POSITION STATEMENT: SECTION 38 HIGHWAYS ACT 1980 – COMMUTED SUM PAYMENTS

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Covering Note

Section 38 Highways Act 1980 – Commuted Sum Payments

The following paper is a position statement regarding Section 38 of the Highways Act 1980 surrounding commuted sum payments.

This position statement has been prepared by a group set up by the HBF board as a result of the substantial increase in the number of times these payments are being demanded by highway authorities.

The paper explores the history of highway adoption and the role and influence of planning and Building Regulation decisions upon this.

It then goes onto talk about the adoption process and the Highway Authorities justification for such payments.

The paper offers guidance on alternative procedures to secure adoption, including Section 37. However, if this is a procedure that you would wish to follow, we suggest that you should consider appointing an independent qualified (consulting) engineer to certify such works.

Another alternative discussed is the private streetworks code procedure which will require you to get over 50% of the house owners fronting the works to consent to an application under the private streetworks act for adoption by the highway authority.
We have attempted to flesh out the guidance to provide members with at least a framework to follow when considering alternative adoption procedures. That said all HBF members are free to contact the HBF London in the event that they may wish to discuss matters further.

The group continues to look at this subject and will report further findings/information obtained on the HBF website. In the meantime any feedback on the alternatives that have been proposed would be gratefully received.

Dave Mitchell
Technical Director

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Introduction

This 'Statement' crystallises the Industry's position in response to an increasing number of English Highway Authorities who are seeking to impose commuted sum payments as a condition of Section 38 Agreements. As a result of support from the Department of Transport (DfT), who earlier this year convened a dedicated 'Steering Group' to promote the concept of commuted sum payments, the HBF has noted a substantial increase in the number of occasions when such payments have been demanded. Moreover, whilst there are compelling arguments in support of the Industry's contention that commuted sums under Section 38 are *'Ultra Vires'*, we have yet to witness a reversal in Highway Authority attitudes. Furthermore, such an unjustified demand comes at a time when market conditions in the UK are such that the House-building Industry can ill afford to succumb to what is in effect a tax on new development which, if introduced, will undoubtedly restrict the supply of land and new housing.

Such is the concern of the UK House-building Industry this position statement includes proposals for an alternative highway design approval and supervision regime, which the HBF intend to feed into the DfT Steering Group. The HBF proposals are considered to be far more equitable and representative of what should take place. Moreover, a change in this area of highway construction and adoption is considered long overdue and HBF see no reason why these proposals should not be given due consideration by the DfT and/or BERR.

History of Highway Adoption

Modern provisions for the adoption and maintenance of newly constructed residential estate roads have existed since the introduction of the Highways Act 1959, albeit legislation concerning such matters can be traced back to the Highways Act 1835 (Section 23). Moreover, this is perhaps a useful starting point in our defence against the imposition of commuted sum payments under Section 38 of the Highways Act 1980. Section 23 of the 1835 Act applied to Highways that were to be constructed after the date the Act came into force and to roads already constructed but not yet dedicated as highways. Importantly, the 1835 Act imposed an unequivocal responsibility as to future maintenance, confirming that roads dedicated after 1835 will be maintainable at the public expense - our emphasis/underlining. The only caveat to this being that the necessary adoption procedures, as set down in the Act had been followed.
Subsequent legislation, namely, The Highways Act 1862 (section 17), The Public Health Act 1875, The Public Health Acts Amendments Act 1890 and the Private Streetworks Act 1892 upheld this basic responsibility for maintenance.

The Highways Act 1959 effectively repealed all earlier legislation but more importantly, it consolidated the concept and status of 'highways maintainable at the public expense". The Highways Act 1980 re-affirmed this basic tenet of Highway law. Indeed, since the introduction of the adoption provisions under Section 40 of the Highways Act 1959 we have effectively gone the best part of 50 years without any demands for commuted sum payments in respect of maintenance. HBF find this to be a compelling argument in support of its case for no commuted sum payments.

