

NEATH PORT TALBOT COUNTY BOROUGH COUNCIL

Cabinet

30 July 2020

Report of the Head of Engineering & Transport D. W. Griffiths

Matter for Decision

Wards Affected: All Wards

Policy for Section 38 Agreements (Highway Adoptions) Under the Highways Act 1980.

1.0 Purpose of Report

1.1 To seek Members' approval for a Policy for section 38 highway adoption agreements for Neath Port Talbot County Borough Council (the "Council").

2.0 Background

Statutory Responsibilities

- 2.1 The 'Council' as a Highway Authority has an important role to discharge in exercising its powers to adopt highways under the Highways Act 1980. Any highway proposed for adoption must be directly linked with the existing public highway network, and be of sufficient utility to the public and offer wider community benefits.
- 2.2 The Highway Authority has powers under section 38 of the Highways Act 1980 to adopt new highways which would then become maintained at public expense. Once a development that includes an associated highway has been granted planning permission, the developer can if they chose to do so formally apply for adoption of highways under section 38 of the Highways Act 1980. Any highway proposed for adoption by the Council will require that the freehold owner(s) of the land dedicate the road as a public highway when it is constructed under section 38 of the Highways Act 1980.

- 2.3 The intention of this policy is to allow the Highway Authority to undertake duties in relation to highway adoption, safe guarding the public, and improve upon service delivery.
- 2.4 An “adopted highway” is a highway which is maintained by the Council at public expense where the responsibility of maintaining a highway which may include: carriageways; footways; footpath links; street lighting; highway retaining structures; verges; and highway drainage such as gullies and gully leaders. Once adopted, all public liability will be with the Council as the Highway Authority.
- 2.5 The Highway Authority is able to adopt roads and footpaths that are essential to a development and allow the safe access or passage for all users of the highway, this includes vehicles, pedestrians, cyclists and equestrians. This is subject to the highway layouts and construction being undertaken in accordance with the Highway Authority current Design Guide for New Developments and the current Specifications for the Construction of Roads for Adoption.
- 2.6 Any or all new highways proposed for adoption have to be formally agreed and dedicated by the landowner(s) and/or developer whereby the highway adoption specifications and criteria meets the satisfaction of the Council as the Highway Authority before being considered for adoption, and maintained by the Council.
- 2.7 The Highway Authority do not have a mandatory duty to adopt a new highway. The adoption criteria and obligations requires any highway (Street or Road) to be of sufficient utility to the public, a constructed to adoptable standard (as approved by the Highway Authority) before becoming maintainable at public expense. At its discretion, the Highway Authority, can, if agreed between all parties, adopt a highway which may not be of sufficient utility to the public but which does still however meet the Highway Authority specification and design.
- 2.8 The most common method of adopting a new highway is for the developers and/or land owner(s) together with the Highway Authority, to enter into a section 38 agreement under the Highways Act 1980. Only the landowner(s) can dedicate the land as highway pursuant to a section 38 agreement. If the land is subject to a charge, lease or other interest then the chargee/lessee or other interested party needs to give their consent to the dedication of the

land. Once the agreement is entered into by all parties then the related highway works are carried out in accordance with the Highways Authority's (Current) highway specifications before the construction is subsequently inspected and approved by Council Highway Section officers. The newly constructed highways shall, on the issuing of a final completion certificate by the Council (following a 12 month maintenance period) become adopted by the Council, and maintained at the public expense. All highway verges to be adopted by the Council must be approved and inspected by the Highway Authority prior to adoption and be compliant with the BS4428: Code of practice for general landscape operations (excluding hard surfaces) [as amended] and BS3882: Specification for topsoil [as amended].

Recent Developments

- 2.9 The Council have recently been involved in a court case regarding highway adoption principles by a housing developer within the County Borough. The Council argued that the highway was not of "sufficient utility to the public" to justify them [the roads] becoming maintainable at public expense.
- 2.10 The final Court hearing concluded in December 2019. This particular case is thought to be one of the first of its kind in Wales and many other Local Authorities eagerly awaited the outcome. The Court found in favour of the Council and costs of circa £45K were awarded to NPT which relate to the legal and technical officers time in defending the position.
- 2.11 Prior to the above Court case taking place, Officers of the Council attended a similar court case whereby the Council for the London Borough of Barnet commenced proceedings against a developer. At the conclusion of that case, the District Judge also found in favour of the Local Council but importantly made reference to their Council's robust policy which they had published and played a significant role in influencing the decision of the Court.
- 2.12 Subsequently, as an outcome of these court actions, it is considered prudent to provide a resilient policy to advise developers on the adoption criteria as set out in Appendix 1 for consideration by members for adoption and implementation.

