is our experience that when disruptive road works are required effective communications become a key component in the project as a whole. Effective communications provide promoters with a chance to control the narrative by justifying the disruption caused to road users' journeys, to help create a positive attitude towards the works. Positive communications can change the perception of not only the works themselves, but also the development it relates to.

The minimum communication that HCC expects as part of the of the permit application will be advised at the point of application and will typically include:

- Written notification to all affected residents and businesses explaining what is happening, what a resident/business should expect and why their routines might be adversely affected, and if nightworks are approved communication with the environmental health officer is also required.
- Written Notification to stakeholders such as the relevant County Councillor, Borough/District Councillor, Parish Council, District Council, and specific stakeholders such as bus companies, surrounding businesses

When promoting major schemes, which may include months of disruption and different styles of traffic management, we strongly recommend that communications experts are appointed to develop a communications strategy that Hampshire County Council can assess and comment on if required. This will outline who will be contacted, how and with what information, it will detail who members of the public and/or organisations can contact in the promoter's organisation for queries.

5.3. Inspections

Inspection of the works will be undertaken by Site Inspectors from the HDA team. This is to ensure construction to the approved plans. The site inspectors will retain site visit records and will be responsible for identifying defects throughout the duration of the works and the maintenance period. Please note that our inspectors are not works supervisors, and if any element of the works cannot be approved, the Contractor should seek advice from the Designer.

6. Section 278 Fees

The fees payable for a S278 submission are based on a time charge basis. The applicant is required to cover the fees incurred by all HCC Officers in dealing with the submission. This includes, but may not be limited to, activities involving the legal agreement, design audit, management, communication and inspection of the works.

6.1. Design Audit, Client Management and Inspection Fees

All officers (excluding HCC Legal colleagues and the Directors Fee, see Section 6.3 and 6.4 below) involved in Section 278 schemes are charged out at the following rates, which are subject to annual uplift. The majority of officers involved, will be grade E to H.

Grade	2024/25 Hourly Rates
A-D	£48
E	£56
F	£70

G	£87
H	£106
I	£120
J	£136

All fees are ultimately secured through the legal agreement; however, they will be invoiced as a minimum; deposit at submission, prior to completion of the agreement and prior to issuing of any certificates.

6.2. Fee Deposits

Initial fee deposits are required at time of submission and to commence inspection of site works, the level of fees incurred will be monitored throughout the process, and additional invoices will be raised if required. The table below shows the level of deposit required for each submission type. **The final fee is calculated on a time charged basis (as per the hourly rates for each officer above) and may be more than the initial deposit, where the fees are less than the deposit, funds will be returned prior to issue of the final Maintenance Certificate, at the end of the process.**

Design Audit Submission Type	Submission Deposit	Inspection Deposit
Minor Works	£5,000	5% of the tender value of the works, excluding services and statutory undertaker diversion costs
Combined Preliminary Detailed	£10,000	5% of the tender value of the works, excluding services and statutory undertaker diversion costs, or £5,000, whichever is greater

NOTE: Delays in paying invoices will result in a delay to the process. The design audit submission cannot be validated until the submission deposit is received.

6.3. HCC Legal Officer Fees

Fees incurred by Hampshire Legal Services in the preparation and negotiation of the Section 278 Agreement will be charged at actual cost dependent upon the officer time spent on the Agreement. **A solicitor's undertaking for the estimated legal costs involved will be required before the drafting of the Agreement commences.** The actual legal fees incurred (including an allowance for post completion work) will be payable **prior** to the completion of the S278 Agreement at the rates advised by Legal Services.

6.4. Directors Fee (DP Management Fee)

There is a Directors Fee on all Section 278 Agreements, which is payable prior to engrossment of the Agreement. This cost contributes towards HCC Administrative and Management Officers time from the 2050 Directorate throughout the process. The value of the fee varies depending upon the type of legal agreement and value of the works, this will be confirmed during drafting of the Agreement and ranges between £500 and £5000 and will be advised through the drafting of the legal agreement.

