



SCOTS guide for the Road Construction Consent and Road Bond process

This leaflet is for guidance only:
It does not purport to be a binding interpretation of the law

This leaflet is a guide to statutory provisions, relating to private roads, in –

The Roads (Scotland) Act 1984 (referred to as “the Act”)
And

The Security for Private Road Works (Scotland) Regulations 1985:
SI 1985 No 2080
And as amended by
The Security for Private Road Works (Scotland) Amendment Regulations
1998: SI 1998 No 3220 (referred to as “the Regulations”).

Anyone who proposes to build a new road or private access, or who proposes to make up a private road, would be well advised to consult with the local authorities concerned at an early stage (see paragraphs 1.2 and 2.1)



Note

This document contains a number of changes to current legislation such as road materials terminology and updates to the staged release of Bond. This updated release staged is described in section 3.15 below which varies from that stated in section 2(d)3 of the amended version of The Security for Private Road Works (Scotland) Amendment Regulations 1998. The amended stages reflect industry concerns and bring this more in line with current contractual completion stages

A Legislative Change request by SCOTS to Scottish Government is currently being reviewed to reflect these alterations as well as additional changes, but meantime the content of this guidance document is considered to constitute Best Practice and is recommended to be adhered too currently, pending formal legislative change.

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1. EXISTING ROADS

1.1 What is a road?

A road is “any way (other than a waterway) over which there is a public right of passage (by whatever means) 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 the road includes a part thereof”.

1.2 What is a roads authority?

The **trunk road network** is the responsibility of Scottish Ministers, and comprises all motorways and some of the main A roads. For the purposes of this document, however, reference should be directed to Transport Scotland through the appropriate trunk road operating companies.

For other roads, the Local Authority Council is the relevant authority. In this capacity they are known as the **local roads authority**.

1.3 Are the local roads authorities responsible for upkeep of all roads other than Trunk Roads?

No, just for public roads, not private roads.

1.4 What is a public road?

A road which a roads authority have a duty to manage and maintain. Such a road must be on a **list of public roads** kept by the authority.

1.5 What is a private road?

Any road which is not on a list of public roads.

1.6 Is the list of public roads open for inspection?

Yes. The local roads authority must make the list available for inspection free of charge. The authority will be able to advise where you can see a copy of the list.

1.7 Who is responsible for maintaining a private road?

Someone other than a roads authority, even though the road is used by the public. In some cases property title deeds may include specific conditions relating to road maintenance and, in others, the owner of the land on which the road is built may be responsible. There may be occasions when it is not clear who is responsible for maintenance of a private road (see 1.10).

A responsible party, constituting the road manager, must be nominated for a new private road and this information included within the National Gazetteer through the SRWR.

1.8 What about other “roads” (for example, leading to a farm)?

If there is no public right of passage over them *they are not roads* in the legal sense and the Act does not apply. They are private accesses and the landowners concerned are responsible for their upkeep.

For clarity, the private access extends usually from the line of the road boundary which is normally either the rear of the adjoining footway or the verge fence line. Where this is not clear, detailed advice should be sought from the appropriate road authority

1.9 Can the local roads authority “adopt” a private road?

The local roads authority have a discretionary power, subject to certain procedures, to add a private road to the list of public roads. They must “adopt” a private road, within 12 months of an application being made (see 1.11), if the road is of a standard satisfactory to the authority and provided that the road does not deteriorate below the acceptable standard during that time.

If there is a dispute as to standards it is to be settled by an arbiter to be appointed by the parties; if they cannot agree, the sheriff will appoint one. (See 2.5 for adoption of new roads).

The local roads authorities also have discretionary power to pay all or any part of the costs incurred in making up and maintaining a private road.

Express planning permission is not required for maintaining or improving an existing private road.

1.10 Can the local roads authority require work to be done to a private road?

Yes. They can serve a notice on the frontages specifying (a) the standard to be met and maintained; (b) the estimated cost; (c) the allocation of costs between the frontagers; and (d) starting and completion dates for the work. If the notice is not complied with, the local roads authority can undertake the work and charge the frontagers.

1.11 Who are the frontagers?

The frontagers are the owners of the land fronting or abutting the road.

