

# Part 5: Adopting new roads and the advance payments code

## Section ANR1: Introduction

### General

- 5.1 This part deals with building new roads within development sites (please see Part 6 for works on existing roads). It covers LCC's requirements and procedures for managing the advance payments code and for adopting a road that you construct as publicly-maintained highway. It covers:
- what you must do when we serve you with an assessment under the advance payments code for the cost of roadworks;
  - how we refund money paid or secured under the advance payments code;
  - technical details, including drawings and details of any safety audits required before we can approve your proposed roadworks for both adoptable roads and roads to remain private;
  - a Section 38 legal agreement, which provides for us to adopt your road;
  - construction and maintenance of the road works by you before we adopt them; and
  - our fees and other payments relating to the construction and adoption of the road.
- 5.2 You should involve both us and the planning authority in consultations at an early stage of preparing your development proposals. This applies especially if the proposed layout is not explicitly covered by the guidance in this document. This will provide an opportunity to resolve any potential problems about adopting your road before you submit any planning application.
- 5.3 We will normally encourage developers to create, whenever possible, 'road' layouts that are to an adoptable standard and that will be offered for adoption for:
- residential developments of more than five dwellings; and
  - multiple-building, multiple-occupation industrial and commercial developments (developments occupied by more than one company).

We will consider other forms of development on a site-by-site basis.

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Please see:

- Part 3, Sections DG2 for design guidance on adoptable residential and commercial roads;
- DG18 for guidance on private residential developments
- DG19 for guidance on industrial and commercial developments.

## Notes:

- Wherever 'the Act' is mentioned in this part, it refers to the Highways Act 1980 unless otherwise stated.

## About Sections 219 to 225 of the Act

- 5.4 Under Section 219 of the Act, we have to assess the cost of the roadworks fronting new buildings on private roads and secure payment of these costs. This makes sure we can complete the new road to a satisfactory standard if you (the developer) fail to do so. It also makes sure that those who live on the road will not be liable to complete it.
- 5.5 Unless your proposals are exempted (see Appendix J) we will serve you with a notice of assessment detailing the costs associated with each building.
- 5.6 The advance payment code applies to all private roads that are not exempted, even those intended for adoption. We monitor all sites where we have served a notice of assessment which has not been paid or secured. If you start work on any building which has an unpaid or unsecured assessment, it is an offence to start work on any building that has an unpaid or unsecured assessment For details on how to get your advance payments code assessment refunded, please see Section ANR2.

## About Section 38 of the Act

- 5.7 Section 38 of the Act provides for us to take over and maintain at public expense (adopt) a road that you have constructed. The adoption process is covered by a Section 38 agreement.
- 5.8 Section 38(6) of the Act says: *“An agreement under this section may contain such provisions as to the dedication as a highway of any road or way to which the agreement relates, the bearing of the expenses of the construction, maintenance or improvement of any highway, road, bridge or viaduct to which the agreement relates and other related matters as the authority making the agreement think fit.”*
- 5.9 This section of the Act entitles us to seek expenses for maintenance and we intend to do this through commuted sums. This will allow us greater flexibility to adopt non-standard layouts and materials without placing undue burdens on our maintenance budget or council taxpayers. However, even if you offer a commuted sum payment, we may still resist adopting the proposed layout if we

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consider it to be inappropriate or unacceptable on highway-safety grounds. (Please refer to paragraph 5.72 onwards for further details on commuted sums.)

### Section ANR2: Our advance payment code procedures

#### The assessment notice

- 5.10 Unless your proposals are exempted (see Appendix J) we will serve you with a notice of assessment detailing the costs associated with each building. By law, the amount set out in the notice must be paid. If development is started without payment this can lead to a court action and a fine.
- 5.11 You can pay the assessment amount by cheque or cash, or we will accept a bond in some circumstances.
- 5.12 Once you have paid or secured your advanced payment code assessment, there are two ways you can have it exempted and your money refunded, or your security cancelled.
- You can enter into a Section 38 road agreement (see Sections ANR3 onwards).
  - You can finish the works to a standard that we judge will provide a durable road construction with the likelihood that only reasonable future maintenance will be needed.