7. Other Items to Note Alongside Section 278 Works

There are other processes required and costs which may be incurred for Section 278 schemes, which might not be taken within the S278 Agreement itself but may still need to be paid by the developer and in place prior to commencement of works. These are separate regulatory processes, and it is strongly recommended that developers or their agents engage with the authority as early as possible, to identify costs and timescales and any impact on their preferred programmes.

7.1. Traffic Regulation Orders (TRO)

In some cases, the highway works proposed necessitate the production of a Traffic Regulation Order (either permanent or temporary). In such circumstances the full cost to the County Council in the progression of this Order will need to be recovered from the developer. Further information is found within [Technical Guidance Note TG21](#).

These are to be applied for separately via traffic.management@hants.gov.uk

The application should be made in consultation with and when advised by the HD Agreements team.

NOTE: Most permanent and all temporary TRO's will need to be in place prior to works allowing to commence. Timescales for TRO's can be lengthy and can directly impact delivery programme, this process should be started as early as possible to avoid delay.

7.2. Ordinary Watercourse Consent (OWC)

An Ordinary Watercourse is any passage through which water flows which is not part of a main river. This includes rivers, streams, ditches, drains, cuts, culverts, dikes, sluices and sewers (other than public sewers). HCC as Lead Local Flood Authority, is responsible for consenting works (**including temporary works**) that affect the flow of an ordinary watercourse, further information can be found at [make changes to a watercourse](#).

Main Rivers are typically larger streams and rivers, but some are smaller watercourse of local significance. Main Rivers are managed by the Environment Agency (EA). To identify whether your watercourse is a Main River and find out what consents or permission are required to work in or about a Main River, visit the EA's website and view their flood maps at www.environment-agency.gov.uk.

7.3. Road Space Permits

Under the Traffic Management Act 2004, notices for works on the Highway under Section 278 of the Highways Act can only be served by the Highway Authority on behalf of the Developer / Consultant. Further information can be found at [Hampshire County Council's Permit Processes](#) and www.hants.gov.uk/transport/roadmaintenance/newroadsact.

[Technical Guidance Note TG22 – Temporary Traffic Management](#) includes details of charges/Fixed Penalty Notice which will be invoiced should the permit scheme not be complied with by the Developer or their Contactor.

Section 2: Onsite Highway Works

8. New Estate Roads

New estate roads and their associated drainage features have long been considered for adoption via the Highways Act (1980), most commonly through agreements under Section 38, which are reached by consensus between the developer and the Council.

There is a wide-ranging programme of housebuilding in Hampshire through to 2030 and beyond. This supports economic growth and prosperity in the county, reinforces a need to work effectively with both developers and Local Planning Authorities (LPAs) to enable adoption. Adoption ensures that maintenance will continue in perpetuity giving confidence to residents. Further policy guidance is available at [Road Agreements Supplementary Policy Guidance](#).

Unless there is a specific desire for the development to remain private, Hampshire County Council's preference is to work with developers to agree the adoption of new estate roads (subject to adherence to required technical standards) through Section 38 of the Highways Act. Adoption of new estate roads offers certainty to residents that roads will be maintained to an acceptable condition in perpetuity.

9. The Advance Payments Code

The Advance Payments Code (or APC) is legislation that requires Hampshire County Council (HCC) to issue notice to developers and/or landowners for a surety (cash deposit or bond) to be secured, before the construction of dwellings commences.

The APC is part of the Highways Act 1980 and is designed to protect the future residents of that development. It also protects county funds as the Highways Act 1980 places powers and responsibilities on HCC, in relation to private streets.

Once an APC Notice has been served on a development, starting works on the dwellings, without securing the required bond, is in breach of the Highways Act and a criminal offence. Where a development is in breach of an APC Notice, HCC may initiate prosecution proceedings.

