

Kirklees Council

Highways Guidance Note – Introduction to Highways and Adoptions March 2019 (version 1)

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This guidance note

1 This guidance note aims to give a simple introduction to the complexities of the legal side of *highways* and how they are created.

2 This guidance note has been written mainly to help developers, but it will also be used by highways teams within Kirklees Council.

Concepts and definitions

Meaning of highway

3 *Highway* is a term that is widely used but seldom defined. In legal matters, *highway* has two different but related meanings:

- Firstly, it can mean an area of land or other surface over which the public has a right to travel, sometimes called a right to pass and repass, a right of way, or a right of passage.
- Secondly, it can mean that intangible right itself rather than anything physical.

4 In this guidance note, *highway* is used in the first sense given above: an area of land over which the public have a right to travel. To avoid confusion, when referring to just the public rights, the term *highway rights* is used.

Highway rights and types of highway

5 *Highways* can be open to all forms of traffic or be restricted to just certain types and can be

categorized by the type of traffic that the public has the right to use them for:

- **public footpath** – *pedestrian* traffic only
- **cycle track** – *pedestrian* and cycle traffic only
- **public bridleway** – *pedestrian*, cycle, and equestrian traffic only
- **restricted byway** – *pedestrian*, cycle, equestrian, and non-motorized vehicle traffic only

6 To avoid confusion when discussing private cycle facilities, in this guidance note:

- **public cycle track** is used to refer to *highways* for *pedestrian* and cycle traffic only
- **cycle track** refers to both *public cycle tracks* and similar private paths available for both *pedestrian* and cycle traffic

7 In addition, the following definitions are also used in this guidance note:

- **public path** – a *public footpath*, *public cycle track*, or *public bridleway*

■ **public right of way or PROW** – either a *public path* or a *restricted byway*

8 In some technical or legal publications, ‘public path’ and ‘public right of way’ do not include *public cycle tracks*.

All-purpose roads

9 *Highways* and other roads open to all traffic are sometimes referred to as *all-purpose roads*.

Meaning of pedestrian

10 In normal use, *pedestrian* means someone who is walking rather than travelling in a vehicle but when used to describe who may use *highways*, it usually has an extended meaning.

11 When using *public rights of way*, *pedestrians* may take with them *natural accompaniments*. This is not a well-defined term, but it is generally taken to include prams, pushchairs, buggies, dogs, shopping trolleys, children’s ride-on toys, wheelbarrows, supermarket trolleys, sack trucks, and wheeled cases. It is unclear whether it includes skateboards, roller skates, or similar. However, wheelchair users and users of mobility scooters have a clear legal right to use *footways* and *public rights of way*.

12 In this guidance note the following definitions are used:

■ **pedestrian** – someone who is walking or using a wheelchair or mobility scooter, including someone with one or more *natural accompaniments*

■ **natural accompaniment** – a pram, pushchair, buggy, dog, shopping trolley, child’s ride-on toy, wheelbarrow, supermarket trolley, sack truck, or wheeled case

Parts of highways and other roads

13 The public right to use a *highway* extends across its full width. However, with wide *highways*, not all the width might be usable and some sections might be intended for different uses. The different parts include:

■ **carriageway** – that part provided for use by vehicles

■ **cycle track** – that part provided for use by *pedestrians* and cyclists only

■ **footway** – that part of an all-purpose road provided for use by *pedestrians* only

■ **verge** – that part not intended for use by any traffic but which is generally flat and at a similar level to the *carriageway* – excluding the side slopes of any cuttings or embankments and any flattish areas or ‘berms’ forming part of them

■ **hard margin** – a narrow, paved *verge*

14 Some private roads and paths also contain parts similar to those described above. For convenience, in this guidance note, these terms are also applied to parts of private roads.

Footways, cycle tracks, and roadside paths

15 From the above, it can be seen that:

■ A *footway* is always associated with a *carriageway* and is always part of a wider *highway* or other road.

■ A *cycle track* can be either a path on its own or a path that is associated with a *carriageway* of a wider *highway* or other road.

16 In this guidance note, *roadside path* is used to describe any *footway* or *cycle track* that runs alongside a *carriageway*, regardless of whether it is separated from the *carriageway* by a grassed *verge* or similar.

Streets and private streets

Streets

17 In normal use, a *street* is a road in a built-up area with, typically, houses or other buildings on one or both sides. However, highways laws, including the [Highways Act 1980](#), usually use the wider definition given in [section 48](#) of the [New Roads and Street Works Act 1991](#). This says that a *street* is the whole or any part of any *highway*, road, lane, *footway*, alley, or passage, whether or not it is a thoroughfare. The definition also includes any land laid out as a way whether, for the time being, it is formed as a way or not. This means that proposed roads or unfinished roads on building sites can count as *streets*.

Private streets

18 Highways laws often refer to *private streets*. The [Highways Act 1980](#) says that *private street* means any *street* that is not a *highway maintainable*

at the public expense. (*Highways maintainable at the public expense* are explained in paragraph 27.)

19 *Street* can also mean part of a *street*.