The Role and Influence of Planning Decisions

The main thrust of the Highway Authorities case to justify the payment of maintenance commuted sums has been the difference in construction standards (and therefore maintenance) between what LPA's have approved under planning, for example, 'home zones' and what the Highway Authority considers to be its' standard adoption specification; the catalyst for this change in attitude effectively being the recommendations contained in Government approved guidance, namely the 'Manual for Streets'. Highway Authorities have suggested that the planning process has no part to play in militating against the requirements for a highway maintenance commuted sum. HBF disagree with this statement on the grounds that the Highway Authority argument is somewhat weak given that a Local Planning Authority effectively sets planning policy and development standards, including highway standards, by virtue of its statutory land-use planning role. It therefore follows that what is approved under planning is effectively the prevailing highway standard and cannot be interpreted in any other way. Moreover, highway issues are one of many material considerations that LPA's must deal with when considering any planning application.

In addition, subsequent to securing planning approval there is a direct link to the Building Regulations and ultimately, the serving of a Section 220 Notice. This is a relatively seamless transition through the statutory approval process. However, at no point in this process is there a requirement (implied or otherwise) that allows for the imposition of a commuted sum for future highway maintenance. Indeed, if a developer so desired, it is not inconceivable for that developer to proceed to secure adoption by relying on several alternatives – see later comments and recommendations.

The Adoption Process

HBF believe that there is merit in reviewing the statutory aspects of the approval process as an integral part of this position statement, in particular the Developer's obligations pursuant to the Building Act 1984. This is of intrinsic importance but the DfT Steering Group has not given consideration to the due legal processes surrounding this obligation.

The Building Act 1984 requires that within 6 weeks from the passing of any building regulation plans, the 'Street Works Authority' (Highway Authority) must serve a notice under the Advance Payments Code – ref: section 220 Notice. The construct of this statutory notice is significant in that it specifically relates to the deposit of a sum of money, the amount determined by the 'Street Works Authority' that in the opinion of that Authority, represents the cost of making up/constructing any streets should the Authority be called upon to do so. The important part of this notice is.... *"in order to bring the highway up to maintainable standards"*. Importantly, this statutory notice carries no provisions that allow for the inclusion of future maintenance costs in the estimate of the street-works cost. (This is confirmed by reference to any number of existing Section 220 notices). Indeed, in November 2001, this basic legal tenet was actually tested before an Inspector appointed by the Secretary of State, the decision from the Inspector being upheld by the then DTLR (now the DfT). The case in question involved the estimated cost of the highway works pursuant to a Section 220 notice. The appellant considered the figure excessive and sought to challenge such by referring the matter to the Secretary of State. The outcome was not only a reduction in the estimated cost of the highway works but a complete examination of the components of those costs – future maintenance was specifically excluded. (DTLR Ref: TP 4/2/35 – November 2001).

It therefore follows that in the event that a developer opts for alternative adoption provisions under Section 38/37 of the Highways Act 1980, which in turn is a direct link/extension to the Section 220 Notice, then no commuted sum payment for future maintenance, can be justifiably demanded. To do so, could be construed as a monopoly organisation using its' privileged position to secure a pecuniary advantage and as such, this must surely be considered to be *Ultra Vires*.

Highway Authority Justification for Commuted Sum Payments

Highway Authorities have argued that innovative highway design concepts, for example 'home zones', have added to the burden of highway maintenance. However, HBF has looked into this issue and does not necessarily agree with this statement. Had more compelling evidence been provided by the DfT Steering Group then matters may have been different. Unfortunately, we can only record the following deficiencies that have emerged from the HBF's investigations to date:- (the list is not exhaustive)

- There is a lack of evidence from Highway Authorities in terms of annual maintenance expenditure specific to newly completed/adopted residential estate roads.

- No evidence has been disclosed by Highway Authorities in terms of transparent budgeting and/or accounting procedures in respect of residential estate road maintenance. Assumptions being made at present by Highway Authorities rely on weak anecdotal evidence rather than factual, financial data.
- Some Highway Authorities are accounting for the full replacement cost of highway infrastructure after 25 years of accrued maintenance, which, in the case of SuDS or a bridge structure, can be financially prohibitive.
- No evidence has been provided confirming current maintenance funding streams and to what extent and from what source(s). In addition, no cost accounting has been undertaken and/or disclosed in support of the Highway Authorities contention that additional payments through commuted sums are both legitimate and justified.
- No evidence of planned maintenance has been disclosed, for example, dedicated road sweeping after winter gritting to remove detritus and abrasive materials from the carriageway rather than just sweep the roads once a year. (Allowing grit to remain for indefinite periods is known to make a significant contribution to wearing course degradation).
- Highway maintenance costs for newly constructed (adopted) estate roads are already offset by virtue of established Government Grant mechanisms. In addition, the dedicated 'highway precept' included in most if not all Council Tax bills, and levied on property owners, provides a further income stream. To seek to secure a third source of funding by way of commuted sum payments is tantamount to the introduction of a tax on new residential development.

