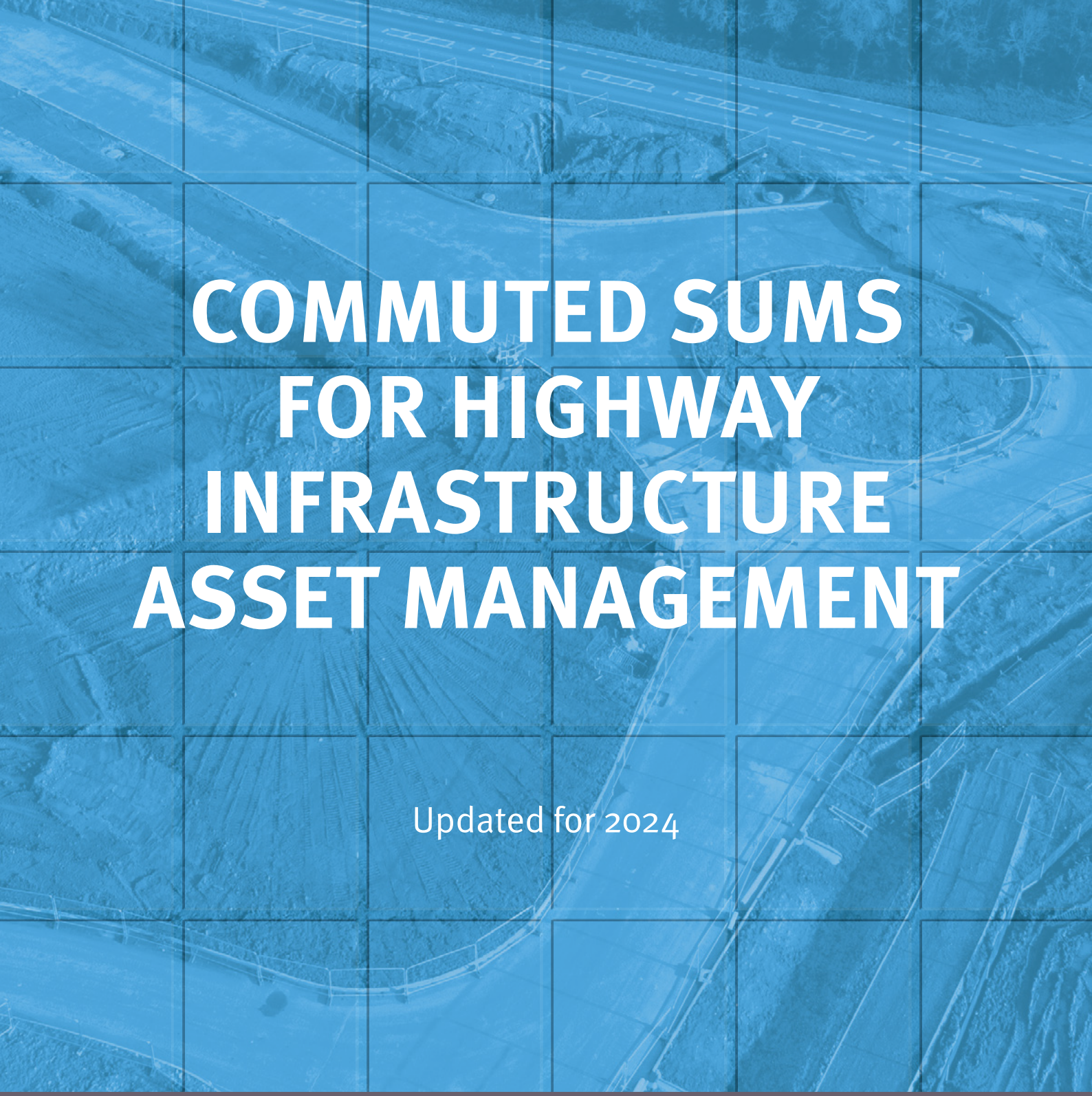

COMMUTED SUMS FOR HIGHWAY INFRASTRUCTURE ASSET MANAGEMENT

Updated for 2024

ADEPT

The Association of Directors of Environment, Economy, Planning & Transport

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1. FOREWORD

The use of commuted sums for future maintenance of highway infrastructure assets is not new, but there is considerable variation in their use and in the practices adopted by local highway authorities (LHAs) in relation to their application.

This guidance is designed to allow LHAs to continue to reflect local priorities in their commuted sums policies, whilst providing a nationally consistent framework and informed guidance in the development and implementation of these policies.