Therefore, *private street* can also mean part of a *street*. It is not unusual for one part of a *street* to be classed as a *private street* and another part to be *highway maintainable at the public expense*. The

private bit does not have to be at one end: one side of a *street* could be private with the rest *highway maintainable at the public expense*. For example, where new houses have been built beside but set back from an existing road, the strip of land across the front of the houses may be classed as a *private street*.

Creation of new highways and permanence of old ones

General principles

Dedication and acceptance

20 The concept of *highways* was established centuries ago at a time when there were few written laws and no local highway authorities.

Consequently, when deciding whether an area of land was a *highway*, the courts adopted the principle of dedication and acceptance: if an area had been dedicated as a *highway* and the public at large had accepted this, then it was a *highway*.

21 To help decide whether dedication and acceptance had actually happened, the courts adopted two further principles:

- If the public used an area of land as if it were a *highway*, then they were deemed to have accepted it as a *highway*.

- If the owner of an area of land did not object to the public using it as *highway*, then they were deemed to have dedicated it as a *highway*.

‘Once a highway, always a highway’

22 The courts also adopted the principle of ‘once a *highway*, always a *highway*’. In other words, once a *highway* has been created, it remains a *highway* for ever; it cannot cease to be a *highway* through lack of use.

Modern highway law

23 The old general principles still apply, although their application has been clarified in recent acts of parliament.

24 Nowadays, various formal methods for the creation of new *highways* are also available. These are discussed in paragraphs 29 to 42.

Legal duty to maintain highways

Kirklees Council’s duty to maintain highways

25 As the local highway authority, Kirklees Council has a legal duty to maintain most but not all *highways* in Kirklees. The way that *highways* can be created through the principle of dedication and acceptance means that *highways* can come into existence without any official involvement or knowledge. It would be unreasonable for the council to have to maintain these.

26 Accordingly, Kirklees Council only has a legal duty to maintain certain types of *highways*. These are:

- Old *highways* – any *public path* that has existed continuously since 16 December 1949 and any other *highway* that has existed continuously since 30 August 1835

- *Highways* that were constructed by Kirklees Council or its predecessor local highway authorities

- *Highways* that Kirklees Council or its predecessor local highway authorities have ‘adopted’ or otherwise agreed to maintain under the provisions of various acts of parliament

Publicly maintainable highways

27 *Highways* that Kirklees Council has a duty to maintain are often called ‘adopted highways’ but this term can be confusing as not all of them have been formally adopted. The usual legal term for this type of *highway* is ‘*highway maintainable at the public expense*’ but this is quite long-winded. Therefore, in this guidance note the shorter term *publicly maintainable highway* is used.

Highways not maintainable at the public expense

28 There are many *highways* in Kirklees that are not *publicly maintainable highways*. Generally, no one has any legal obligation to maintain these.

Creation of new publicly maintainable highways

Introduction

29 New roads and paths can become *publicly maintainable highways* in various ways. The most relevant to new developments are discussed below.

Highway authority roads and paths

30 Roads and paths built by Kirklees Council in its capacity as the local highway authority become *publicly maintainable highways* once they are finished.

Section 38 agreements

31 Roads and paths built by private developers can become *publicly maintainable highways* by being adopted by agreement with Kirklees Council using its powers under [section 38](#) of the [Highways Act 1980](#). These agreements are usually known as *section 38 agreements*.

32 *Section 38 agreements* are popular because:

- They give developers a legally enforceable guarantee that, if the roads and paths were provided in accordance with the agreement, then the council would adopt them as *publicly maintainable highways*.
- They give the council a legally enforceable guarantee that, if the roads and paths were not provided in accordance with the agreement, then the council would be allowed to correct or finish them and would have access to funds to do so.
- They give prospective purchasers confidence that their properties would be served by *publicly maintainable highways*.
- Once the roads or paths have been adopted, then the *section 38 agreement* would define exactly what was adopted.

Further information

33 The council has prepared a highways guidance note [Section 38 Agreements for Highway Adoptions](#) which explains how to use a *section 38 agreement* to get new roads and paths adopted by Kirklees Council as *publicly maintainable highways*.

Section 278 agreements

34 [Section 278](#) of the [Highways Act 1980](#) allows Kirklees Council to enter into legally enforceable agreements (*section 278 agreements*) to allow someone else to pay for the council to exercise its powers as a local highway authority. These powers include the creation of new *publicly maintainable highways*, but *section 278 agreements* are mainly used to allow developers to order and pay for works in existing *highways*.

Street works and the Advance Payments Code

35 Kirklees Council may undertake *street works* to *private streets* (see paragraphs [18](#) and [19](#)) to bring them up to a suitable standard and then declare them to be *publicly maintainable highways* using the provisions of the [Private Street Works Code](#). This is contained in [sections 205 to 218](#) of the [Highways Act 1980](#). Using this procedure, the council's costs are shared between the different 'frontagers' of the *private street*.

36 To reduce the amount the frontagers might have to pay on new developments, the [Advance Payments Code](#) or APC ([sections 219 to 225](#) of the [Highways Act 1980](#)) creates a system which allows the council to collect a bond from the developer before work starts. Under this system, within six weeks of a proposed building being given building control approval, Kirklees Council serves an *APC notice* on the applicants stating the value of the required bond. The applicant must then pay this

amount before starting work; otherwise, they would be committing a criminal offence.