In summary, the evidence presented to date fails to provide a compelling case that supports the Highway Authorities demands for the payment of highway maintenance commuted sums. Moreover, factual evidence held by the HBF can confirm that when commuted sum payments have been demanded they are significant; current case studies involving two relatively small sites have a combined commuted sum payment demand exceeding £0.5 million. Such unjustified costs strike at the very heart of housing affordability and provide a compelling rationale for this 'position statement'.

Alternative Approaches to Highway Adoption

There are two alternatives to securing the formal adoption of residential estate roads. However, irrespective of the method chosen there will still be a requirement to provide a bond, or cash surety, equivalent to the estimated cost of the highway works. In addition, whilst no supervision fee would be payable to the Highway Authority as part of any alternative procedure, the Developer will still be required to provide evidence of compliance with the Highway Authority's 'construction' specification. This would normally be dealt with by retaining the services of an experienced highway consulting engineer to undertake the necessary supervision and final statement of verification.
A brief overview of each of the alternatives to secure adoption follows:-

Section 37 Procedure

- The Developer notifies the Highway Authority of its intention to proceed to adoption by way of Section 37 at the time of technical approval submission. A specific request should be made for the Highway Authority to confirm the key stage inspections that will be required and what evidence will need to be presented to demonstrate compliance.
- The Developer constructs all of the estate roads, or appropriate phase thereof.
- The Highway Authority (HA) is to be invited to inspect at various key stages. (Note: The HA is not obliged to inspect but records will need to be kept of the dates and times inspections were requested, together with the response(s) from the HA)
- Supervision and verification of compliance with the Highway Authority's construction specification will need to be undertaken at the Developers cost – a competent/accredited highway/civil engineer will need to be retained for this. These costs are not recoverable.
- On completion of the work, including the street lighting installation, a formal request for adoption is submitted to the Highway Authority. Any refusal to adopt can be immediately referred to the Magistrates' Court. If there is still a refusal to adopt, the matter can be referred to the Secretary of State for determination.

The construct of Section 37 of the Highways Act 1980 does not allow for the imposition of any commuted sum payments as a pre-requisite to adoption.

Private Streetworks Code Procedure [Sections 228 & 229 Highways Act 1980]

- The Developer constructs all of the estate roads, or appropriate phase thereof.
- Through the plot disposal contract/conveyance, the Developer agrees with each new home-owner that they in turn will consent to an application under the Private Streetworks Act (Section 228[7]) for the roads to be adopted once the aggregate of frontages exceeds 50%. However, the house-builder will have to agree to underwrite these costs and indemnify the purchaser against any costs claims or actions. Providing the bond/surety is in place the CML and Law Society respectively should have no concerns.
- Jointly with the house-builder, who by default would hold the balance of all frontages; proceed to apply for adoption under the provisions of Section 228[7] of the Highways Act 1980. The Highway Authority has three months to complete the formal adoption process.
- No supervision fees are paid to the Highway Authority

These sections of the Highways Act 1980 contain no provisions that allow for the imposition of a commuted sum for future maintenance.

Construction Standards

To date, no evidence has been advanced by Highway Authorities to demonstrate that increased maintenance costs are likely to arise due to innovative changes in highway design. In many respects, the conservative highway design standards that are imposed upon Developers, both from a structural and material quality perspective, already make a significant contribution to considerably reduced highway maintenance. Anecdotal evidence from across the UK extending over 35 years and obtained by the HBF provides compelling confirmation to this effect. Moreover, once a highway is adopted, the Highway Authority is at liberty to change/increase the volume and type (axle loading) of traffic that uses the road, particularly local distributor roads. The developer has no say in such matters and one is left questioning whether or not such decisions have contributed to reduced highway durability with corresponding calls for increases in maintenance budgets. There is clearly evidence in place in the former 'New Town' development areas to justify this comment.