#### Our design and construction requirements

- 5.13 If the road is to remain private you will need to:
- agree a construction specification and submit plans for technical approval;
  - get our approval for your plans and pay our administration and inspection fee; and
  - notify our inspector at each major phase of construction so they can inspect the works.
- 5.14 For a non-adoptable road the drawings you submit for approval should show:
- the layout and construction of the road to meet the conditions of Part 3 DG18;
  - the private-road signs erected where they do not block any visibility requirements, level with the back of the public highway, with the exact location to be agreed with the Inspector;
  - the boundary with the public highway, typically a flush kerb in the carriageway, changes in surfacing materials or any other agreed alternative;

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- the access onto the highway including gradients (generally no more than 1:10) and visibility splays;
- details of surface water drainage showing that it does not run onto the public highway; and
- any additional site-specific details and requirements of the planning permission.

### When the works are completed

- 5.15 When the road has been constructed to our satisfaction, we will serve an exemption notice under Section 219 (4e) of the Act. We will refund the advanced payment code assessment in full, with interest if appropriate, or we may cancel the bond. Please note that completing this process does not mean that the road will be of an adoptable standard, in which case it will remain private and we will not maintain it at public expense.
- 5.16 Before we grant any exemption of the advanced payment code assessment, we will need to be indemnified (insured) against any future petition to adopt the road under Section 37 of the Act at a later date. This should be done by including a covenant in the deeds of sale to each plot fronting the private road. Our Legal Services section will approve the wording of the proposed covenant before it is put in place.

### Our fees

- 5.17 We will charge for the work involved in checking and approving your plans and inspecting the works on site. Please contact us to establish the appropriate fee.

### More information

- 5.18 For more information about the advanced payment code procedure, see Appendix J.

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### Section ANR3: General requirements for entering into a Section 38 agreement

- 5.19 Before you can enter into a Section 38 agreement:
- you must obtain full planning permission for the development from the planning authority. This will include approval of any reserved matters relating to the road works; and
  - you must prove title to the land to be dedicated as public highway within the agreement.
- 5.20 You will also need to apply to us for the right to discharge surface water from the highway to an existing sewer, a proposed sewer or a watercourse. We will require proof that your drainage proposals have been approved by the relevant water authority which is (which is Severn Trent or Anglian Water.)
- 5.21 You will need to give us the approved details of all necessary easements before we sign the agreement.
- 5.22 If the highway water discharges into sewers containing roof or yard water (or both), the relevant water company must approve the proposals and they must be included in a Section 104 agreement of the Water Industry Act 1991. We will **not** sign a Section 38 agreement before you have received a 'letter of intent' from the water authority that the drainage proposals are suitable for including in a Section 104 agreement.
- 5.23 We will adopt only drains laid for the sole purpose of discharging surface water from the highway. However, you must also get consent from the Environment Agency or the water company for its discharge and we will require proof of this before entering into a Section 38 agreement. We must approve proposals for highway drainage, including calculations of surface water run-off. Highway drainage will then be included within the terms of the Section 38 agreement for future adoption.

### Section ANR4: Designing your road works

- 5.24 You should normally design your road works in line with Parts 3 and 4 of the Design Guide is document and our Specification. Our standard conditions applying to highway works for new development provides additional advice, for example on utility equipment (such as gas, water, electricity, and so on). If you have not carried out development in Leicestershire before, please first read Parts 1 and 2.
- 5.25 You will also normally be required to submit safety audits where the layout contains features which are not explicitly covered by this design guidance or is not covered in any other way by this document.
- 5.26 Where a layout contains features not explicitly covered by this design guidance you must provide a

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design statement for the safety auditor to support the proposed layout. The statement must cover:

- design speed;
- justification of visibility splays;
- service corridors and future maintenance practicalities;
- access for service vehicles including tracking;
- on-street parking;
- pedestrian routes;
- implications for people with disabilities.

