

AGENDA ITEM 7

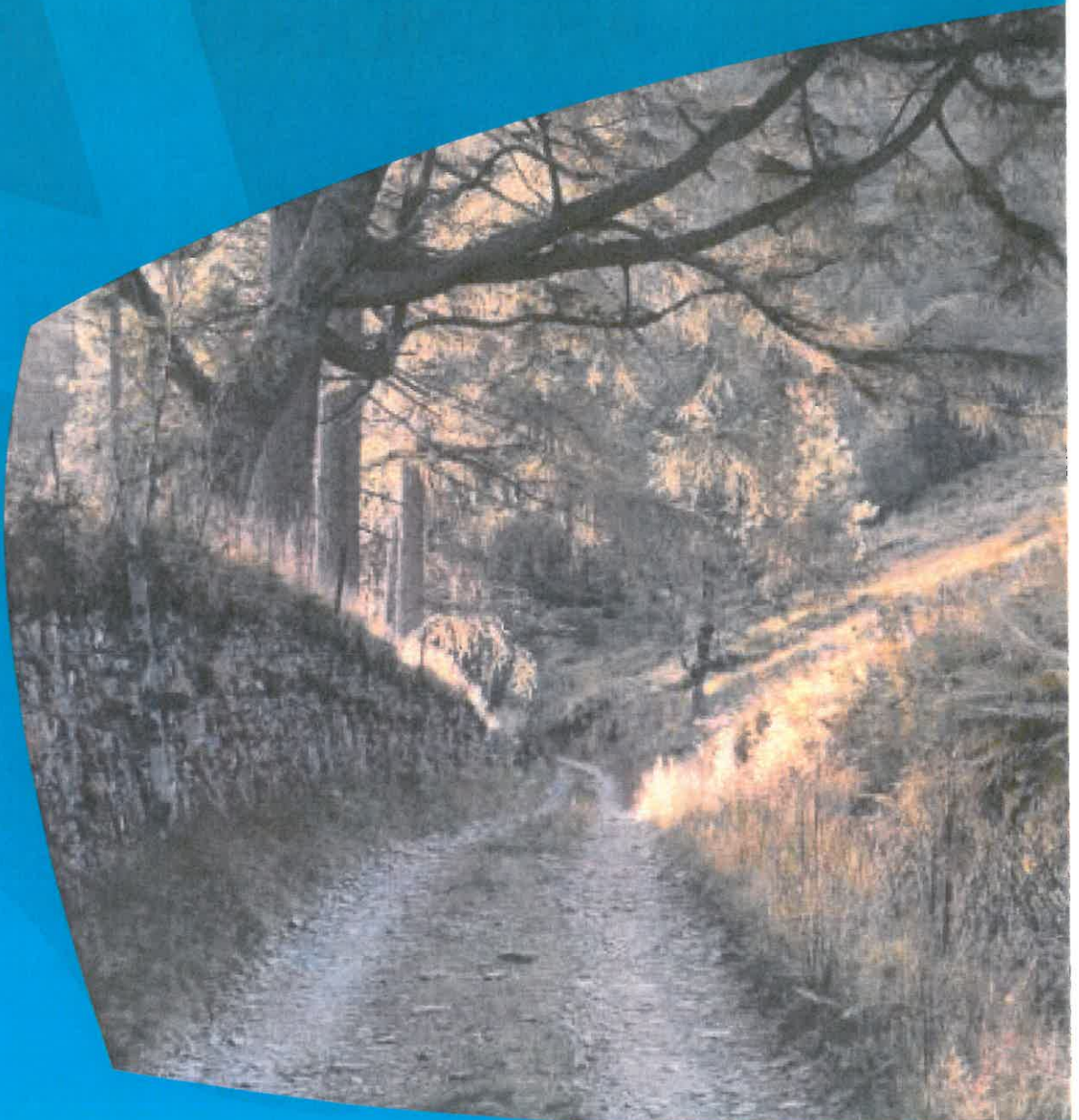
APPENDIX 3

HIGHLAND COUNCIL GUIDANCE

AGRICULTURAL & FORESTRY WAYS

**Permitted Development Rights
Guidance for Agricultural and
Forestry Private Ways (Interim)**

**December 2014
An Dùbhlachd 2014**



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About this guidance

This guidance was published by The Highland Council as interim guidance on 22 December 2014 to accompany the coming into force of The Town and Country Planning (General Permitted Development) (Scotland) Amendment (No. 2) Order 2014 on 15 December 2014. The guidance is non-statutory, but is an important consideration for, and provides crucial advice to, the developers of agricultural or forestry private ways.