2.13 This policy is intended to provide both clarity on the Highway Authority's adoption criteria and will assist in discouraging developers from serving section 37 notices on the Council and to further negate the need for the Council to defend its stance through the Courts in terms of the requirements for commuted sums that are needed for the long term maintenance of the highway assets in the County Borough.

4.0 Financial Impact

4.1 Should developers successfully apply notices under section 37 of the Highways act 1980, instead of the more traditional route of highway adoptions under section 38 agreements then there will be a significant cost to the Council in respect of financing long term maintenance for any adopted highway assets. This policy defines what is acceptable for adoption by the Highway Authority and aims to mitigate this risk.

4.2 Additionally the Highway Authority could be faced with adopting a development that does not meet the design and specification criteria and would then have to finance any costs attributed to make good any defects.

4.3 For un-adopted roads there are financial impacts upon the residents themselves who would be liable for the maintenance costs for repairs on what are deemed privately maintained roads.

4.4 The adoption of this policy is intended to mitigate against these financial implications and aims to reach agreement with developers on adequate commuted sums for the long term maintenance liabilities which will enable the adoption of the relevant highways.

5.0 Workforce Impact

5.1 None

6.0 Legal Impact

6.1 The legislative provisions under the Highways Act 1980 are as set out in this report.

7.0 Risk Management

- 7.1 This policy will minimise the legal risk of litigation, together with challenges to decisions made on highway adoptions and will help to formalise current practices within the adoption process of new highways within the locality.
- 7.2 The section 37 method simply requires a developer to serve a formal notice on the Council (as the Highway Authority) requesting that a “highway be adopted by the Highway Authority and maintainable at public expense”. Subsequently, section 37 does not have any provisions within that section that would allow the Council to call upon any commuted sums payments required and to be paid by the developer/landowner. This could allow the developer and/or landowner to circumvent payments for future maintenance on highway design and materials that are considered to be a deviation from the standard highway design, materials and specifications.

8.0 Consultation

- 8.1 There is no requirement under the Constitution for external consultation on this item.

9.0 Recommendation(s)

- 9.1 It is recommended that the Policy for Section 38 Highway Adoption Agreements as set out in Appendix 1 of this Report be adopted for implementation.

10.0 Reason for Proposed Decision(s)

- 10.1 To ensure that the Highway Authority has in place a clear policy and criteria in assessing and evaluating any formal requests to adopt any highways in the locality of Neath Port Talbot and to safeguard the Council from unwarranted financial strain.

11.0 Implementation of Decision

- 11.1 The decision is proposed for implementation after the three day call in period.

12.0 Appendices

12.1 Appendix 1 – Policy on section 38 highway adoption agreements.

13.0 List of Background Papers

13.1 None

14.0 Officer Contact

14.1 Mr Justin W. Griffiths

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Appendix 1

Policy for Section 38 Agreements (Highway Adoptions) Under the Highways Act 1980.

1.0 Purpose

- 1.1 Neath Port Talbot County Borough Council (the “Council”), wish to formalise a policy to set out the current practices of highway adoption within the County Borough. For the purposes of this policy, the Council is the relevant Highway Authority pursuant to the powers set out in the Highways Act 1980.
- 1.2 A formal highway adoption policy is required to manage and facilitate the highway adoption process within the Council. Without a clear and consistent policy, the Highway Authority may be subjected to further legal challenges should a highway not be considered for adoption whilst also defending the position of the Council on highway adoption related matters.
- 1.3 The Highway Authority has powers under section 38 of the Highways Act 1980 to adopt new highways which would then become maintained at public expense. Once a development, that includes an associated highway, has been granted planning permission, the developer can if they chose to do so formally apply for adoption of highways under section 38 of the Highways Act 1980. Any highway proposed for adoption by the Highway Authority will require that the freehold owner(s) of the land dedicate the road as a public highway when it is constructed under section 38 of the Highways Act 1980.
- 1.4 The intention of this policy is to allow the Highway Authority to undertake duties in relation to highway adoption, which in turn will safeguard the public and improve upon service delivery.

