

Highways Works Agreements (“Section 278 Agreements”)

Real Estate

Background

When a development project requires undertaking work to the adjoining public highway (such as the creation of a visibility splay, a mini-roundabout or turn right lane), the fact that you have successfully obtained the planning permission does not by itself allow those works to be undertaken to the public highway.

Rather, you will require an additional Agreement, commonly known as a Section 278 Agreement. This Agreement is with the Highways Authority; often this is the same Local Authority as the Planning Authority, but this is not always the case.

Why do you need a Section 278 Agreement?

Entering upon the highway to carry out the works is basically a criminal offence under the Highways Act, 1980, which makes a Section 278 Agreement essential.

The developer’s and the Highways Authority’s viewpoint

From the developer’s viewpoint, the purpose of the Section 278 Agreement is to have authority to enter the highway and to undertake works, so that such action is not a criminal offence.

From the Highways Authority’s viewpoint, a Section 278 Agreement is used to deal with many other matters. As a consequence, you should not assume that you can enter into this Agreement speedily once you have obtained the planning permission. You will need to invest both time and cost into a Section 278 Agreement; this is even more important when your planning permission includes a condition whereby the development cannot commence until a Section 278 Agreement has been completed. Such a condition may mean that you cannot even undertake preparatory works (such as demolition of existing structures) at the site.

What does a Section 278 Agreement include?

The key provisions of a Section 278 Agreement are typically as follows:

1. To provide for payment of various heads of costs incurred by the Highways Authority. (Please see below for those heads of costs).
2. To set out how the works are to be undertaken and what further information and reports need to be supplied to the Highways Authority before work commences.
3. To provide for supervision of those works by the Highways Authority.
4. To provide for a third party financial bond or security deposit to be paid to the Highways Authority so that in the case of default, the Highways Authority can step in and undertake the works and recoup the costs incurred.
5. To provide that once the works have been undertaken, they will be inspected and, subject to that inspection, a Provisional Certificate issued.
6. To provide for the works to be dedicated for use by the public and possibly transfer of ownership of the land to the Highways Authority.
7. To provide for a maintenance period (typically 12 months) during which the responsibility for the works and making good any defects with them will remain with the person developing the site.
8. Following a satisfactory completion of the maintenance period and payment of the Commuted Sum, for the issue of a Final Certificate, following which the works will become maintainable at public expenses.
9. To pay a Commuted Sum for the future maintenance of the works. This is a capital sum for the future maintenance over a number of years, but with a discount to reflect the fact that the payment is being paid up front.

Costs to be paid

The Heads of Costs for which the person developing the site will usually be responsible for are as follows:

1. The costs of the Council to enter into the Section 278 Agreement.
2. The administrative costs and technical expenses of the Council incurred in supervising the carrying out of the works and any costs for analysing or testing the materials that have been used in the carrying out of the works.
3. The costs of the Council in inspecting the works following their completion and prior to the issue of a Provisional Certificate and a Final Certificate.
4. The costs incurred by the Council in making good any default by the person carrying out the works.

The administrative costs and technical expenses of the Council incurred in supervising the carrying out of the works are usually calculated as a percentage (typically 5%) of the costs of carrying out the works. Therefore it is beneficial to have quotations for those works to submit to the Highways Authority to avoid it basing these costs on its estimates.

Conclusion

In short, entering into a Section 278 Agreement is not a quick, cheap or simple process that happens swiftly after planning permission has been granted. Accordingly, if you can start the process before planning permission is granted (for example whilst a Section 106 agreement is being agreed), you can achieve a meaningful saving in time and commence development without unnecessary delay.

For more information on Section 278 Agreements or any other Real Estate issue, contact our expert team.

Please note that this note is not intended to constitute legal advice, nor is it intended to be a complete and authoritative statement of the law. Legal advice should be sought to confirm the application of any information set out above in relation to any specific situation.