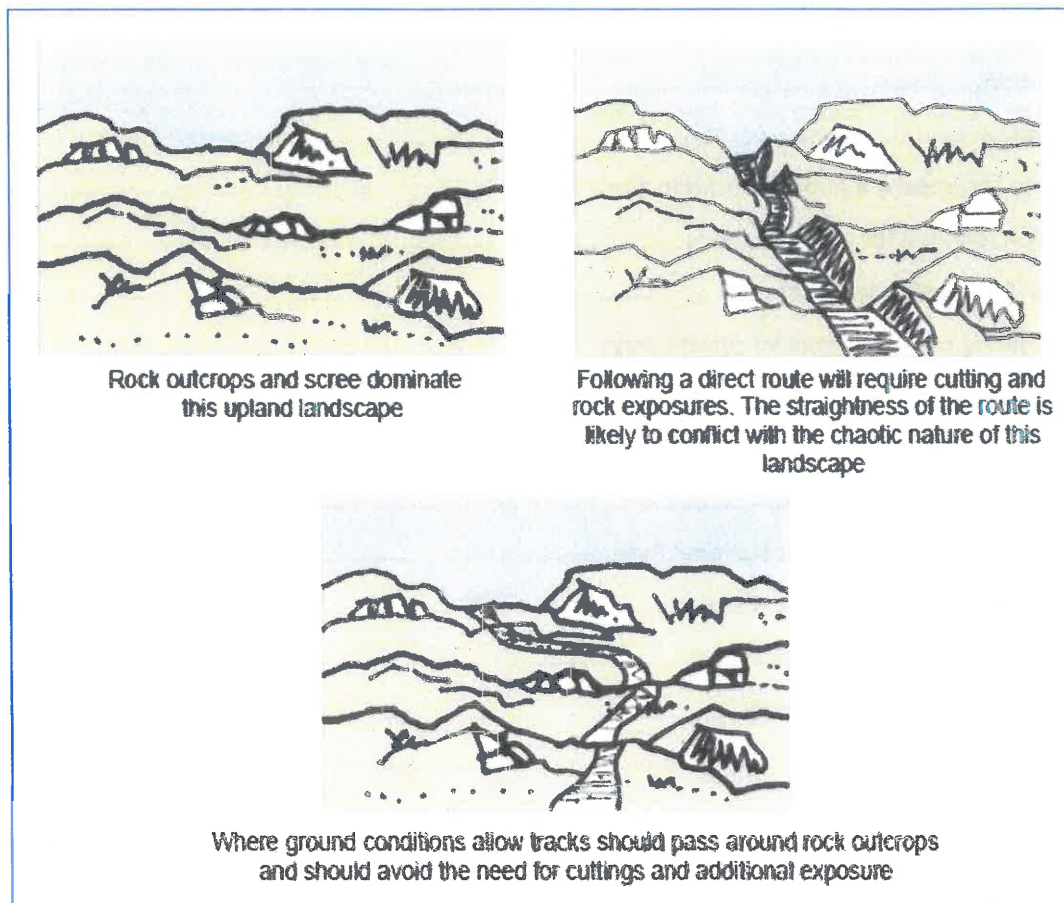


Figure 1 - Excerpt from SNH's 'Constructed tracks in the Scottish Uplands' guidance (2013)

Introduction

Before 15 December 2014, [The Town and Country Planning \(General Permitted Development\) \(Scotland\) Order 1992](#) afforded developers unrestricted permitted development rights for the construction of private ways on agricultural (Class 18) or forestry land (Class 22), requisite¹ for the purposes of agriculture or reasonably necessary for the purposes of forestry, without the need to apply for planning permission.

While many private ways, particularly those at a low level, have been constructed under these permitted development rights without issue, an increasing number of tracks in sensitive upland, highland and peatland areas in recent years have given rise to a variety of concerns, including landscape, visual and environmental impact, flooding and drainage.

Following a lengthy consultation period, the Scottish Government has now revised the framework surrounding permitted development rights for private ways on agricultural land² within an agricultural unit³ and on land used for the purposes of forestry. While permitted development rights remain, they are now subject to conditions.

From 15 December 2014 onwards, following the introduction of [The Town and Country Planning \(General Permitted Development\) \(Scotland\) Amendment \(No. 2\) Order 2014](#), private ways cannot be formed or altered unless and until the developer has completed a 'prior notification' process with the Planning Authority.

Transitional arrangements

Agricultural and forestry private ways constructed in full prior to 15 December 2015 benefit from the planning permission granted through permitted development rights as they were prior to that date; such private ways require no additional approval by the Planning Authority.

Where the construction of a private way was begun prior to 15 December 2014, and where construction work actively continued up to and beyond that date, development may generally continue without the need for prior notification.

In cases where development of a private way commenced prior to 15 December 2014, but then ceased or was suspended, for whatever reason, a prior notification application will normally be required for the remainder of the development.

Similarly, where development of a private way did not commence prior to 15 December 2014, even if it was planned (or in the case of forestry ways, was approved as part of a forest plan) prior to that date, or alterations (including extensions) are proposed to a private way that was itself constructed prior to that date, a prior notification application will be required.

Where there is any doubt, developers must contact the Council prior to commencing any development.