2.0 Introduction

- 2.1 The Highway Authority has an important role to discharge in exercising its powers to adopt highways under the Highways Act 1980. Any highway proposed for adoption must be directly linked with the existing public highway network, and be of sufficient utility to the public and offer wider community benefits.
- 2.2 An “adopted highway” is a highway which is maintained by the Council at public expense where the responsibility of maintaining a highway which may include: carriageways; footways; footpath links; street lighting; highway retaining structures; verges; and highway drainage such as gullies and gully leaders. Once adopted, all public liability will be with the Highway Authority.
- 2.3 All highway verges to be adopted by the Highway Authority must be approved and inspected by the highway authority prior to adoption and be compliant with the BS4428: Code of practice for general landscape operations (excluding hard surfaces) (as may be amended from time to time) and BS3882: Specification for topsoil (as may be amended from time to time).
- 2.4 The most common method of adopting a new highway is for the developers and/or land owner(s) together with the Highway Authority, to enter into a section 38 agreement under the Highways Act 1980 [as amended]. Only the landowner(s) can dedicate the land as highway pursuant to a section 38 agreement. If the land is subject to a charge, lease or other interest then the chargee/lessee or other interested party needs to give their consent to the dedication of the land. Once the agreement is entered into by all parties then the related highway works are carried out in accordance with the Highway Authority’s (current) highway specifications before the construction is subsequently inspected and approved by Highway Officers. The newly constructed highway shall, on the issuing of a final completion certificate by the Highway Authority (following a 12 month maintenance period), become adopted by the Council, and maintained at the public expense.
- 2.5 Any or all new highways proposed for adoption have to be formally agreed and dedicated by the landowner(s) and/or developer whereby the highway adoption specifications and criteria meets the

satisfaction of the Highway Authority before being considered for adoption, and maintained by the Council.

- 2.6 The Highway Authority is able to adopt roads and footpaths that are essential to a development and allow the safe access or passage for all users of the highway, this includes vehicles, pedestrians, cyclists and equestrians. This is subject to the highway layouts and construction being undertaken in accordance with the Highway Authority current Design Guide for New Developments and the current Specifications for the Construction of Roads for Adoption.
- 2.7 The Highway Authority do not have a mandatory duty to adopt a new highway. The adoption criteria and obligations requires any highway (Street or Road) to be of sufficient utility to the public before becoming maintainable at public expense. At its discretion, the Highway Authority, can if agreed between all parties, adopt a highway which may not be of sufficient utility to the public but which does still however meet the Highway Authority specification and design.

3.0 Criteria for Adoption of New Highways

3.1 Unless otherwise agreed with the Highway Authority, the minimum criteria associated with a sufficient utility to the public and which offers wider community benefits would require the majority of the following items:-

1. All Highways are designed in accordance with the Highway Authority current design guide and specification for adoption highways.
2. The construction of all highways must be constructed to the satisfactory adoptable standards.
3. A highway is required to have a direct link with or is connected to an existing publically maintained highway. The Highway Authority will not adopt highways that are in isolation from an existing highway.
4. The new highways network must be of sufficient utility to the public and be of benefit to the surrounding community. Whereby the highways proposed for adoption would have a wider use than simply providing access to residential, commercial and/or industrial development(s)/properties.
5. All materials used on any highways being built, to an adoptable standard, must be designed and constructed in accordance with the Council's design guide and highway specifications.
6. The new highway(s) must remain open to the public to offer safe passage for pedestrians and vehicles to pass and re-pass, at all times, when formally adopted and maintained by the Highway Authority.
7. Suitable and/or sustainable surface water drainage for the highways must be approved and constructed in accordance with the current Highway Authority design and specification unless the drainage is approved, and proposed to be adopted by the SAB Authority.

8. Any Highway proposed for adoption will require the submission and approval of technical details, which includes all highway and drainage construction specifications, site layout and phased drawings and a program of work. The approval process requires a payment to be made to cover the Authorities cost for vetting the submission.
9. Surface water drainage to be adopted by Dwr Cymru Welsh Water (or any other approved agent or SAB authority). The Highway Authority will consider adoption of surface water drain that purely serves for run-off from adoptable highways.
10. The Highway Authority will not consider any connection from roof and yard or shared areas that are to remain in private ownership, unless all other alternative means of disposing surface water have been considered and found to be unacceptable, unviable and impossible to design another alternative connection, this however has to be agreed writing by the highway authority.
11. Private drainage needs to be provided for parking bays, and all other non-adoptable areas. No surface water run-offs will be permitted to drain on to the public highways. Surface water from private ownership should not drain on to the adopted highways.
12. Street lighting shall comply with current local and national standards and approved by the Highway Authority.
13. To ensure that both vehicular and pedestrian visibility splays are provided and are compliant with Manual for Streets and Technical Advice Note (TAN) 18 (as may be amended from time to time).
14. Any nonconformity of highway construction materials, surface water drainage and street furniture that would otherwise deviate from the standard highway and adoption specifications would require a commuted sum. These commuted sums shall be paid in full on signing of the adoption agreement. This shall cover the ongoing maintenance of highway infrastructure assets that are proposed for adoption.