5.27 Safety audits must be carried out by an accredited safety audit team that is independent from the designers.

5.28 You will be responsible for commissioning and paying for all safety audits. Please see appendix D for further information on safety audits.

### Section ANR5: Obtaining our approval for your road works

5.29 Leicestershire County Council has its own Act of Parliament that requires the owner of land on which a new street is to be constructed, or the person who holds the planning permission for this development, to obtain our approval as the Street Works Authority to plans, sections and other details of the level, width and specifications for the proposed street (including the sewers and drains) before any construction work is done.

5.30 Before carrying out any technical approval checks, we will require payment of our costs for any checking of the design and for preparing the Section 38 agreement in case the development does not take place. If you enter into the Section 38 agreement, we will deduct this from our administration and inspection fees.

5.31 We must approve your design consultant.

5.32 As soon as possible after stating that you want to enter into a Section 38 agreement, and before you have started to construct your road works, you must send us all the relevant information in line with the standard checklist we have given to you. When you have supplied all the information we need, we will carry out all the necessary design checks.

5.33 Where required you must satisfactorily complete the stage 1 and stage 2 safety audit processes and make all changes that we require before we will approve your proposed road works. (Please see paragraphs 5.58 and 5.62 regarding stage 3 and stage 4 safety audits)

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5.34 We will only issue a technical approval when:

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

However, the issuing of technical approval alone does not mean that you can start to construct the works. There are other matters which need to be addressed as set out in Section ANR7.

### Section ANR6: Completing the legal requirements

#### The Section 38 agreement

5.35 After we have granted technical approval, you must provide 13 coloured copies of the drawing to be included in the Section 38 agreement and 2 uncoloured copies of all other details. These drawings are required for completing the legal agreement, inspecting the works, providing a street-lighting scheme and for search purposes.

5.36 You must colour the drawings as follows:

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

5.37 We will prepare all documentation for the Section 38 agreement. Details to be provided at this time include:

- the name and address of the landowner;
- your name and address as the developer;
- the name and address of any bondsman;
- the name and address of the solicitor;
- proof of ownership of the land; and

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- proof of an intention to enter into a Section 104 agreement and any deeds of easements.
- 5.38 Our Section 38 agreements are in a standard format. However, at times it will be necessary to include various additional clauses for ‘structures’, ‘commuted sums’ and ‘the need for individual licences for trees, benches, bins and so on within the proposed highway limits’.
- 5.39 We will charge you a fee for preparing the agreement. Please see Section ANR9.

### The Construction (Design and Management) Regulations

- 5.40 Before we sign the Section 38 agreement, you must provide us with written proof that you have informed the Health and Safety Executive in writing that you are appointed client for the works for the purposes of the ‘Construction (Design and Management) Regulations’ (CDM Regulations). We will not sign the agreement until you have provided this proof.

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

### Surety

- 5.41 We must be protected against the risk of unforeseen expenditure if you leave the road works unfinished for any reason. We will calculate the cost of the road works, including any highway structures, highway drainage and commuted sums (where applicable) and you must provide us with an appropriate surety equal to the cost that we calculate. This may be in the form of:
- a bond with a recognised financial institution; or
  - the equivalent sum of monies lodged with us.
- 5.42 For information on the fees we charge for road works covered by Section 38 agreements and on commuted sums, please see Section ANR9.