¹ In order to be "requisite for the purposes of agriculture", works must be reasonably necessary for the purposes of agriculture within the unit (MacPherson v Secretary of State for Scotland 1985 SLT 134).

² "agricultural land" means land which, before development permitted under this Order is carried out, is land in use for agriculture and which is so used for the purposes of a trade or business and excludes any dwellinghouse or garden or any land used for the purposes of fish farming.

³ "agricultural unit" means agricultural land which is occupied as a unit for the purposes of agriculture other than fish farming, but includes— (a) any dwelling or other building on that land occupied for the purpose of farming the land by the person who occupies the unit; or (b) any dwelling on that land occupied by a farmworker.

Definition of a private way

Article 2 of the General Permitted Development Order defines a “private way” as being “*a road or footpath which is not maintainable at the public expense*”. The Order goes on to clarify that a “road” has the meaning assigned to it by Section 151 of the Roads (Scotland) Act 1984, which confirms that “road” includes within its meaning any track, cycleway, footway, footpath or any other terrestrial way (including all associated verges, structures etc.) over which the public has a *right of passage*. Section 47 of The Countryside (Scotland) Act 1967 also defines a footpath as a path over which the public has a *right of way*.

Definition of a road

The Roads (Scotland) Act 1984 (as amended) defines a “road” as being “*any way (other than a waterway) over which there is a public right of passage (by whatever means and whether subject to a toll or not and includes the road’s verge, and any bridge (whether permanent or temporary) over which, or tunnel through which, the road passes; and any reference to a road includes a part thereof;*”.

Definition of a footpath

The Roads (Scotland) Act 1984 (as amended) states that where the public right of passage “...referred to in the definition of “road” in subsection 1 above [see definition above] —

(a) *is by foot only, the road is—*

- (i) *where it is associated with a carriageway, a “footway”; and*
- (ii) *where it is not so associated, a “footpath”;*

(b) *is by pedal cycle only, or by pedal cycle and foot only, the road is a “cycle track”;*

(c) *includes such a right by vehicle, other than a right by pedal cycle only, the road is a “carriageway”.*

The Countryside (Scotland) Act 1967, referred to in the Town and Planning (Scotland) Act 1997 (as amended), also defines a “footpath” as being “*a way over which the public have the following, but no other, rights of way, that is to say, a right of way on foot with or without a right of way on pedal cycles.*”.

It should be noted that all private ways may be accessed by the general public by foot and normally by bicycle; the term ‘private’ does not mean that the public may be denied access where rights of way or passage exist or that the general right of access under the Land Reform (Scotland) Act 2003 does not apply.

Formation or alteration of a private way

The General Permitted Development Order states that a prior notification process applies to the formation or alteration of **all** agricultural or forestry private ways. *Formation* is a fairly straightforward concept: a new or significant extension to an existing private way.

The Council considers *alteration* to mean all private way development which is not maintenance and may include: widening, rerouting, small/medium extensions, spurs, the formation of closely associated parking or marshalling areas, the replacement of culverts with bridges etc., alterations to drainage infrastructure or any other change that materially alters the form or developed area of the private way. Please note that this list of examples is not exhaustive and every case will be considered on its merits.

Maintenance, which is not subject to a prior notification process, may include resurfacing, edge strengthening, like-for-like replacement of existing infrastructure etc., however we would strongly encourage developers to discuss proposed maintenance with us prior to it taking place so a judgement can be made as to the application of the prior notification process.

Reasonably necessary for the purposes of agriculture/forestry

It is important to consider the use of a private way, as **permitted development rights apply only to those ways which serve a clear and demonstrable agricultural or forestry purpose *and* are also reasonably necessary.**

If a private way does not have a clear agricultural or forestry use, or is not considered reasonably necessary for agricultural or forestry operations, then it cannot constitute permitted development and will require an application for planning permission. It is the developer's responsibility to demonstrate that the proposed use falls within the scope of the Permitted Development Order.

The courts have held that "agricultural use" includes arable farming, the keeping of livestock, the growing of crops, grazing horses (but not where the horses are kept for recreational purposes), allotments, fox farming, mink farming, fish farming and the making and selling of wine made from grapes grown on the land.

Agricultural use **does not include** the keeping, breeding and training of horses for show jumping or recreation, hill access for sporting activities (which may include 4x4 activities, shooting, fishing etc.), the keeping and boarding of dogs, the establishment of a cheese-making business or similar. These lists are not exhaustive.

If a private way, or an alteration to an existing private way, is proposed as being for an agricultural or forestry use, or reasonably required for agricultural or forestry purposes, but this turns out not to be the case, then enforcement action may be taken.

Enforcement action may require the new or altered way to be removed in part or full and the land reinstated, which may prove costly for the developer. It is important, therefore, that developers always discuss the proposed use of a private way with the Planning Authority at an early stage.