37 If, after an APC bond has been paid, the council undertakes *street works* under the *Private Street Works Code*, the bond money would be used to help cover the council's costs. If the bond were too high, any extra would be repaid to the applicant but if the bond were insufficient, then the frontagers would have to pay the extra amount required.

38 If, after an APC bond has been paid, a *Section 38 agreement* for the roads or paths were signed, then the APC bond would be refunded.

Further information

39 For more information about the APC, please contact the highway adoptions team.

Deeds of dedication

40 Landowners can use a deed of dedication exercise their common law right to dedicate land as *highway*. Using this method in cooperation with Kirklees Council means that there would be no confusion over whether or when the *highway* had been created. The council may then declare that the road or path is a *publicly maintainable highway*.

Section 228 notices

41 If no one knows who owns a particular road or path, then there would not be a landowner to dedicate it as *highway* or to enter into a *section 38 agreement*. Where *street works* have been undertaken – whether by Kirklees Council or some other body – to a road or path with no known owner, the council may post notices on site under *section 228* of the *Highways Act 1980* saying that it intends to take on the road or path as *publicly maintainable highways*. Then, unless anyone objects, the road or path becomes a *publicly maintainable highway* one month later.

Public paths

42 Various acts of parliament allow new *public paths* to be made or existing ones to be diverted or stopped up by using legal orders. Any new or diverted paths would be *publicly maintainable highway*.

43 Developers considering proposals that would require new *public paths* to be made or existing ones to be diverted or stopped up should discuss them with Kirklees Council's highway adoptions team as soon as they can.

Stopping up, extinguishment, or diversion of highways

General principles

44 Various acts of parliament allow *highways*, including *public rights of way*, to be stopped up or extinguished – that is, to cease to be *highways* – or diverted by using legal orders. However:

- There usually has to be a very good reason for making an extinguishment or stopping up order or a diversion order.
- An order would usually require the support of both Kirklees Council and the appropriate government minister – currently, the Secretary of State for Transport.
- It might take some time for the application to be processed by both the council and the government.
- An application for an order might be unsuccessful.

- The applicant for the order would usually have to pay for the application and associated admin and legal work, even if it were unsuccessful.
- If the application were successful, the applicant would have to pay for any construction work required, which might include the provision of a new alternative *highway*.

Ownership of stopped up highways

45 When a *highway* is stopped up, the owner of the land regains full control of it, regardless of who requested or paid for the extinguishment, stopping up, or diversion order. (See paragraph 48 for more information on *highways* and landownership.)

Consultation

Anyone considering a development that would require a *highway* to be stopped up or diverted

should consult with Kirklees Council's highway adoptions team as soon as practicable.

Highway records and landownership

Highway records and enquiries

46 Some *highways* have paved surfaces and are readily apparent on site. These might have been created using legal orders, with plans showing their exact locations. Others might be shown on Kirklees Council's 'definitive map' – a statutory document prepared by the council. However, as *highways* can become established through prolonged public use – but do not lapse through lack of it – a development site might contain *highways* that are neither visible on the ground nor recorded in any legal document.

47 Developers should, as soon as practicable, contact Kirklees Council's highway adoptions team to establish whether any *highways* might be affected by their proposals – regardless of what was said in response to any local land searches when the land

was purchased or whether there appears to be any paths or tracks on the site.

Highways and landownership

48 The way that *highways* can be created through the principle of dedication and acceptance means that *highways* can come into existence without any official involvement or knowledge. In these cases, the ownership of the land would be unaffected: it would not be transferred to Kirklees Council. Accordingly, there are many *highways* – even *publicly maintainable highways* – where the land is not owned by the council. With some old *highways*, the identity of the owner might now be unknown.

49 The ownership of a road or path does not give any clues about whether it is a *highway*.

Further information, comments, and queries

Kirklees Council highways standards and guidance

Highways guidance notes

- Existing Roads and Paths Affected by New Developments
- Gradients
- Highway Adoption Drawings
- Highway Adoptions and the CDM Regulations
- Highway Adoptions Criteria
- Highways Technical Approval
- Highways, SuDS, and Private Drainage
- Introduction to Highways and Adoptions
- Operation and Maintenance Manuals for Adopted Highways
- Requirements of New and Improved Roads and Paths
- Requirements of Submitted Documents
- Section 38 Agreements for Highway Adoptions
- Soakaways
- Technical Approval of Surface Water Flow Attenuation Tanks and Pipes

Other highways documents

- Kirklees Highways Standard Details

Comments and queries

Kirklees Council welcomes comments and queries about this guidance note

Although Kirklees Council is not responsible for the content of external websites, please report any broken links

- Huddersfield (01484) 22 1000 – ask for ‘Highway Adoptions’
- Highways.Section38@kirklees.gov.uk
- www.kirklees.gov.uk/highwayadoptions
- Kirklees Council
Highway Adoptions
Flint Street Depot
Flint Street
Fartown
Huddersfield
HD1 6LG