## Section ANR7: Constructing the road works

### Before you begin

- 5.43 Where works are being carried out under a Section 38 agreement, you must not begin construction unless and until:
- we have given you technical approval;
  - the Section 38 agreement has been completed and signed and an appropriate surety is set in place;
  - you have provided us with written confirmation that you have notified the Health and Safety Executive that you are client for the works for the purposes of the Construction (Design and Management) Regulations (see paragraph 5.42 for further details);
  - all necessary fees have been paid to us; and
  - the following requirements have also been satisfactorily completed.
- 5.44 **Notification of start:** You must normally give us at least five weeks' notice in writing of your intention to begin construction work or begin it again.
- 5.45 **Approving your contractor:** Your road works must be constructed by a contractor (including any subcontractor) who has relevant experience and capabilities and who must be approved by us or on our select list if applicable. You must not start construction of the road works until we have approved your contractor.
- 5.46 Where we have had no previous experience of a contractor's work you will be required to provide us with satisfactory references and examples of similar work which they have successfully completed to the satisfaction of a highway authority. Where you are unable to do this, or where we have previously experienced problems with a contractor (for example with quality of workmanship), we will not approve that contractor.
- 5.47 **The contractor's insurance:** You must indemnify us (protect us from legal responsibility) against any claims by third parties arising from the road works. Before we will approve your contractor they must provide us with written evidence that they have, as a minimum, £5 million public liability insurance with no limit on the number of claims.
- 5.48 **Pre-start meeting:** You must arrange a 'pre-start' meeting with the Infrastructure Planning team to establish and emphasise our stance on any issues, including:
- approving and issuing drawings;
  - testing procedures;
  - inspecting works;

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- traffic control; and
- agreed start dates.

Please see our document 'Standard Conditions Applying to Construction' for further details on pre-start meetings.

- 5.49 The meeting should be attended by your representative, the designer, your contractor for the road works, the development inspections officer and the development approvals engineer.

### Health and safety

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

### Site inspection

- 5.51 You are responsible for the day-to-day supervision of the road works construction. We will only inspect the works to check that they are being constructed in accordance with the approved drawings and our requirements. Access to the works must be given to our representative at all times. If problems arise, we will be happy to discuss possible solutions with you, but it will still be your responsibility to instruct your contractor and make sure that the works are satisfactorily completed in accordance with our requirements.
- 5.52 Inspecting construction of the road works included in the Section 38 agreement will normally be carried out by the relevant Development Inspections staff. We will give you this information at the 'pre-start' meeting. Access to the works must be given to our representative at all times. These visits do not free you from your responsibility for supervising the work and making sure that it is carried out in a proper and safe manner, and in line with the specification.

### Timescale for completing the road works

- 5.53 Once you have begun work on site it is your responsibility to complete the road works to our satisfaction and to make sure the adoption takes place within a 'reasonable' period to minimise any potential risks or inconvenience to residents.
- 5.54 We impose a time limit on completing road works. Normally, the works must be completed, that is we have issued a provisional certificate, either:

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

whichever is soonest.

5.55 Where you do not complete the road works within the specified time limit, and we agree an extension of time, we will charge you extra fees towards our additional administrative and inspection costs. Please see paragraph 5.70 for further details. We may call on the bond or use the surety monies that you lodged with us to complete the works.

## Section ANR8: Maintaining and adopting the road works

### Issuing a provisional certificate

5.56 We will issue a provisional certificate of completion once:

- you have substantially completed the road works to our satisfaction;
- you have completed all street lighting to our satisfaction;
- any new planted landscaping areas, grassed areas, trees, shrubs and so on that we are to adopt have been fully planted and established;
- the works (including any existing and new planted landscaping areas and so on) have been jointly inspected (that is by us, you and your contractor) and no significant defects have been identified, or where they have, you have agreed to remedy them to our satisfaction; and
- where required, any stage 3 safety audit has been completed and all changes that we require have been made satisfactorily.

5.57 When we issue a provisional certificate, the amount of bond excluding the commuted sums element can be reduced, usually to 90% of the original amount. The exception to this is where you are paying us a commuted sum in which case the bond cannot be reduced to a value less than the provisional commuted sums that we have calculated.