Circumstances where permitted development rights do not apply

There are certain circumstances in which agricultural or forestry permitted development rights for private ways do not apply. Circumstances include proposed private ways where:

- the use of the proposed or altered private way is not requisite⁴ for the purposes of agriculture or reasonably necessary for the purposes of forestry;
- the use of proposed or altered private way includes significant non-agricultural or non-forestry access;

⁴ In order to be "requisite for the purposes of agriculture", works must be reasonably necessary for the purposes of agriculture within the unit (MacPherson v Secretary of State for Scotland 1985 SLT 134).

- any part of the proposed or altered private way would be within 25 metres of the metalled portion of a trunk or classified road;
- prior notification has not been submitted;
- prior approval is refused;
- a condition attached to a planning permission or an Article 4 Direction removes or limits permitted development rights;
- the proposed or altered private way would have a likely significant effect on a Special Area of Conservation (SAC) or Special Protection Area (SPA) and approval has not been given for the development under The Conservation (Natural Habitats, &c.) Regulations 1994;
- the proposed or altered agricultural private way constitutes 'EIA Development' under the EIA Regulations;
- the proposed or altered private way is located within a National Scenic Area, unless it comprises part of an approved afforestation scheme⁵.

If one or more of the above criteria is relevant to a proposed private way or a proposed alteration to an existing private way, an application for planning permission will always be required. Developers must contact the Planning Authority to discuss any proposals that fall, or may fall, within these criteria.

Prior notification

Prior notification means a developer must submit details of the proposed development (including an application form and plans) to the Planning Authority before any work commences.

The Planning Authority will then consider the details submitted and decide if the development may proceed as proposed or if further assessment, examination or changes are required.

The prior notification process for private ways is very similar to that which currently exists for agricultural and forestry buildings, namely:

- If the proposed development raises no issues and the Planning Authority does not advise that their 'prior approval' is required, after a period of 28 days following the submission of the prior notification, the developer may commence development; or
- If the Planning Authority have concerns or believe that a closer assessment of the proposed private way is necessary, they will notify the developer within 28 days of the prior notification to advise that their 'prior approval' will be required. Thereafter, development cannot commence until that prior approval has been given or, if it is refused, that an appeal has been lodged with, and allowed by, the Scottish Government. Where approval is given, the development must commence within three years.

⁵ The Town and Country Planning (Restriction of Permitted Development) (National Scenic Areas) (Scotland) Direction 1987.

It is important to note that no work on a private way can take place before the prior notification (and, if required, approval) process has been concluded. Where prior approval is not required, a private way must be carried out within three years.

The carrying out of any works relating to a private way without first notifying the Planning Authority or, where relevant, receiving their prior approval, voids Class 18/Class 22 permitted development rights.

Once voided, the private way cannot benefit from permitted development rights and an application for planning permission will always be required.

Prior approval

Where the Planning Authority determines that prior approval is required, no development can commence on the private way until approval has been given. As part of the prior approval process, the Planning Authority may request additional information from the developer and may need to consult other bodies, such as Scottish Natural Heritage (SNH) or the Scottish Environment Protection Agency (SEPA).

The Planning Authority may decide to:

- give their approval unconditionally;
- give their approval subject to conditions; or
- refuse to give approval.

If conditional approval is given or approval is refused, the developer may appeal to the Scottish Government, whose decision will be final.

Where approval is given subject to conditions, the conditions may only relate to the design, manner of construction, materials to be used or route of the private way and no other issue.

Once approved, a private way must be carried out within three years, otherwise the approval will expire and the developer will have to reapply to the Planning Authority.

Information to accompany a prior notification application

An [application form](#) is provided for prior notification applications and must be used by developers. Applications may be submitted online through the Scottish Government's ePlanning portal, or by sending the documentation direct to the Planning Authority through the post. There is currently no application fee.

The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (as amended) requires that applications for prior notification must also be accompanied by a description of the proposed development (including the proposed design and manner of construction, details of the materials to be used and a plan indicating the route of the private way) and any fee required to be paid.

While there are no hard and fast rules, and requirements may vary on a case-by-case basis, for many low-level private ways, those located within areas of established forestry or alterations to existing ways, information requirements may comprise little more than that required through the application form, a

location plan, a plan of the proposed route of the way and details of construction methods, practices and materials.

More information is, however, likely to be required for private ways in prominent, sensitive, scenic or special landscape areas, areas of gradient or complex topography, and development on peatland, wet flushes, affecting water bodies/other water environments or involving water crossings. This list is not exhaustive.

If sufficient information is not submitted, the progress of an application is likely to be delayed. Developers should always contact the Planning Authority before submitting a prior notification application for advice on the specific information requirements for the proposed private way.

