

BRIDGEND COUNTY BOROUGH COUNCIL

REPORT TO CABINET

REPORT OF THE CORPORATE DIRECTOR – COMMUNITIES

15 MARCH 2016

STATUTORY HIGHWAY AGREEMENTS– UN-ADOPTED ROADS AND PATHS THAT ARE SUBJECT TO SUCH AGREEMENTS

1. Purpose of Report.

- 1.1 To seek approval to trial the services of a specialist consultant to complete works in connection with selected outstanding statutory highway agreements so that roads and paths that are subject to such Agreements within developments can be adopted by the Highway Authority without having to use public funds.

2. Connection to Corporate Improvement Plan / Other Corporate Priority.

- 2.1 The current Corporate Improvement Plan 2013-2017 has six Improvement Priorities. The first of these is to “improve the local economy”. In order to do this, it is necessary to have a functioning, well-maintained highway network to facilitate movement of people and goods.
- 2.2 The sixth Improvement Priority in the Corporate Improvement Plan is to “work together to make the best use of our resources”. One of the ways that the Plan says we will achieve this is to “explore innovative and flexible ways of delivering services, including commissioning.” As a result of current staffing levels and current workload, it is not possible to “call in the Bond” as required by the signed statutory highway Agreements for problem sites using our own staff. Consequently, it will be necessary to seek the services of an external specialist Consultant in such matters, in order to achieve any progress for such sites.

3. Background.

- 3.1 The Council has powers as a Highway Authority under Section 38 of the Highways Act 1980 (Section 38 Agreements) to enter into Legal Agreements with developers (or other persons) to adopt highways (roads and/or paths) that they build as part of their developments for future maintenance at public expense.
- 3.2 The criteria for the adoption of highways include that they must be of sufficient public utility, constructed to agreed standards, maintained for the maintenance period by the developer, and be used as a highway during the maintenance period.
- 3.3 Those elements of a highway may include carriageways cycle-ways, footways, verges, service strips, street lighting and highway drains where no public sewer has been provided.
- 3.4 A Section 38 Agreement provides for a developer to bear the costs of the construction and maintenance of the highway and other appropriate matters. A bond or cash deposit is deposited to cover the cost of bringing the road up to an

adoptable standard should a developer become insolvent or is otherwise unable to meet their obligations under the Agreement.

- 3.5 Most residents in buying a new property seek assurance via their solicitors that the highway will eventually be adopted under the mechanism of a Section 38 Agreement. The existence of a Section 38 Agreement and Bond is revealed on a Local Land Charges Search which is part of the conveyancing process.
- 3.6 It is prudent for the Council in its capacity as the Highway Authority not to adopt a highway until a development is completed. This ensures that wear or damage through the use of the road by construction traffic is not rectified at the public expense but by the developer.
- 3.7 The time taken for a highway to become adopted and maintainable at the public expense is dependent upon the developer and how long it takes for a development to be completed to the stage that the highway is of adoption standard. In some cases a small development may only take a matter of months to complete and the highway may then be ready for adoption in a short timeframe. In other cases with much larger developments it can be several years before the roads are ready for adoption. In addition the economic climate can have an impact on the speed with which developments are brought to the stage when the highway can be adopted.
- 3.8 In a number of instances however developers have either unfortunately ceased to trade before bringing the highway in their developments to an adoptable standard or have failed to construct the highway to a standard that is suitable for the Council to adopt. This has resulted in concerns being raised by Local Members and residents who highlight that it has a serious impact upon those living on developments where they were informed that the highway would be adopted but through no fault of their own they remain un-adopted. Such residents may find that they are responsible for maintenance costs and meeting the costs of insurance claims, whereas if the highway were adopted then these responsibilities would be assumed by the Council. Residents living on a development where the roads have not been adopted may find it difficult to sell their houses and may have Council services such as regular litter-picking denied as a result of the non-adoption of their road. Residents may even find themselves left with a half-finished road.

4. Current situation / proposal.

- 4.1 The Council in its capacity as the Highway Authority recognises that this is important issue but unfortunately does not have sufficient resources available to deal with all of the outstanding Section 38 Agreements and ensure that roads are completed to a standard where they may be adopted. It is therefore important that an alternative solution can be found as it is likely that some long standing issues with un-adopted roads on developments will continue unresolved as explained in paragraph 3.8 above).
- 4.2 There are instances when it is difficult for the Highway Authority to make progress on such matters particularly when a developer has ceased to trade or sold on their site or business. In addition, in the case of older developments, the original bond amount can be eroded by inflation meaning that there is insufficient funding for the Council to complete the necessary works to the developer's highways by default to

bring them up to adoptable standards so that they can be adopted. It is therefore necessary for early intervention in order to avoid such a scenario.