5.58 You will then be responsible for maintaining the road works for a minimum period (usually twelve months). This allows any defects in the works to become apparent after they are brought into use.

5.59 Any variations to the areas originally dedicated as public highway in the Section 38 agreement must be included in a supplemental agreement at this time.

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## Issuing a final certificate

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

- You must contact us at the end of the maintenance period to arrange a further joint inspection of the road works (including any landscape planting, trees, grassed areas and so on). We will issue you with a list of any outstanding remedial works we require you to do, which you must then complete to our satisfaction.
- You must have maintained the road works to our satisfaction during the maintenance period.
- You must have maintained any existing or new landscape planting, trees, shrubs, grassed areas and so on to our satisfaction during the road works' maintenance period.
- You must provide us with a copy of the provisional certificate of adoption for the drainage and sewers, as issued by the relevant water company.
- You must pay us any commuted sums that are required.
- You must pay us any other charges that are required, for example some Authorities require payment to cover the bulk clean and lamp change for illuminated signs (see Part 4, paragraph 4.106) or to cover similar for street lighting (see Part 4, paragraph 4.121).
- Where the new road is subject to a safety audit, stage 4 must have been completed to our satisfaction. We will decide whether we can issue the final certificate once the stage 4 12-month report has been completed. (Please see appendix D for further information on safety audits).
- You must provide us with 'as built' drawings, preferably in an electronic form such as AutoCAD on CD.
- You must provide us with the health and safety file, on CD, produced in line with the Construction (Design and Management) Regulations 1994 (CDM).

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

- issue a final certificate of completion;
- inform you that the bond can be cancelled;
- post notices of adoption on-street; and
- adopt all areas dedicated within the Section 38 agreement as highway to be maintained at public expense.

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## Section ANR9: Payments to us

### Our fees

- 5.62 We make a charge for the work involved in:
- preparing and managing the Section 38 agreement;
  - checking the design of the road works, any associated structures and any highway drainage; and
  - inspecting the works on site.
- 5.63 The charge for administration, design checking and site inspection is normally a fixed percentage of the estimated cost of the total road works, as calculated by us, excluding any associated structures (see below) and SuDS and 'non-standard' drainage systems.
- 5.64 We will make additional charges for design checking and site inspection of highway structures based on 'actual' costs. (Please see Part 4, Section MC14 for further details on structures.) We will also charge additional fees, based on 'actual' costs, for SuDS and 'non-standard' drainage systems. (Please see Part 4, Section MC7 for further details on drainage).
- 5.65 We will also charge a separate fee of 10% on any commuted sum towards the costs of our additional administration and inspection work.
- 5.66 There is also an additional fixed fee for each agreement plus disbursements (money we pay on your behalf) to cover legal costs. This fee is fixed by our Legal Department and we review it every year.
- 5.67 We will also charge an additional fixed fee for any supplemental agreement for extra administration work.
- 5.68 If the road works are still not complete after the time limit specified in the agreement, we will offer you an extension of up to three-years; however we will re-assess the bond and charge you a further inspection fee based on our assessment of the cost of the outstanding works.
- 5.69 If a period of two years or more has elapsed since we issued the provisional certificate and the final certificate has not yet been issued, we will charge you a further fixed fee for additional administration and inspection work.

### Commuted sums

- 5.70 We normally required commuted sums to cover maintenance of such items as highway structures, noise fencing, traffic signals and 'heritage' street lighting where they are to be adopted as part of a publicly maintained highway<sup>7</sup>. We have now broadened this requirement to give us greater flexibility to adopt 'innovative' layouts and 'non-usual' materials without placing undue burdens either on our budgets or on Council Taxpayers.

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5.71 Where in principle we are prepared to adopt them, you will normally also have to pay commuted sums on:

- additional areas exceeding usual highway design standards and which are not required for the safe functioning of the highway;
- materials outside our usual Specification;
- non-usual or additional street furniture;
- landscaping within the proposed highway, including trees; and
- sustainable drainage systems (SuDS), for example, flow-attenuation devices, swales and storage areas).