2. NEW ROADS

2.1 What permissions are needed for a new road?

A new road requires **planning permission** from the planning authority. The application should make it clear whether it is in fact a road for which permission is sought, or a private access.

In addition to planning permission, **construction consent** is required from the local roads authority for a new road or an extension of an existing road. Extension to an existing road constitutes longitudinal and lateral extensions.

It is an offence to build a new road without construction consent. Construction consent is *not* required for a private access but, if the access joins a road, the local roads authority may, at the planning stage, notify the planning authority of any adjustments to the private access which they think necessary in the interests of road safety. **(VA's)**

If the road is associated with a new private housing development, then a “**road bond**” is also required (see Part 3 of this guide).

It should be noted that the granting of any individual permission does not infer the granting of another.

2.2 How do you apply for construction consent?

The application must be in writing in the form laid down by the local roads authority the format of which are included within the National Road Development Guide

- Notice must also be given by the applicant to owners of land which would front or abut the new road or extension; to those owners whose land the road (or extension) will be built upon; and to anyone else whom the authority may specify. Clearly, it would be **Strongly** advisable to consult the local roads authority informally on procedures before submitting an application.

2.3 What details are to be included in a Roads Construction Consent Application?

The process and technical details required to constitute making a Road Construction Consent are described in the National Roads Development Guide and any related amendments specific to the Local Authority in their guide. (pending completion)

The application includes all elements of infrastructure that constitute the new roads or upgraded roads function and extends to street lighting, structures, all Sustainable Urban Drainage system components, Service provision, and street furniture as well the obvious pavement elements.

2.4 Is there a right of appeal?

Yes. If the local roads authority propose to refuse construction consent or to grant it with conditions, they must first allow the applicant an opportunity to be heard by them. If they still refuse the consent, or apply conditions which the applicant considers to be unreasonable, the applicant may appeal to the **Secretary of State**. The procedure for such an appeal can be found in the Road Construction Consent (Appeals Procedure) (Scotland) Regulations 1986 (SI 1986 No 509).

2.5 If a developer has already been granted planning permission for the development, why is a separate construction consent required for the road?

Planning permission is a control over the carrying out of operations on land or over the change of use of land.

Having obtained planning permission to build a house, a developer must apply for a building warrant before constructing it. In the same way he must secure a road construction consent from the local roads authority before he builds a road. The construction consent procedure enables the local roads authority to exercise control over the design, engineering and safety standards of the proposed road. Moreover, it is reasonable that the authority should have control over the standard of something they will be obliged to maintain.

2.6 Is there a cost or fee associated with a Road Construction Consent?

Currently there is no fee associated with applying for a Road Construction Consent despite the extensive technical approval checks undertaken but reasonable costs are rechargeable to a developer by the Local authority.

2.7 What are reasonable charges?

Section 140(6) makes provision enabling the authority to recover the expenses reasonably incurred by them doing anything in relation to ascertaining whether work required to be done by any person in relation to any land has been done (section 140(1)(e) and inspecting any work to which a consent or authorisation by them is granted and 140(1)(f)). So they can charge for any inspections they carry out to check that the work is being done in accordance with the construction consent.

The wording only allows “expenses reasonably incurred” to be recovered by the authority from the developer. This should reflect therefore the amount such an inspection would normally cost in the industry. There is no actual mechanism set out in the legislation on how to arrive at any figures – it only states that recovery is allowed of expenses reasonably incurred. The local authority should not therefore charge e.g. for repeated, unnecessary inspections if fewer inspections would be reasonable in the circumstances.

It is reasonable to accept that where an inspection or related investigation and action is required that all associated costs attributable to that process incurred by the local authority are rechargeable.

Charges may be levied on a pay-as-you-go basis, based on actual costs incurred or on an agreed sum reflective on a percentage basis of the development size and complexity

2.8 Does the local roads authority “adopt” a new road completed satisfactorily?

Not automatically. It remains a private road until it is added to the list of public roads.

On satisfactory completion of the road an application may be made to the local roads authority who subject to the road being to an acceptable standard, must then add the road to the list of public roads within 12 months of the application, *provided* that the road does not, within that period, deteriorate below the standard satisfactory to the authority. Any dispute as to standards is to be determined by an arbiter appointed by the parties, or appointed by the sheriff if the parties cannot agree.