This guidance provides a transparent and consistent approach to both the requirement for and calculation of commuted sums. The clarity of approach should help address uncertainty and risk for developers at an early stage in the process. It places responsibility for future maintenance costs with the appropriate party, provides security to overstretched highway maintenance budgets and capital allocations, and enables developments to progress with increased certainty about their overall requirements and commitments.

Importantly, in the past commuted sums have been limited in the main to payments in respect of the future maintenance of bridges, tunnels and unusual or extra-over items. More recently, for a variety of reasons, there has been a trend for the scope of the application of commuted sums to be widened, and legal cases have now established[1] that commuted sums may be considered nearly without restriction.

However, each commuted sum will need to be considered based on local priorities and the overall financial viability of the development to which it is related. This will include any other sums raised against it by the local authority e.g. for social infrastructure, including schools. The LHA also needs to balance protecting its funding of future maintenance against the broader desire for economic growth that development brings.

The style, location and expectation of housing, industrial and other developments continues to change and evolve, including an increasing consideration of sustainability and place-making. This often leads to maintenance-hungry materials and designs, that otherwise enhance the value of the development. This has occurred in parallel with moves to develop more constrained and challenging sites, raising questions over the adoption and, in particular, the maintainability and future financial support for assets.

These higher levels of maintenance may also involve additional features such as Sustainable Drainage Systems (SuDS), which place additional burdens on future maintenance, but are often the only reasonable way to allow the sustainable and practical development of the site.

The pressures on LHAs' established maintenance budgets would normally preclude these enhanced features from being maintained to the appropriate standard unless payment is sought from the developer for the additional costs involved.

This guidance document aligns with the fundamental need to apply the principles of whole life costing in order to achieve effective asset management. Its use should help to develop design concepts and material specifications which are of benefit to all parties with the intention of moving towards providing durable, sustainable infrastructure while minimising any need for commuted sum payments for their future maintenance.

It is intended that LHAs and developers use this guidance in the spirit in which it is meant, so that innovation is not stifled. The aim is to enhance flexibility for each and every LHA to adopt non-standard layouts and materials, without placing undue burdens on maintenance budgets, through constructive dialogue with developers. It is designed to facilitate a fair and amicable funding arrangement for new highway infrastructure assets.

[1] Court of Appeal decision on 31 October 2014 in the case of R (on the application of Redrow Homes Ltd) v Knowsley Metropolitan Borough Council (Redrow)

2. LEGAL AND PLANNING ISSUES

2.1 Commuted sum definition

The definition of the term 'commuted sum for maintenance' (often shortened to 'commuted sum' and sometimes known as a 'maintenance fee') in relation to the adoption of new highway infrastructure assets is:

A payment of a capital sum by an individual, authority or company to the highway authority, local authority, or other body, as a contribution towards the future maintenance and replacement of the asset being provided, adopted, or transferred.

2.2 Highways Act 1980 and commuted sums

2.2.1 LHA statutory duty to maintain

The LHA has a statutory duty for the maintenance of existing, new or newly adopted highways maintainable at public expense. This responsibility extends beyond just the highway surface and includes the entirety of the infrastructure assets that make up the highway.

2.2.2 Section 38 (S38)

Section 38 (6) of the Highways Act 1980 enables the LHA to seek – through agreement – commuted sums from developers towards future maintenance of highway assets. It applies to highways assets that are part of a new road constructed on private land, but which are to be adopted by agreement as highway maintainable at public expense and that would otherwise not be required if the development had not been introduced.

There is a court of appeal decision from October 2014[1] that confirms that LHAs may, when entering into agreements under Section 38 of the Highways Act 1980, legitimately charge commuted sums for the future maintenance of highway assets after their adoption.

For Section 38 agreements the commuted sum, the value of which will be stated in the agreement, is usually required to be paid prior to adoption.

2.2.3 Section 278 (S278)

Section 278 (3) of the Highways Act 1980 enables the LHA to seek – through agreement – commuted sums from developers. These are towards the future maintenance of alterations and additions made to highway assets on the existing highway maintainable at public expense, that would otherwise not be required if the development had not been introduced.

Agreements under Section 278 secure the delivery of works to operate safely (e.g. everything that is required to deliver a road junction such as visibility splays, pedestrian crossings etc.) even if a Section 38 is anticipated.