### **Note:**

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

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

5.72 Part 4, Section MC17 gives more details on commuted sums and how we calculate them.

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### **Application for an agreement under Section 38 Highways Act 1980 Submission check list**

The following information is required before the Section 38 can be processed.

Prior to undertaking technical approval checks, we will require a payment to be paid to cover their costs for any checking of the design and preparation of the Section 38 Agreement in the event of the development not taking place. If the Section 38 is entered into then this £1000 will be deducted from the required administration/inspection fees.

The design consultant must be approved by us.

All requested relevant information must be supplied, as this will reduce the time taken to complete the agreement.

It is an offence under each local authority Act of Parliament for work to be carried out for the purpose of constructing a street other than in accordance with plans approved by the Street Works Authority.

Confirmation is required that the submitted layout conforms to all planning requirements.

Please supply one copy of a 1:500 scale plan, drawn on a current survey base, together with calculations and supporting documents showing all relevant details in respect of the following:

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## Application for an agreement under Section 38 Highways Act 1980

### Submission check list

<p><b>Layout:</b></p> <ul style="list-style-type: none"> <li>Plans indicating the areas of proposed highway offered for adoption</li> <li>Plans indicating the position of all carriageways, footways, footpaths, cycleways, verges, service strips, visibility splays, traffic calming features, surface water drainage including gully positions, position of dwellings, gradients of driveways, garaging and/or parking spaces with vehicular crossings, traffic signs, road markings and structures</li> <li>For layouts not conforming to normal HA standards, a drawing and schedule indicating different materials proposed together with appropriate areas for use in the calculation of commuted sums</li> <li>Drawings in 'AutoCAD' format will be printed by the Authorities and distributed as required</li> <li>Safety Audit</li> </ul>	Tick
<p><b>Vertical Alignment:</b></p> <ul style="list-style-type: none"> <li>Longitudinal sections of the carriageway showing existing and proposed levels for the centre line, channel, gradients and vertical curves with the appropriate horizontal road layout drawn below this section.</li> <li>Longitudinal sections must also indicate surface and foul water sewer profiles including the position of manholes, gradients, pipe sizes etc.</li> </ul>	
<p><b>Standard Details:</b></p> <ul style="list-style-type: none"> <li>Typical cross sections showing carriageway, footway and verge construction including details of kerbs and edgings (as per standard drawings)</li> <li>Typical construction details of footways, footpaths, cycleways, vehicular accesses and pedestrian crossing points kerbs, manholes and pipe bedding (as per standard drawings)</li> </ul>	
<p><b>Ground Conditions:</b></p> <ul style="list-style-type: none"> <li>A geotechnical report, including CBR test results at formation</li> </ul>	
<p><b>Drainage:</b></p> <ul style="list-style-type: none"> <li>Details of existing and proposed surface and foul water drainage, including a highway gully layout</li> <li>Calculations of surface water run-off, 'micro drainage' etc</li> <li>A manhole schedule</li> <li>Details of deeds of easements and discharge consents</li> </ul>	
<p><b>Landscaping:</b></p> <ul style="list-style-type: none"> <li>Details of planting and additional maintenance proposals</li> </ul>	
<p><b>Other Features:</b></p> <ul style="list-style-type: none"> <li>Any specialist information regarding bridges, culverts, headwalls and retaining walls supplied on separate drawings</li> </ul>	
<p><b>Street Lighting:</b></p> <ul style="list-style-type: none"> <li>LCC has an in-house street lighting design team that carries out all the lighting for S38 and S278 works. All of LCC lighting designs are in accordance with BS5489. Any design that is not carried out by LCC will have to comply with BS5489, well as any additional LCC street lighting requirements, such as part time lighting and provide details on any impact on the existing lighting system as part of the Section 38 submission.</li> </ul>	