Proposals for the Future Management of the Adoption Process

As stated at the outset, for many years the House-building Industry has considered that Highway Authority estimates of 'Streetworks Costs' have been unrealistically and unnecessarily inflated. Whilst Highway Authority's continue to rely on established and sometimes 'index linked' public works procurement costs and schedules, at the expense of 'real-time costs' form the competitive tendering process, this trend will continue. Moreover, the difference in the Highway Authorities' estimated costs versus actual tender costs can be as much as 35 – 50% in favour of the Highway Authority. In simple terms a cost difference of £100k, which is not unusual, can result in an increase in supervision fee between £5000 and £10,000 depending on the supervision fee rate that is levied. Furthermore, questions continue to be raised by House-builders that the supervision fees paid are not representative of the limited level of supervision that is often provided. (Many House-builders have commented that Industry does not get 'value for money').

It is for these reasons that the HBF considers that the time has come to look at an alternative, more effective and equitable means of dealing with prospectively adoptable estate roads.

The HBF is proposing that the DfT and its Steering Group give due consideration to the following proposed procedure:-

- Consider the creation of a National Agreement that will allow for three or four major/national UK consulting engineers to undertake the highway design vetting and supervision role.
- Agree with the DfT, the minimum level of supervision to ensure adoption of newly constructed estate roads, i.e. nationally agreed key stage inspections. In addition, agree the minimum verification requirements/evidence to ensure that there are no delays with adoptions.
- The fees levied by the consultancies can be based on actual rates and actual supervision costs – this is far more equitable*.
- The estimated cost of the highway works can be based on the highest of three tender returns with a top-up provision for street lighting cost*.
- Street Lighting designs and installation to be undertaken by approved nominated contractors.
- Surety (bond) to be provided by the NHBC or similar recognised body is to be the preferred option rather than a cash equivalent of the highway works deposited with the Highway Authority
- Leave the developer with the freedom of choice in terms how newly constructed estate roads are to be adopted but in most instances there should be nothing preventing this from being concluded under the provisions of Section 37 of the Highways Act

* This approach is entirely consistent with the outcome of the recent 'Roots Review' – "Review of Arrangements for Efficiencies from Smarter Procurement in Local Government" – 19th February 2009

Surety Provision

This is another area of concern/contention and the Industry continues to question why 100% of the estimated cost of the highway works must be secured or 'bonded'. It has often been cited that reduced bonding provision does not expose the Highway Authority to any undue commercial risk. Indeed, evidence available from recognised surety providers confirms that the number of occasions when Highway Authorities have proceeded to actually 'call-in' a bond is quite rare. Moreover, under Section 104 WIA 1991, most if not all UK Sewerage Undertakers only ever require a bond equivalent to 10% of the total cost of the sewerage infrastructure works. This is a fair, equitable and sensible approach as it recognises the construction standards that must be achieved and the significantly reduced cost of intervention action once the infrastructure has been constructed. It therefore begs the question why Highway Authorities cannot adopt the same approach and accept a surety/bond of 10% or at least at a level significantly lower than 100%. This is a particularly relevant question given that estate roads and footpaths can be constructed up to and including base-course level before Building Regulations consent has been obtained. Furthermore, in almost every instance, the construction of highway infrastructure can be significantly advanced long before a section 38 Agreement is prepared by the Highway Authority and ready for engrossment.
In the present financial climate bonds are becoming increasingly difficult to broker on realistic terms and conditions. Moreover, cash deposits have an even more pernicious effect on a Company's overdraft facility. Indeed, overly-conservative bonding requirements are adding to the regulatory burden confronting the UK House-building Industry at present. The HBF are therefore firmly of the opinion that the time has come for a more progressive and responsive review of this aspect of our business.

This may be considered a somewhat radical approach when compared to what has transpired for the past 50 years. However, it is consistent with value for money objectives both within private enterprise and Local Authorities alike. Most importantly, it does not undermine the ability of all stakeholder interests to deliver estate road construction that is consistent with the prevailing highway construction specification and without exposing any party to either undue or unacceptable risk.

Home Builders Federation
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