In some instances, the Section 278 agreement includes areas congruous with the existing highway that might otherwise be part of a Section 38 agreement, in which case the commuted sum will cover the Section 278 area as well as any new road area to be dedicated and adopted as highway. This often includes new assets such as street lighting, structures, traffic signals and signage as well as new carriageway, footway and cycleway areas for the LHA to maintain.

While changes within the existing highway usually add to the existing maintenance regime, there can be cases where assets are removed or downgraded, or the maintenance requirement is reduced, in which case this should also be considered in the calculation of the value of any commuted sum.

For Section 278 agreements the commuted sum, the value of which will be stated in the agreement, is usually required to be paid prior to works commencing.

2.3 Planning consent

Commuted sums cannot be determined at the planning stage as many items remain undetermined until detailed design is undertaken. A developer securing planning permission from the local planning authority does not bear any weight in relation to the adoptability of a development by the LHA, nor the potential level of commuted sum required to do so.

Therefore, LHAs are advised to work as closely and as early as possible with the local planning authority, in order to avoid compromising the adoptability of layouts already approved in planning. Doing so will also minimise the need for commuted sums through the provision of a sustainable design that considers the whole life cost of the assets created or altered.

2.4 Early advice to developers

The adopting LHA can entertain adopting non-standard materials, but their suitability will need to be reviewed: this will include assessing if the LHA can maintain them in perpetuity and at what cost.

When innovative solutions or materials are being considered, or landscaped areas are proposed for adoption, it is recommended that discussions are held at an early stage with the adopting LHA to determine what is adoptable, what provision will be made for future maintenance of areas or assets not adopted and what commuted sums are envisaged.

2.5 Application to other assets

The guidance in this document can be equally applied for the calculation of commuted sums in relation to the adoption of assets by the LHA from other bodies, organisations or individuals.

3. FINANCIAL CONSIDERATIONS

3.1 Management of commuted sum income

In an ideal world, monies received in respect of commuted sums would be spent on the specific asset for which they were collected. However, this is impracticable due to the volume of commuted sums and assets in question, combined with the complexities of LHA budget disaggregation and continuing changes in asset management prioritisation. Despite this, it is considered essential that commuted sums received are ring-fenced exclusively for the maintenance of the highway network.

It is recommended that LHAs adopt a formal and transparent approach to commuted sums and establish a protocol to ensure that the ringfencing of monies to the highway maintenance revenue budget is achieved, preferably allocated to the specific asset categories. The protocol should allow for annual out-turn reports to be produced to provide financial control and ensure that the correct funds are transferred to the respective maintenance budgets for future years.

Any commuted sums monies should be treated by the highway authority as additional to any considerations in respect of normal maintenance budget allocations for the year.

3.2 Methodology

A worked example of the methodology that supports the principles set out in this guidance is shown in Appendix 1.

4. ASSET MANAGEMENT

4.1 Responsibility for highway maintenance

In order to meet its statutory responsibilities, the LHA should develop, implement, and adhere to a carefully considered strategy for asset management and highway maintenance. Pressure on budgets for maintenance mean that they are increasingly insufficient to meet the needs of the network, with well publicised maintenance backlogs occurring across the majority of LHAs' networks. As such, adhering to appropriate maintenance standards is a challenge for the LHA, which requires a formal and robust asset management approach.

4.2 Asset lifecycles and maintenance regimes

LHAs either individually, or in regional/national groups, are encouraged to set up databases of acceptable materials, their design life and expected maintenance regime: this is especially useful where special materials are likely to be associated with commuted sums.

The lifecycle, and maintenance regime, for an asset will be dependent on the initial design specification and local standards adopted. This is an area for agreement to be reached between the developer and the LHA on a case-by-case basis, remembering that the LHA is the maintenance expert. However, the publication of clear local standards for asset design and maintenance will reduce the variations in the approach taken.

A whole life costing approach (looking at the most economic maintenance regime over the life of the asset) should be used for calculating commuted sums, involving the discounting of future maintenance and replacement costs based on the year they are expected to arise.

Typical issues to be considered are:

- Hierarchy, network type and location.
- Specification and materials.
- Maintenance practices.
- Frequencies of intervention.
- Life span and therefore time to replacement.

For the calculation of commuted sums to be transparent and equitable, having local maintenance standards published in the LHA's Highways Infrastructure Asset Management Plan, will ensure that the mechanism for deciding upon eligible commuted sums is readily available and auditable.

4.3 Overall levels of service

In addition to the specific aspects required for its effective functioning, each asset should also be looked at in respect of its contribution to the overall service requirements of each LHA. This is a complex issue which the LHA will consider within the development and review of their Highway Infrastructure Asset Management Plans and may be expanded further for commuted sum calculation considerations.