15. All construction works, within the adopted highway, shall be undertaken by a competent contractor and the Council shall at any time during construction inspect the construction works.
16. The highways are traffic sensitive and forms part of the highway network that carries large volumes of vehicular and pedestrian traffic.
17. The highways serve a bus route(s) together with the community facilities.
18. Should highways proposed for adoption be situated on land that is freehold, the owner(s) shall dedicate the highway (road or street) to the public as a highway that is constructed to the Highway Authority Specification, at no cost to the Council, under section 38 of the Highways Act 1980.
19. On street parking bays/spaces/areas that are contiguous to the highway can be adopted as part of the public highway on the condition that they are used by the general public and its not restricted in any way whilst being considered as visitors spaces and are in addition to the parking standards requirements imposed by the Highway Authority and Planning Authority for all types of development.
20. Public footpaths and footways proposed for adoption shall allow for connectivity to all public amenities and public places such as schools, shops, public transport etc. these must be open, available, and unrestricted for the public use. Whilst joining amenities and public places footways/footpaths should be provided with an approved street lighting system and constructed up to an adoptable standard which will serve the public's needs.
21. Statutory undertakers (Utilities) apparatuses shall be laid in accordance with the Council's Highways Specification, and with the National Joint Utilities Group Guidelines and Requirements.

4.0 Criteria for when Highways are not adopted.

- 4.1 Any steps (ambulant or otherwise) and associated railings proposed within a highway will not be considered for adoption by the Highway Authority.
- 4.2 The Highway Authority does not adopt any footpaths leading to front, side and rear of properties, together with entrances, car parking compound areas, parking forecourt, driveways, communal shared drives, amenity areas, footpaths that do not serve the wider public utility, roads accessing businesses and industrial estates. Private car parking areas that have restricted use by residents will not be considered for adoption. Unless otherwise directed by the Highway Authority, adoptable footpaths/footways need to comply with the adoptable design guide and specifications.
- 4.3 Highways which do not meet with the design and construction of the design criteria and to the satisfaction of the Highway Authority will not be considered for adopted and maintained at public expense. The applicant, developer and contractor must ensure that the highway(s) offered for adoption meet with the Council's design guide, specifications and to the satisfaction of the Highway Authority.
- 4.4 The Highway Authority will not adopt and take on maintenance responsibility of a highway that is used as an access for construction traffic on phased approach to large developments unless an agreement is in place between the Highway Authority and the developer/applicant/contractor that all defective and damaged works on the adopted highway will be made good at no expense to the Council.
- 4.5 The Highway Authority will not adopt any highway without a formal legal agreement under Section 38 that has been legally ratified, approved, signed and all payments concluded, which will include bond(s), inspection fees, legal costs and commuted sums (if applicable).
- 4.6 The Highway Authority do not have a duty to adopt any highway. Housing developments can, if they chose, to keep their new highways private and set up a management company to maintain the highway whether it meets with the above criteria or not.

- 4.7 The Highway Authority will not adopt any private roads within any development whereby the developer(s)/applicant(s) has refused to pay commuted sums.
- 4.8 The Highway Authority will not adopt any highway that does not meet with the adoption criteria within this policy, regardless of any formal requests made by a developer or powers under which they are applied, such as section 37 of the Highways Act 1980. The Highway Authority must be satisfied that the highway has sufficient utility to the public and is also constructed to an adoptable standards.
- 4.9 Where development(s) have no through road, only the main access (spine) road will be considered for adoption by the Highway Authority subject to the main access road serving: more than 5 residential units; bus routes; community facilities; places of worship; serving transport hubs; and schools etc. Unless otherwise agreed in writing by the Council.
- 4.10 The Highway Authority will not consider for adoption residential access roads serving car parks/ industrial properties/ forecourts, unless otherwise agreed in writing by the Highway Authority.
- 4.11 The Highway Authority will not consider for adoption residential access roads supported by structures, unless otherwise agreed in writing by the Highway Authority
- 4.12 The Highway Authority will not consider for adoption roads with shared surface treatment, unless otherwise agreed in writing by the Highway Authority.
- 4.13 The Highway Authority will not consider for adoption cul-de-sacs and/or development estates with no through routes, and serving no wider community benefit, unless otherwise agreed in writing by the Highway Authority.
- 4.14 The Highway Authority will not consider for adoption access roads within supermarkets, and commercial units etc. unless otherwise agreed in writing by the Highway Authority.

5.0 Section 37 Adoption

- 5.1 The Highway Authority can reserve the right under this policy to apply the above adoption criteria for both section 38 agreements and adoption under section 37 of the Highways Act 1980.
- 5.2 A section 38 agreement is usually discussed and indicated at the planning stage between the developer and the Highway Authority. After technical approval is granted, and all relevant payments such as commuted sums, inspection fees, bonds and legal fees are completed on signing of the agreement and ideally before works commence on site.
- 5.3 For adoption of the road to proceed under section 37 of the Highways Act 1980, the Highway Authority must be satisfied that the road has been dedicated in accordance with the terms of the owner's notice, has been made up in a satisfactory manner and will be of sufficient utility to the public.