As a general rule of thumb, and to ensure that applications can be processed timeously, the following level of information is requested:

Information required for all applications

- A completed application form.
- Any relevant agricultural holding/crofting/forestry registration number.
- A description of the agricultural activities carried out within the agricultural unit.
- A description of the proposed use of the proposed private way.
- A scale location plan showing the full extent of the agricultural or forestry unit (ownership boundaries should be marked in blue) and the route of the proposed private way therein (outlined in red).
- A scale plan (or plans) showing and encompassing the full extent of the proposed private way, including all areas of cutting or filling (or both), track edges, water crossings and other engineering operations (boundaries should be outlined in red).
- Full details (incl. scale drawings, as necessary) of the design and means of construction of the private way (including proposed materials and finishes, construction methods, seeding and verge reinstatement etc.).
- Full details (incl. scale drawings, as necessary) of all engineering operations.
- Full details (incl. scale drawings, as necessary) of surface water drainage provision.
- Full details (incl. scale drawings, as necessary) of any on-site proposals to dispose of waste material resulting from the formation of the private way.

Additional Information Requirements

Where water courses or bodies will be crossed:

- ☑ Full details (incl. scale drawings, as necessary) of the design and means of construction of any culverts, bridges or other water crossings.

Where water courses/bodies other water environment resources and peatland may be affected:

- ☑ A scale plan showing the location of any water courses, lochs/lochans, wetlands, flushes, groundwater-dependant terrestrial ecosystems (GWDTE), peatland, groundwater resources and private water supplies.

Where cutting or filling (or both) is required or private ways will be form on a gradient:

- ☑ Full details (incl. scale drawings, as necessary) of all cutting or filling (or both) or other engineering operations.
- ☑ Cross-sectional scale drawings for all sections of the private way where:
 - i. with regard to cutting or filling (or both), the cut and/or fill exceeds 0.5m in height/depth; and
 - ii. the existing gradient of the land exceeds 1 in 5 / 20% / 11.31°.

In sensitive areas, such as a formal landscape, protected species or other environmental designations, and depending on the nature of the proposed private way, additional information may also be required. Developers are strongly encouraged to discuss their proposals with the Planning Authority, and identify the type and level of information required, prior to the submission of a prior notification application.

Design and routing considerations for private ways

The design, construction and routing of all proposed or altered private ways must demonstrate compliance with relevant [national policy/guidance](#) and the applicable Development Plan.

For private ways within Highland, but outwith the Cairngorms National Park, this means that consideration must be given to the policies contained within the [Highland-wide Local Development Plan](#). In particular:

- ▣ Policy 28 – Sustainable Design
- ▣ Policy 29 – Design Quality & Place-making
- ▣ Policy 30 – Physical Constraints
- ▣ Policy 36 – Development in the Wider Countryside
- ▣ Policy 51 – Trees and Development
- ▣ Policy 52 – Principle of Development in Woodland
- ▣ Policy 55 – Peat and Soils
- ▣ Policy 57 – Natural, Built and Cultural Heritage
- ▣ Policy 58 – Protected Species
- ▣ Policy 61 – Landscape
- ▣ Policy 63 – Water Environment
- ▣ Policy 64 – Flood Risk

Please note that the above list is not exhaustive and depending on the specific nature, character and location of a proposed private way, other policies may also be relevant.

For proposed private ways within the Cairngorms National Park, consideration must be given to the relevant policies contained within the [Cairngorms National Park Local Plan](#).

Agricultural private ways

In addition to Development Plan considerations, the design, routing and means of construction of all proposed or altered agricultural private ways should accord with the principles outlined in SNH's [Constructed Tracks in the Scottish Uplands](#).

Forestry private ways

In addition to Development Plan considerations, the design, routing and means of construction of all proposed or altered forestry private ways should accord with the principles outlined in the [UK Forestry Standard guidelines](#) and SNH's [Constructed Tracks in the Scottish Uplands](#).

General design considerations

In general terms, private ways should always be designed so as to:

- Demonstrate inconspicuous and sensitive routing which reduces visual impact and encourages successful assimilation into the landscape;
- Demonstrate due consideration of any relevant [Landscape Character Assessment](#), [Special Qualities Descriptions](#) and any other reports or citations;
- Minimise surface water run-off/scouring and incorporate proper and effective drainage;
- Avoid areas of deep peat, flushes, wetland and groundwater-dependent terrestrial ecosystems;
- Avoid steep gradients and the need for significant cutting or filling (or both);
- Use local stone and aggregate wherever possible, avoiding significant importation of materials (particularly those of differing colours and textures to those found locally);
- Avoid adverse impact on historical, natural and cultural heritage designations and key tourist routes and viewpoints;
- Avoid adverse impact on the character of [Areas of Wild Land](#);
- Avoid adverse impact on sensitive habitats and protected species;
- Avoid, wherever possible, adverse impact on better quality in-bye or agricultural land; and
- Constitute the minimum appropriate width, length and (for hill tracks) altitude of private way required for the proposed use.