5. PROCESS, PRACTICE AND PROCEDURES

5.1 Commuted sum principles

The following principles apply in the application and calculation of commuted sums:

- The overriding principle is that commuted sums should be calculated objectively and as fairly as possible to reflect the genuine present day value of predicted future costs which they are designed to cover.
- The methodology in this guidance is equally applicable to S278 and S38 adoptions, other asset adoptions and transfers of ownership.
- For adoption or transfer of ownership of existing infrastructure assets to take place, there may be a pre-requisite for (sometimes substantial) pre-adoption remedial work, or for the impaired condition to be reflected in the commuted sum calculation.
- As far as possible, all assets should be treated on the same basis for commuted sum calculation purposes. For the avoidance of doubt, this includes SuDS.
- The historic acceptance of the basis of application of commuted sums in respect of adoption of bridges and structures should remain.
- Commuted sums should be calculated over 120 years for assets integral to the integrity of the highway (eg for bridges and other structures) and over 60 years for other assets.
- There should not be any requirement to calculate any degree of benefit to the local authority in respect of commuted sums for S278 works, even where such works are considered to provide some benefit to the general public (e.g. an improved junction layout with enhanced pedestrian facilities being provided).
- Under S278, commuted sums are not applicable to additional works which are merely for aesthetic rather than for design reasons (e.g. full width resurfacing where only part-width would be necessary to accommodate a new junction, unless it is for safety reasons such as differential skidding).




5.2 Considerations within the calculation of commuted sums

Commuted sums are often not calculated until a proposed scheme has reached the technical approval stage and legal instructions are drafted to secure the necessary adoption or transfer (e.g. a S278 or S38 agreement). It is possible to estimate the sums at an earlier stage, but doing so must carry substantial caveats for assets, areas or materials that may change through the design and technical appraisal stages as these would alter the maintenance regimen allowed for in the calculation of the commuted sum.

It is therefore recommended that the LHA calculates the final commuted sums value as late in the process as possible, but bearing in mind the developer will be looking for cost certainty in the process.

Where possible and agreeable to all parties, commuted sums should be calculated immediately before the highway asset infrastructure is adopted, based on provisional commuted sums agreed at the S38 or S278 agreement stage. The agreement should contain provision for recalculating the provisional commuted sums based on actual quantities, revised time periods to maintenance operations if appropriate, and a price fluctuation factor to adjust current costs and maintenance operations specified in the agreement.

There should also be provision in the agreement for a dispute resolution mechanism to cover disputes resulting from either developer liquidation or a significant increase in the final commuted sum compared to the provisional one or some other circumstance.

A typical commuted sum procedure for highway infrastructure assets adopted through S38 & S278 agreements is set out in Appendix 2. This is designed to be able to be used by any LHA as a national standard, although it may be modified locally.

The financial process should demonstrate the justification for the level of commuted sum set for each asset item.

In the case of specialist landscaping materials (such as setts), lighting columns or signs etc, where finding replacements in future years could prove to be difficult, an option could be for the LHA to request a stockpile of material and adjust the commuted sum accordingly. This option would allow for any replacement specialist paving type materials to weather on the same basis as the original. However, storage may be an issue for many LHAs.

If maintenance contract rates are used to calculate the commuted sums for different materials (such as listed in an LHA's database of acceptable materials), these should be adjusted periodically to accommodate any price fluctuations. This could be carried out by using current contract rates, and appropriate cost indices e.g. Baxter Index.

5.3 Bonding of commuted sums

Any commuted sums should be included in the bond required under the S38 or S278 agreement unless payment is made prior to engrossment of the agreement. This should be based on the commuted sums calculated when the agreement is completed and released following satisfactory completion of the maintenance period or payment of the commuted sum, whichever is earlier.

5.4 Timing of payments

The issue of when any commuted sum payment is to be made will be dependent on the individual LHA and may be on the execution of the agreement or prior to the 'final certificate' (which would formally recognise the suitability for adoption of the new asset(s) by the LHA) being issued, or even after. It is recommended that, as best practice, the commuted sum be payable before issue of the final certificate and following satisfactory completion of the maintenance period by the developer, i.e. immediately before formal adoption.

The time between the agreement and completion of the development can be quite long. As such, recalculation of the sum calculated at the time of the agreement may be necessary to arrive at the commuted sum payable prior to the issue of the final certificate.