Further information is contained within [The Advance Payments Code Guidance Note](#).

10. The Section 38 Process

There are two elements to the Section 38 process: The legal agreement and the design audit. The design submission via the Developer Portal initiates the whole process and allows audit of the design to commence and then also the drafting of the legal agreement. Both

items can be progressed in parallel to ensure timely adoption, but the agreement must be completed before technical approval can be given.

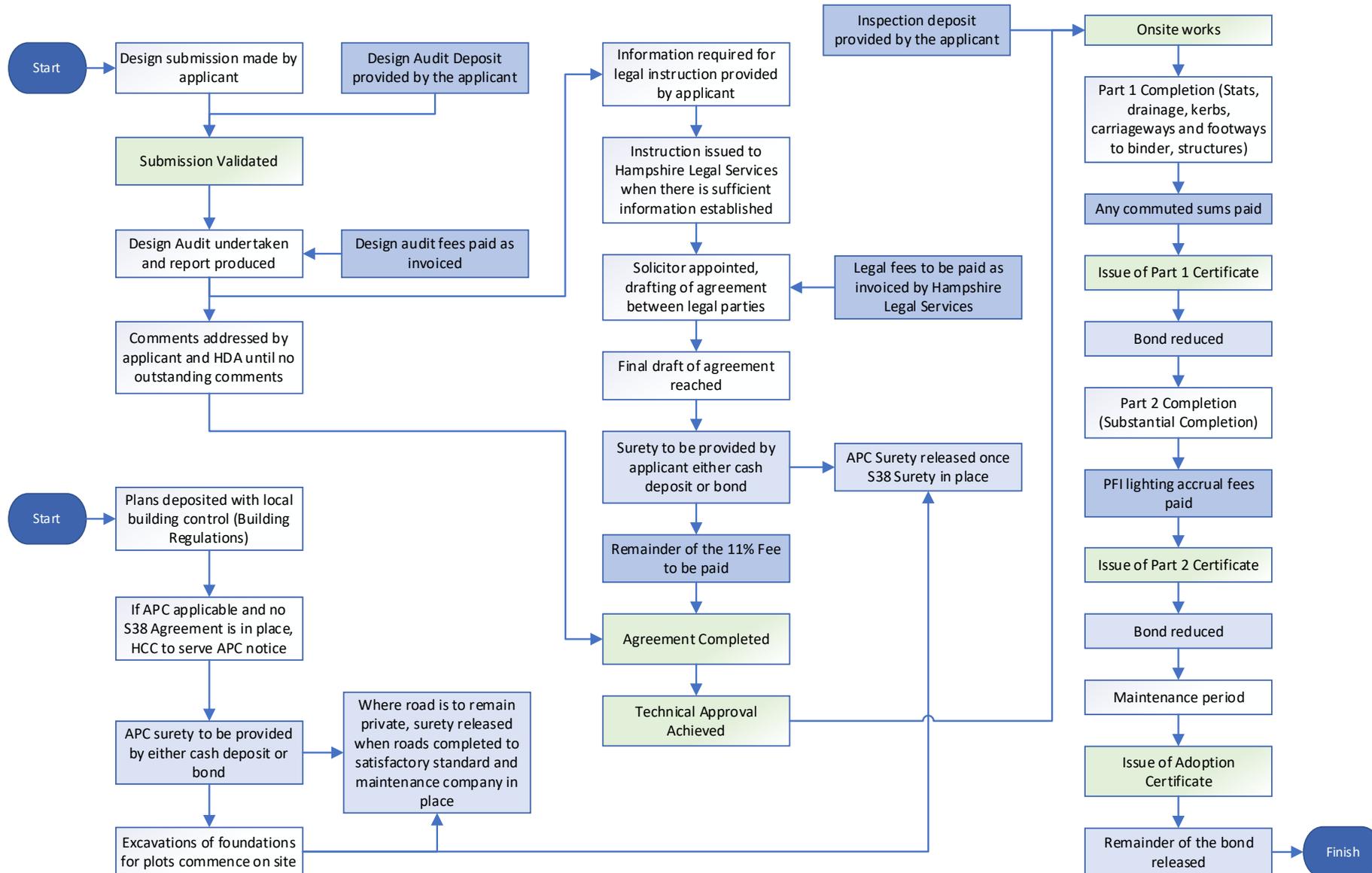
The Section 38 Agreement secures the standard of the works and allows them to be secured by an appropriate surety, which ensures that the road works can be completed in the event of the developer defaulting. The technical details and specifications for the works must be in accordance with HCC's [Technical Guidance Notes](#), Model Specification, [Construction Standard Details](#) and associated [Section 38 Guidance for Developers](#).