It is the responsibility of the developer to request the road be adopted on completion as this is a key component of the process.

Prior to adoption it is a requirement that an “as built” record of construction is furnished to the road authority as part of its asset management process and potentially as part of the Health and safety Plan.

3 ROAD BONDS

3.1 What is a road bond?

“Road Bond” is the colloquial name for a sum of money or a security which must be lodged with the local roads authority before work can start on a housing development for which a road is to be provided. The bond provides a guarantee that the road will be completed.

The function of the bond is to provide security to the authority. It is a mechanism which guarantees, one way or another, that the road in its widest term, will get built and completed to the necessary standard and specification.

It effectively makes available a sum of money to the authority, if it is needed, to construct or complete the road. The bond can be called in, in terms of regulations 13 and 14 if the work is not completed or not carried out to the necessary standard i.e. in accordance with the construction consent conditions.

3.2 What is the statutory basis for the road bond scheme?

The regulations and section 17 of the Act.

3.3 The regulations refer to a “person”: do they apply to housebuilding by a company?

Yes. The road bond scheme applies equally to individuals, companies and partnerships.

3.4 Is a bond required for every new road?

No, just those which are being constructed in connection with new dwelling houses.

3.5 Is anyone exempt from the road bond scheme?

Yes. The road bond scheme does not apply to these organisations: -

- local authorities;
- the Scottish Government;
- A housing association registered in the register of housing associations maintained under section 3 of the Housing (Scotland) Act 2001 (d) where the housing project falls within a programme approved and financed (or guaranteed) by the Scottish Government or by a local authority;
- An unregistered self-build societies, where the housing project is financed by a loan from the Housing Corporation or a local authority or, if the project is financed from another source, it is guaranteed by the Housing Corporation.

3.6 Is a bond necessary for a private access?

No. The road bond scheme applies only to roads. *It is important* therefore to clarify when planning permission is sought, whether the housing development is to be served by a road (over which there is a public right of passage) or a private access.

Neither is construction consent required for a private access. On the other hand, a local roads authority cannot adopt an access, no matter how high its standard of construction, because there is no public right of passage over it, so there is no “road”.

Intending house purchasers should therefore establish whether the house is being provided with a road or a private access since the local roads authority will have no responsibility for maintaining a private access.

3.7 What is a road bond expected to cover

A road Bond is required to ensure the Road and its associated infrastructure is brought up to the standards in the Construction Consent to enable it is adopted by the appropriate authorities on completion

It follows that everything that is conventionally involved in such road construction will be included in that valuation - so will include the actual carriageway, footways, verge, service strips, lighting, all forms of drainage and any other works normally associated with the road works.

For clarity, it is important that drainage and associated infrastructure that is to be maintained by other agencies such as Scottish Water achieves the standards required by them to permit their adoption on completion.

3.8 Can a housing development road be started without lodging a bond?

No work on house construction can start until the construction consent has been obtained and the road bond has been lodged. It is an offence to start housebuilding work before lodging a road bond and before securing construction consent?

However, prior to any element of house construction, the more work done on a road before lodging a bond, the smaller the bond ought to be. However construction consent, under section 21 of the Act, must be obtained before the road works can start (see 2.1)

3.9 How large a bond is required?

That is determined by the local roads authority. It is based on the estimated cost of work required to bring the road up to the standard laid down in the

construction consent, within the period specified in that consent; the calculation can allow for inflation.

When valuing a Bond, the authority has to be satisfied that the amount covers the cost of construction of the road. As the road will ultimately be adopted by the authority, it will need to conform with the terms of the 1984 Act.

As a result, a Bond will be subject to a re-evaluation where an extension to an existing Construction Consent is requested.

3.10 Is there an appeal?

Yes. Section 17(4) of the Act provides for arbitration on *any* dispute arising from section 17 itself or from the regulations. If agreement cannot be reached on appointment of an arbiter appointed by the sheriff will appoint one on the application of either party.

3.11 What if more than one person intends to build houses on the same new road?

The local roads authority will apportion the amount of the road bond between the parties.