5.5 Scope for variation

While this document is designed purely to provide guidance, it is recommended that the principles are adopted by all LHAs and developers. The guidance allows for flexibility of approach and ability to stimulate any mutually agreed amendments. This document does not propose any unit rates for maintenance costs to be used within the commuted sum calculations, as these should be locally or regionally calculated and managed where appropriate.

5.6 Risk

Risk is acknowledged as a primary consideration in the calculation of the scale of commuted sum requirements, and it is incumbent on the adopting authority to understand such risk by making use of the available data and experience both locally and nationally.

While it is accepted that there is a certain element of risk to all parties, with regard to such issues as the use of new materials, SuDS, and the life of a development, any such risk can be minimised by the use of the standard procedures advocated in this document.

Risk transfer to the LHA taking over the asset is effected once any commuted sum payment is received, and the asset adopted (or as otherwise set out in the agreement).

It is important that a degree of flexibility, and scope for innovation, is maintained within the process. It is expected that the adoption of this guidance should not hinder this situation.

5.7 The way forward

This guidance provides a basis for negotiation that can be followed by all parties. It attempts to take a fair and balanced view, but it will be for the parties in each case to flesh out the framework it provides. The aim is to create a consistent and transparent approach, and a 'base' position from which to move forward.

APPENDIX 1

A worked example of calculating a commuted sum:

The calculation of a commuted sum is usually based on:

VOLUME OF ASSET	X	DISCOUNT PERIOD	X	PERCENTAGE REPLACEMENT	X	UNIT COST
(e.g. m² of carriageway)		*(see note 1)*		*(see note 2)*		*(see note 3)*

The above sum is the multiplied by the Discount Rate. *(see note 4)*

Note 1 - Discount Period

A common Discount Period (applied to all asset types) is often used in commuted sum calculations, usually 30 years although some highway authorities use 60 years.

The following lifecycles for some key asset types may also be considered:

Structures	120 years is commonly used in commuted sums as this is also the assumed life for a structure in most asset management life cycle models.
Traffic signals	Often included in the general discount period, but a better reflection of design life is 20 years.
Street lighting	Often included in the general discount period, but a better reflection of design life is 40 years.

Note 2 - Assumed percentage replacement

This relates to the assumed percentage replacement of the asset subject to a commuted sum over the Discount Period (see note 1 above).

Reference should be made to:

- The Association of Directors of Environment, Economy, Planning & Transport (ADEPT) / Mineral Products Association (MPA) for pavement service life.
- Highway Maintenance Efficiency Programme (HMEP) for structures design life.
- Institution of Lighting Professionals (ILP) for street lighting design life.

Note 3 - Unit cost

This should be based on current local unit costs related to design specifications in the local design guidance if provided.

Note 4 - Discount rate

Discounting in the public sector allows costs and benefits with different time spans to be compared on a common present value basis. Further details are set out in the government's Green Book:

https://www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-governent

It is recommended that the highway authority's finance (or s151 officer) is consulted regarding the appropriate discount rate.

Discount rates may also be derived from current construction indices (as often used for indexation of highways contracts) or the RPI-X data from the Office of National Statistics.

Discount Rates commonly applied by local authorities for commuted sums are in the following range:

- Zero, taking account of the likely affordability of total charge.
- A figure based on current interest rates.
- A figure from the government green book.

APPENDIX 2

A typical commuted sum procedure for section 38 and section 278 arrangements:

Stage	*Highway Authority actions*	*Other actions*
Initial discussions between a developer and the planning authority regarding the development proposal.	*The planning authority may invite the highway authority to participate in the initial discussions.*	
Indicative planning requirements are established including any commuted sum requirements in principle.		*Developer confirms land purchase and intention to proceed with the development.*
The developer submits a planning application.		*The planning authority will consult the highway authority.*
	The highway authority should calculate provisional (subject to confirmation of final development details) commuted sum requirements to be included in a bond.	
	The highway authority should start consultations with the developer and other parties on the more specialist inventory items where site evaluation may be required e.g. bridges.	
	Draft section 278 legal agreement prepared.	*Draft section 38 legal agreement prepared.*
Consultation and final planning and legal agreements made.	*Final commuted sum value included within the bond.*	
Construction phase.	*Assessment of any design changes that will affect the commuted sum requirements.*	
Construction phase completed.	*Commuted sum recalculated including indexation.*	
Maintenance period completed.	*Developer invoiced for commuted sum.*	
Final certificate issued	*Highway adopted.*	

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