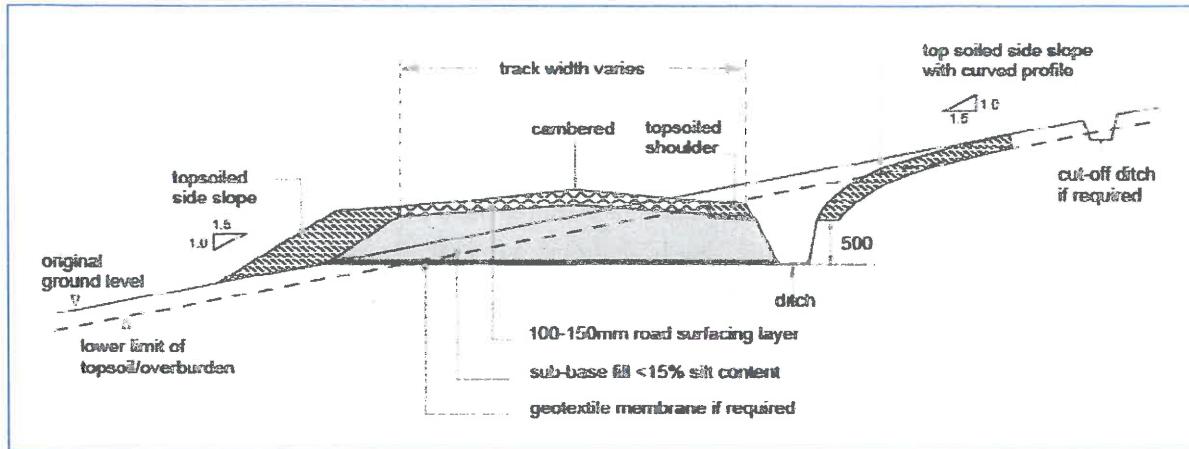


Figure 2 - Cut-and-fill on a gentle slope - Excerpt from SNH's 'Constructed tracks in the Scottish Uplands' guidance (2013)

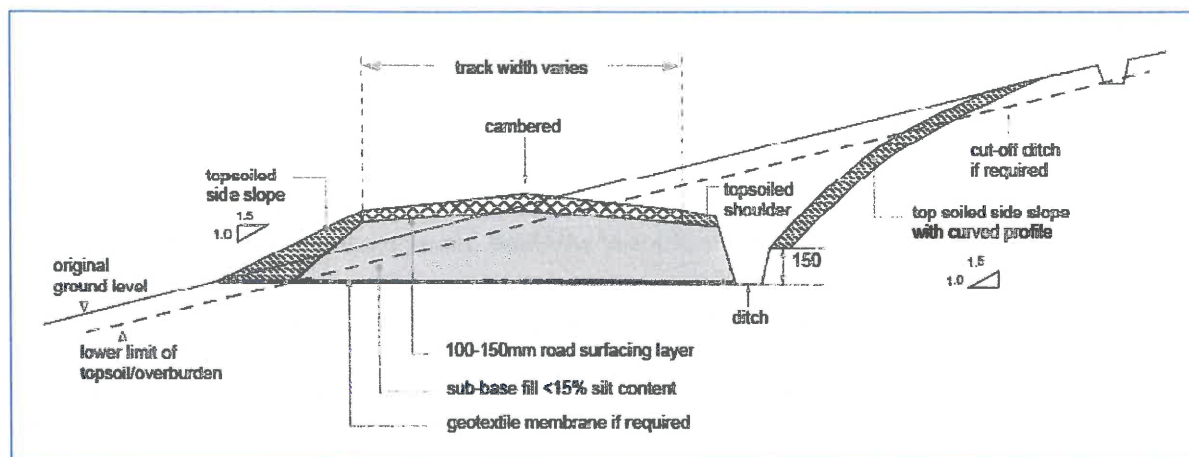


Figure 3 - Cut-and-fill on a steeper slope - Excerpt from SNH's 'Constructed tracks in the Scottish Uplands' guidance (2013)

Private ways within the Cairngorms National Park

Where a private way is proposed within the Cairngorms National Park, developers should submit a prior notification to The Highland Council as normal. The [Cairngorms National Park Authority](#) does, however, have a roll to play in the process and will be consulted on any application within their boundary. The Cairngorm National Park's own planning policy will also be used in the determination of the application.

For all private way proposals within the Cairngorms National Park, developers must clearly demonstrate that the siting, design and routing of a proposed private way will not have any significant effect on the core attributes, qualities or character of the designation. Reference should be made to the relevant [Landscape Character Assessment](#), any other reports or citations and the Cairngorms National Park Authority's own guidance.

The Cairngorms National Park Authority has published a variety of documents that may be of use to developers of private ways within the Park area. Downloadable versions can be accessed here: <http://cairngorms.co.uk/park-authority/about-us/publications>

Private ways within National Scenic Areas

The Town and Country Planning (Restriction of Permitted Development) (National Scenic Areas) (Scotland) Direction 1987 remains in force and removes permitted development rights for proposed or altered private ways located within a National Scenic Area, unless they comprise part of an approved afforestation scheme.