The authority may, on application, allow a person who has deposited his share of the bond to proceed with his development even though others have not deposited their share. However, the authority are not compelled to give such permission but any dispute over a refusal may be referred to an arbiter (see 3.10).

3.12 Can anyone stand guarantor for a bond?

No. If the bond does not take the form of a cash deposit then it has to be arranged by the developer through **(a)** a *recognised bank or licensed institution* under the Banking Act 1979 or **(b)** through an *insurance company* carrying on business within the meaning of the Insurance Companies Act 1982.

3.13 What happens to the bond if it is in the form of cash?

The local roads authority must deposit the money in an interest-earning bank or building society account and the interest has to be paid, at agreed intervals, to the person who deposited the money with the authority.

3.14 What if the building start is delayed?

A lodged bond may be withdrawn after notice to the local roads authority but a bond, of such amount as the authority require, must be re-lodged before the building work is ready to start. It is an offence to start housebuilding work before re-lodging the bond. If the authority extend the term of a construction

consent, they can require an addition to the bond to cover any estimated increase in cost of the road.

3.15 As work on the road progresses, can partial release of the bond be requested?

Yes, the local roads authority may release a proportion of the Bond as soon as practicable after completion of the following stages

Stage 1 in accordance with the Road Construction Consent and the road being constructed up to Binder Course, Surfacing Course where modular blocks are specified, the Sustainable Urban Drainage System or other drainage system is complete and functioning, all underground infrastructure is fully installed and standards of work agreed with the adopting authority and any appropriate kerb log is completed.

Stage 2 Completion of all other items as detailed on the Construction Consent up to substantial completion which should only omits such items as grass or soft landscaping elements due to annual planting periods.

Stage 3 Expiry of the Maintenance period (or the expiry of maintenance period of defects required identified during that period) or the addition of the private road concerned to the local Authorities List of Public Roads, which ever is the earlier.

It should be noted that the authority will release a part only if they are satisfied that the remaining security will cover the cost of the work still required to fully complete the road. However, the regulations require the local roads authority to retain at stage 3 a minimum of 10% of the original security lodged.

In the event of a dispute over the partial release of a bond, the matter may be referred to an arbiter (see 3.10).

3.16 What if the land is sold before the development is finished?

The seller and the local roads authority may come to a special agreement. Otherwise,

(a) if the bond is in cash, the seller and the new owner must jointly notify the authority of the sale and the new owner's name and main residence; the authority then retain the money and treat it as having been deposited by the new owner; or

(b) if the bond is not in cash, it will be retained by the authority unless the new owner lodges a similar bond, in which case the authority will return the original bond to the person who lodged it.

3.17 What happens if the road is not completed in the time allowed?

The local roads authority may serve a notice on the developer requiring him to complete the road in a specified time. If he fails to do the work, the

authority must construct the road to the required standard and may use the bond for that purpose.

3.18 What if the road has been completed but it develops faults later?

If the road has not been added to the list of public roads (and is therefore not yet the responsibility of the local roads authority) the authority will tell the developer to carry out specified repairs in a specified time. If the repairs are not done on time, the authority must execute them and may use the bond for that purpose.

It should be noted that it is the responsibility of the authority to satisfy that the works have been executed correctly and to identify any risk prior to assessing and releasing Bond monies.

3.19 Who is responsible for a new road completed or repaired by the local roads authority?

The local roads authority must add the road to their list of public roads and therefore become responsible for its future maintenance.

3.20 When will the local roads authority release a bond finally?

There are 3 occasions when the authority must return a bond, or that part which still remains as the case may be, to the person who deposited it.

- (a) When they are notified that the housebuilding project has been abandoned.
- (b) When the authority consider, for any reason, that security is no longer needed.
- (c) When the new road has been added to the list of public roads, thus becoming a publicly maintained road.

3.20 Will the road bond scheme increase the cost of new houses?

Yes, but not significantly. It is only to be expected that housing developers will pass on the cost of providing a road bond. However, the additional cost on the purchase price of each new house should be very small and it will guarantee completion of the road and ensure that future maintenance is carried out by the local roads authority, whatever might happen to the developer.

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East Lothian District Council
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