- 4.3 For those existing developments where the Developer has defaulted, it will be necessary to “call in the Bond” using the default procedure laid out in the Section 38 Agreement. This procedure involves a Notice – Counter-Notice process and will involve a tender process to engage a Contractor to carry out the outstanding (“default”) works. This procedure is resource-intensive, and the Council does not have the staff resources to carry out the default process in addition to the usual workload.
- 4.4 One option open to the Council is to make use of a specialist consultant to complete works on behalf of developers utilising the bond supporting the Section 38 Agreement. These specialist consultants offer their services to navigate through the complexities of these issues without it becoming an additional burden to a local authority in either time or resource as their fees can be recouped as part of the “establishment charges” defined in the Agreement. The establishment charges are defined as “the costs incurred by the Council in the surveying, inspecting, designing, estimating, preparing tender documents, inviting tenders, vetting tenders, letting successful tender and supervising a scheme of completion works including all administration procedures associated with the scheme”. The default procedure allows for the amount or remaining bond to be claimed from the Surety and be used for carrying out any default work, maintaining the works for the maintenance period prior to the road or roads becoming maintainable at the public expense, payment of the appropriate usual establishment charges of the Council and any outstanding commuted sums/one-off payments owing to the Council. Therefore there is no additional financial burden on the Authority by using external consultants rather than in-house staff.
- 4.7 Such consultants are already employed by a number of other councils who are Highway Authorities including Durham, Shropshire and Worcestershire County Councils who have all reported favourably on the consultants.
- 4.8 The consultants have expertise and experience in dealing with outstanding Section 38 Agreements that the Council would have difficulty in completing. This enables them to bring most outstanding Agreements to a satisfactory conclusion with the eventual adoption of the estate roads and at no cost to the Authority.
- 4.9 In exploring the use of such consultants in the County of Bridgend the Council has recently been approached by Bellavail Indemnity Management Services (IMS) who provide such a service and have worked for a number of other local authorities and successfully dealt with over 300 outstanding Agreements over the past 6 years. In order to ascertain if the service offered is of benefit to the Council it is proposed to carry out a trial arrangement with Bellavail (IMS) whereby they are employed to bring a particular site to a satisfactory state so that the estate roads may be adopted. Upon completion of the trial it is proposed that the results will be reported back to Cabinet. If the trial is deemed to be successful and the service offered is still required then a proposal will also be presented to Cabinet to enter into a formal agreement through the appropriate procurement processes.
- 4.10 By having a small initial trial the Council will be able to determine the usefulness of the service offered prior to carrying out a full procurement tendering process. The

Procurement Section are satisfied that an initial trial of one site only using this Consultant will be acceptable, although if successful and the Council wish to continue to employ external consultants for similar matters then adherence to the full procurement procedure will be required. In order to undertake this small trial a A waiver of the Council's Contract Procedure Rules will be required under Rule 3.6 to permit this small trial to take place by means of a single tender procedure. Under Rule 3.6 of the Council's Contract Procedure Rules a single tender procedure shall only be permitted when a single firm or contractor or a proprietary item or service of a special character is required and justified. The circumstances as outlined in the report demonstrate that this is of a special character and is justified in order for the Council to be able to assess whether this consultancy process can be successful and enable the Council to then consider a full procurement exercise.

5. Effect upon Policy Framework & Procedure Rules.

5.1 There is no effect upon Policy Framework or Procedure Rules

6. Equalities Impact Assessment

6.1 An Equality Impact Screening Form has been completed and this did not highlight potential impacts.

7. Financial Implications.

7.1 The use of a specialist consultant will have no financial impact on the Council as the Consultant's fees will be recouped as part of the "establishment charges" defined in the relevant statutory highway Agreements.

8. Recommendation.

It is recommended that:

8.1 Approval be given for the Corporate Director-Communities to enter into a trial arrangement with Bellavail (IMS) where they are engaged to bring the highways for an identified area or areas to be decided upon by the Corporate Director - communities to an adoptable standard utilising the bond supporting the main agreement, and in order for the trial to take place Cabinet authorise under Rule 3.6 waiver of the Council's Contract Procedure Rules to enter into the agreement with Bellavail (IMS).

8.2 Upon completion of the trial it is proposed that the results of the trial be reported back to Cabinet and if the trial is deemed to be successful and the service offered is still required then arrangements will be made for tender documents to be prepared and issued in accordance with the appropriate procurement processes to engage the services of a specialised consultancy service.

MARK SHEPHARD CORPORATE DIRECTOR - COMMUNITIES

Contact Officer: Kevin Mulcahy, Group Manager Highways
Telephone: (01656) 642535

E-mail: kevin.mulcahy@bridgend.gov.uk