Accordingly, all proposed or altered private ways in a National Scenic Area will require an application for planning permission and developers must clearly demonstrate that the siting, design and routing of a proposed private way will not have any significant effect on the core attributes, qualities or character of the designation. Reference should be made to the relevant [Landscape Character Assessment](#), [Special Qualities Descriptions](#) and any other reports or citations.

In all cases concerning proposed new or altered private ways within a National Scenic Area, developers should contact the Council at an early stage to discuss their proposals and for advice and guidance. A new private way proposed within such a designation without prior discussion may well give rise to concerns and result in significant delays or refusal.

Private ways within Wild Land Areas

In June 2014, SNH published a series of [Wild Land Area](#) maps which tie into paragraph 215 of Scottish Planning Policy (23 June 2014), which states *"In areas of wild land...development may be appropriate in some circumstances. Further consideration will be required to demonstrate that any significant effects on the qualities of these areas can be substantially overcome by siting, design or other mitigation."*

Planning policy does not state that private ways in areas of wild land will not be acceptable, but it does make clear that development potential is likely to be limited. For development to be acceptable, developers must clearly demonstrate that the siting, design and routing of a proposed private way will not have any significant effect on the core attributes, qualities and character of wild land.

In all cases concerning proposed new or altered private ways within Wild Land Areas, developers should contact the Council at an early stage to discuss their proposals and for advice and guidance. A new private way proposed within a Wild Land Area without prior discussion may well give rise to concerns and result in significant delays or refusal.

Private ways within other designations

A private way proposed within another type of environmental, built or cultural heritage designation, such as a Special Landscape Area (SLA) or Conservation Area, will not automatically be unacceptable, but development potential may be more limited and careful management will be required.

For private ways to be acceptable within such designations, developers must clearly demonstrate that the siting, design and routing of a proposed private way will not have any significant effect on the core attributes, qualities and character of designation. Reference should be made to any citations, [Landscape Character Assessments](#) or reports relevant to the area.

In all cases concerning proposed new or altered private ways within designated sites and areas, developers should contact the Council at an early stage to discuss their proposals and for advice and guidance. A new

private way proposed within a designation without prior discussion may well give rise to concerns and result in significant delays or refusal.

Environmental impact assessment

Where a proposed agricultural private way falls within the description of development in Schedule 1 of The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (“the EIA Regulations”), ‘Environmental Impact Assessment’ will be required and permitted development rights do not apply. An application for planning permission will always be required in such circumstances.

Where a proposed agricultural private way falls within Schedule 2 of the EIA Regulations, the developer must request a screening opinion before or at the same time as lodging prior notification. If the Planning Authority, upon screening the proposed development, determines that ‘Environmental Impact Assessment’ will be required, permitted development rights will not apply and an application for planning permission will be required.

NB. Forestry private ways are screened separately under the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999.

Habitats regulations

The Conservation (Natural Habitats, &c.) Regulations 1994 state that where a proposed private way is likely to have a significant effect on a ‘European site’ – which includes a Special Area of Conservation (SAC) or Special Protection Area (SPA) – permitted development rights are suspended until the Planning Authority has approved the proposed development in writing.

In reaching a decision, the Planning Authority must consult with SNH and the authority can only approve the development after having ascertained that it will not adversely affect the integrity of the site. Alternatively, the developer may approach SNH direct for a view, which would also be conclusive for the purpose of reliance on the planning permission granted by a general development order.

Where a prior notification under the Permitted Development Order is submitted for a private way within a European site, the Planning Authority will carry out an additional assessment under the 1994 Regulations. There may be a fee for this additional assessment and it may also consider broader issues than those considered for standard prior notifications.

If written approval is unable to be given because the Planning Authority is unable to ascertain that it will not adversely affect the integrity of the site, and permitted development rights cannot therefore apply, a developer may still submit an application for planning permission.

Wherever a European site may be affected, developers are strongly encouraged to discuss their proposals with the Planning Authority and Scottish Natural Heritage prior to submitting an application.

Operational needs assessment

Where there is any doubt about the reasonable necessity of a proposed private way, an operational needs assessment may be required. The assessment should be carried out by a suitably qualified and experienced independent person and outline in clear, detailed terms the need for the development.

Amongst other things, the assessment should consider the specific use of proposed private way and the likely frequency of its use, the size of the agricultural unit/forested area and the nature and scale of its use (e.g. arable vs. livestock use, stock levels, forestry crop rotation, the topography and geography of the unit etc.) and whether there are any other practicable means of achieving access and servicing the holding/forested area without forming a new way.

Making an application

If you have read all of the relevant guidance and wish to make a prior notification application, completed [application forms](#) should be sent, along with all supporting information, to:

ePlanning Centre
The Highland Council
Glenurquhart Road
INVERNESS
IV3 5NX

You may also apply online at: <http://eplanning.scotland.gov.uk>

NB. There is currently no fee for an agricultural or forestry private way prior notification.