A Section 38 Agreement can be entered into at any time; however, it is strongly advised that a Design Audit submission is made as early as possible, prior to construction commencing to allow for early engagement and discussion. This will reduce the risk of abortive works on site and ensure that estate roads are of an adoptable highway standard to HCC.

NOTE: If a Section 38 Agreement has been entered into, the development will be exempted from the requirements of the Advanced Payments Code.

Flowchart 4 provides further information on the S38 process and how it ties with the APC process.

Flowchart 4
High-level APC and Section 38 Process



11. Section 38 Design Audit Submissions

There is only one type of S38 design audit submission, ideally all items on the checklists are required prior to the submission being made. It is however, acknowledged that some developers will be under pressure to commence works on site as soon as planning is approved. In these instances, please contact the Highway Development Agreements team in advance of making a submission, where minimum levels of information required can be advised, once the basic submission has been made and deposit paid, site inspections can commence.

11.1. Section 38 Design Audit Submissions

All design audit submissions are to be made through HCC's Developer Portal. You will be able to track your application and invite other users (such as the developer or other consultants) to each individual application so that you can all instantly see the latest status, share the progress and work together to progress the application promptly. Further information can be found at:

[Section 38 Guidance for Developers](#)

The portal enables communications and messages to be recorded in one location which is then accessible to all parties involved in the application. Refer to the following guides for further information:

[Developer Portal User Guide](#)

NOTE: HCC cannot add others to the application, please ensure that the party who makes the application invites other interested parties (who can then also invite others).

11.2. Section 38 Design Audit Report Timescales

A Design Audit Report will be provided to the applicant within 8 weeks of the validation (all items received and deposit paid), of the submission, refer to [Developer Portal User Guide](#) and [Section 38 Guidance for Developers](#) document for further information. Each subsequent iteration of the report, where there are outstanding comments, will be issued within 4 weeks of return to the HDA Engineer, unless communicated otherwise.

11.3. The Audit Outcome

A report will be drafted by a HDA officer, which will then be uploaded onto the Developer Portal along with any subsequent iterations of the report. This will be done until all comments have been addressed, with the aim of this being achieved

within no more than 3 iterations of the report. Technical approval will not formally be given until the agreement is completed.

12. Section 38 Legal Agreement

The agreement secures the scope of works, the standard of construction, extent of land to be adopted, easement requirements, the certification requirements, surety provision and also provides for the collection of any moneys payable in terms of either fees, commuted sums, CAVAT payments or streetlighting accrual fees.

When there is sufficient information, HDC officers will instruct a solicitor from Hampshire Legal Services (in parallel with the design audit process) and a solicitor will then be appointed. They will contact the solicitor appointed on behalf of the developer and request an undertaking. Once the undertaking is received, they will circulate a draft agreement and communicate with the developer's solicitor until a final draft is agreed. This draft will then be recommended for authority to produce engrossments and be completed to the HDC Team Leader or above.

NOTE: Hampshire Solicitors cannot commence work on the draft until an undertaking is received, which could delay adoption.

12.1. Section 38 Agreement Surety

The Section 38 agreement also serves as a bond, in which a bondsman also becomes party to. A cash deposit can also be provided, this needs to be requested at the time of HCC instruction to our solicitors. This surety secures the ability of HCC as the Highway Authority to carry out the works if the developer defaults on the works. This bond would secure the release of an APC bond.

The bond value will be the **HCC estimated cost** of the proposed adoptable highway infrastructure, including road works, highway drainage, structures, streetlighting, street furniture, trees and landscaping.

The bond figure will be reduced to 50%, upon issue of the Part 1 Certificate and to 15% at Part 2 Certificate and fully released upon issue of the Adoption Certificate (see Flowchart 4).

12.2. Commuted Sums

In many cases highway works required as part of a development constitute an increased maintenance liability on the County Council that would not have been present without the construction of these works. It is therefore required that the developer pay commuted sums for these elements of works in accordance with HCC's adopted [Commuted Sums Policy](#). The commuted sums are payable prior to issue of the Part 1 Certificate, this avoids the requirement for the commuted sums

to be added to the bond value. It should be noted that further commuted sums may be payable if further assets are added to the Highway after the Part 1 Certificate has been issued. For example, as a result of an RSA 3, then commuted sums for these elements will be payable prior adoption.

12.3. Streetlighting and Illuminated Signs

HCC's streetlighting is managed by SSE under a PFI Contract lasting 25 years (from April 2010). A flat rate charge per illuminated unit added to the inventory will be payable by the developer prior to the issue of the Part 2 Certificate and is currently £200. Further information on streetlighting can be found within [Technical Guidance Note TG13](#).

13. Section 38 Fees

Section 38 fees (excluding HCC Legal Officers costs) are based on a **fixed fee of 11%** of the construction estimate (based on HCC's maintenance term service contract rates and other factors applicable if HCC were to undertake the works). Any deposits, as described below, are deductible against the total fee where the agreement is completed.

13.1. Design Audit Deposit

A non-refundable deposit is required to be paid at the time of making the Design Audit submission, this is **£10,000** for all Section 38 submissions. This fee will be deducted from the final S38 balance of 11% of the value of the works.

13.2. Inspection Deposit

A second deposit is required to initiate inspection of the works, this will be payable at the time works commence on site. If works have already commenced, or have been completed at the time of submission, these will be due to be paid at time of submission. The inspection deposit will be **25% of the 11%** total fee.

13.3. Remainder of the Fee

The remainder of the 11% fee will be due upon signing of the Section 38 agreement. i.e. the total 11% fee minus the already paid Design Audit Deposit and Inspection Deposit. Where the Section 38 Agreement hasn't been entered into within 6 months of submission, HCC reserve to right to invoice for further interim deposit payments to cover the ongoing costs incurred due to the Design Audit, Client Management and Inspection up until the point of the Section 38 agreement

being entered into or until the applicant confirms in writing that they are no longer proceeding with the adoption.

Where a developer decides to pull out of the application, fees will be charged on a time charge basis as per the fees published within the S278 fees, where greater than the deposit amount.

Fee Invoicing Breakdown	Value
Design Audit Deposit	£10,000
Inspection Fee Deposit	25% of the 11% fee
11% minus any previous payments made	Remainder of the total fee

NOTE: 11% fee is based on 8 years between entering into the agreement and achieving adoption. If this takes longer than 8 years, an additional 1% fee for overrun will be applied per each additional year and will be payable prior to the issue of the Adoption Certificate.

13.4. Section 38 Legal Fees

Fees incurred by Hampshire Legal Services in the preparation and negotiation of the Section 38 agreement will be charged at actual cost dependent upon the officer time spent on the Agreement (and are in addition to the 11% fixed fee). **A solicitor's undertaking for the estimated legal costs involved will be required before the drafting of the Agreement commences.** The actual legal fees incurred (including an allowance for post completion work) will be payable **prior** to the completion of the S38 Agreement.