Making variations to an approved proposed private way

Private ways constructed under permitted development rights must be built in full accordance with:

- i. the details, plans and other information submitted with the prior notification; or
- ii. where prior approval is required and has been given, the particulars of that approval (including any conditions attached thereto).

It is important to note that unless it is considered by the Planning Authority to be *de minimis*, no variation can be made to the proposed private way without the submission of a further prior notification application.

Further guidance

For further guidance or to obtain an application form, please contact The Highland Council on:

Web: www.highland.gov.uk/planning

Phone: 01349 886608

Other guidance referred to in this document can be obtained as follows:

- *Constructed Tracks in the Scottish Uplands* (SNH) can be downloaded by [clicking here](#).
- *UK Forestry Standard guidelines* (Forestry Commission) can be downloaded by [clicking here](#).

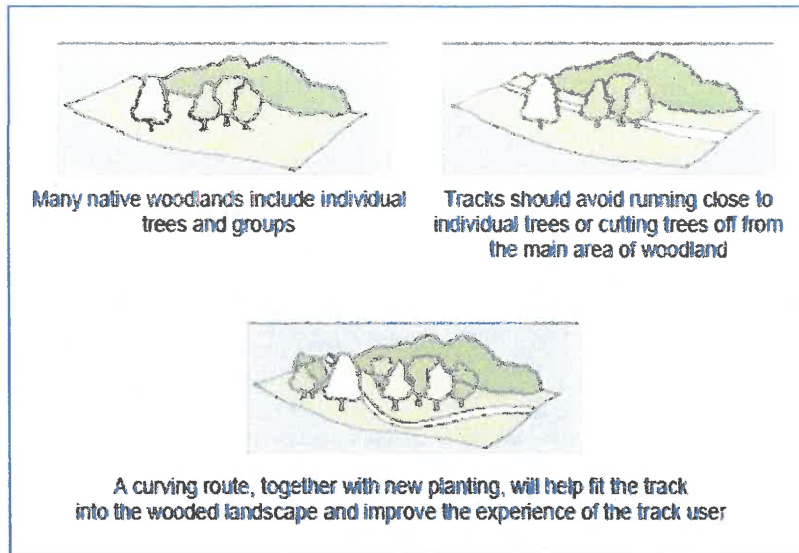


Figure 4 - Excerpt from SNH's 'Constructed tracks in the Scottish Uplands' guidance (2013)

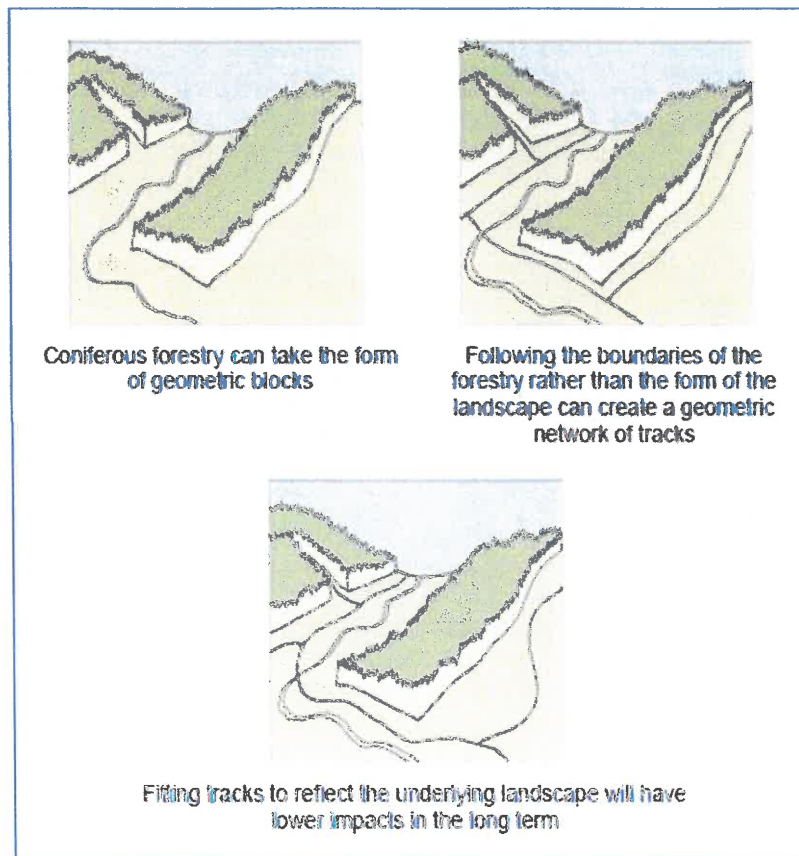


Figure 5 - Excerpt from SNH's 'Constructed tracks in the Scottish Uplands' guidance (2013)

If you would like more information on agricultural or forestry private ways, please contact us in one of the following ways:

Development Management
Development and Infrastructure Service
The Highland Council
Glenurquhart Road
Inverness, IV3 5NX

Phone / Fòn: 01349 886608
Web / Lion: www.highland.gov.uk/planning

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