14. Other Items Which Might Apply for a S38 Agreement

There are other processes and costs which may be incurred during the Section 38 process which are not taken within the S38 Agreement itself but may still need to be paid by the developer. These are separate regulatory processes and it is strongly recommended developers or their agents engage with the authority as early as possible, to identify costs and timescales and any impact on their preferred programmes.

14.1. Traffic Regulation Orders

In some cases, the highway works proposed necessitate the production of a Traffic Regulation Order (either permanent or temporary). In such circumstances the full cost to the County Council in the progression of this Order will need to be recovered from the developer. Further information is found within [Technical Guidance Note TG21](#).

These are to be applied for separately via traffic.management@hants.gov.uk The application should be made in consultation with and when advised by the HD Agreements team

14.2. Ordinary Watercourse Consent

An Ordinary Watercourse is any passage through which water flows which is not part of a main river. This includes rivers, streams, ditches, drains, cuts, culverts, dikes, sluices and sewers (other than public sewers). HCC as Lead Local Flood Authority, is responsible for consenting works (**including temporary works**) that affect the flow of an ordinary watercourse, further information can be found at [make changes to a watercourse](#).

Main Rivers are typically larger streams and rivers, but some are smaller watercourse of local significance. Main Rivers are managed by the Environment Agency (EA). To identify whether your watercourse is a Main River visit the EA's website and view their flood maps at www.environment-agency.gov.uk.

Note: These are separate regulatory process from the S38 Design Audit process and it is strongly recommended that these are pursued early by the developer's consultant if the works are going to impact on either Ordinary Watercourses or Main Rivers.

14.3. Road Space Permits (Works on Existing Highway Only)

This may only be applicable to a limited number of S38 schemes, and you will be advised if this is the case in your design audit report. Under the Traffic Management Act 2004, notices for works on the Highway under Section 278 of the Highways Act can only be served by the Highway Authority on behalf of the Developer / Consultant. Further information can be found at [Hampshire County Council's Permit Processes](#) and www.hants.gov.uk/transport/roadmaintenance/newroadsact.

[Technical Guidance Note TG22 – Temporary Traffic Management](#) includes details of charges/Fixed Penalty Notice which will be invoiced should the permit scheme not be complied with by the Developer or their Contactor.

Appendix A – Submission Summary Table

Design Audit Submission Type	Fee Basis (See sections 3.3 & 8.3)	Submission Deposit	Inspection Deposit	Further payments	1st Design Audit Report Target Timescales	2 nd Design Audit Report Target Timescales	3 rd Design Audit Report Target Timescale
S278 Minor Works	Time Charged	£5,000	5% of the tender value of the works, excluding services and statutory undertaker diversion costs	Actual costs charged at regular intervals where above value of any deposit	3 weeks	2 weeks	
S278 Combined		£10,000	5% of the tender value of the works, excluding services and statutory undertaker diversion costs, or £5,000, whichever is greater		6 weeks	3 weeks	2 weeks
S278 Preliminary (followed by a detailed submission)							
S278 Detailed							
S38	11% fixed fee (based on the HCC Estimated Value of works)*		25% of the 11% fixed fee	Remainder of the 11% fee paid upon completion of the agreement*	8 weeks	4 weeks	

*based on 8 years from entering into the agreement to achieving adoption, 1% additional fee per year applicable after 8 years prior to issue of the Adoption Certificate.

Appendix B – Legal Agreement Summary Table

Legal Agreement Type	Initial Surety Value	Surety Value Reduction	
Minor S278 Agreement	Tender Value of works + unpaid SU's + 10%	After Issue of Certificate of Completion	
		The cash deposit will be reduced to 30% of the original Surety Value or to £10,000 whichever is the greater	
S278 Agreement		Bond or cash deposit reduced to 30% of the original Surety Value or £10,000 whichever is the greater	
S38 Agreement	100% of HCC estimated cost of Works	After Part 1 Cert	After Part 2 Cert
		Reduced to 50% of the value of Works	Reduced to 15% of the value of Works