

Caithness Local Access Forum

9th March 2020

Section 11 Access Exemption Application within Limekilns Forest to allow Construction of Wind Farm Development to take place.

1. Introduction

- 1.1 The developer of the Limekilns Wind Farm (Limekiln Wind Limited - application 16/02756/S36) has applied to The Highland Council for an exemption of access rights, as provided by Section 11 of the Land Reform (Scotland) Act 2003, from the land as shown on Figure 2, see Appendix 1.
- 1.2 The proposed development is shown on Figure 1.1, see Appendix 2. See map of core paths in the Limekilns area in Appendix 3, the core CA11.03 is covered in its entirety whilst it is the forest area by the application for exemption of access rights.
- 1.3 Typically land where construction activities are taking place are not areas where the public can exercise their access rights, see Section 6 (1) (g) of the Land Reform (Scotland) Act 2003. However, land that is a core path is not covered by this Section 6 provision, see Section 7(1), and to restrict public access rights over a core path requires a Section 11 order.

2. The Application

- 2.1 The developer has asked for an exemption of access rights in the area shown in Appendix 1 from the 7th December 2020 to 7th December 2022.
- 2.2 Construction of the development is expected to start in July 2020 with a new access being created to the site. Some disruption to the core path is expected during this time as a borrow pit and substation platform, both adjacent to the core path, are established. Public access to the core path will be managed by the applicant and their contractor during this period.
- 2.3 Site tracks, including the upgrade of the core path track for wind farm development purposes, will be started no later than 7th December 2020 with an expected completion date of 30th July 2021.

3. Reasoning for the Access Exemption by the Applicant

- 3.1 The core path is the arterial route for the construction of the wind farm, which includes 17 turbines to be installed from individual spurs, and will be in continuous use for construction activities for a long period of the construction programme. The Applicant considers the situation is unique as the arterial route for the construction of the wind farm is a designated core path;
- 3.2 Furthermore the applicant considers any limitations on the use of the core path for construction activities, due to permitting public access, would severely limit the ability of the contractor to deliver the construction programme by reducing the ability to fully maximise the access provided by the core path when flexibility and a dynamic response is required due to weather and other factors;

- 3.3 Construction of a segregated route is considered disproportionate, as a temporary path would need to be almost 7km long and would still need 17 individual diversions during progress of the works;
- 3.4 Open and closing of the core path on a Sunday, or other times when construction allowed, would likely lead to confusion and additional security and Health & Safety liabilities for the contractor;
- 3.5 Once Limekiln Wind Farm is operational, the Applicant believes there will be an improvement in access to the Limekiln Forest Core Path.

4. Considerations by The Highland Council

- 4.1 The Highland Council does not have a written policy for the deciding of Section 11 access exemptions and the authority relays of Scottish Government guidance and consultation responses such as those from the Local Access Forum.
- 4.2 Scottish Government guidance, see Appendix 4, states an exemption should not normally be considered for land management purposes. To our knowledge no Section 11 access exemption has ever been granted for construction activities since the Land Reform (Scotland) Act 2003 came into force in February 2005.
- 4.3 A Section 11 order for longer than 5 days, such as this, requires confirmation by Scottish Ministers. Should there be any objections which are not withdrawn Scottish Ministers shall not confirm an order without considering any objections or representations and may cause an inquiry to be held. Essentially an order for more than 5 days is not able to be confirmed by The Highland Council, however a proposed order does need to be supported by the authority as it would be required to defend any proposed order which it promoted.
- 4.4 A number of large scale developments have taken place in Highland over core paths since the Highland Core Paths Plan was adopted in September 2011. The majority of these have been windfarms and other renewable energy projects but projects such as the final phase of the West Link road in Inverness are on-going which is affecting a number of core paths on land and water as a new swing bridge is being built over the Caledonian Canal. Some significant challenges during some forestry operations also occurs near core paths.
- 4.5 The key factors which officers consider was advising on such projects are;
 - 1) Is the proposed disruption to a core path taking place for the minimum period of time as possible.
 - 2) Are alternative routes available
 - 3) Can the public be managed during the construction period through additional measures.
- 4.6 No proposed management of the core path CA11.03 is detailed in the planning application supporting documents. Scottish Ministers when granting the planning application, after the Public Local Inquiry, set out a number of planning conditions. Condition 29 relates to public access and states an Access Management Plan (AMP) is required to be submitted, and approved, that ensures public access is retained within the vicinity of Limekiln Wind Farm during construction. No AMP has yet been submitted to The Highland Council.

4.7 The relationship between the Limekilns Wind Farm and core path CA11.03 is similar to many other developments. The length of core path and number of turbines close to the core path is however more than other sites, nearest comparison in Caithness would be Camster WF where borrow pit haulage and core path upgrade for the development was just over 4km and 3 turbines were within 50m of core path.

5. Local Access Forum Decision

5.1 The Caithness Local Access Forum is being asked to discuss the application as detailed above and subject to these discussions;

5.2 Propose to support or not support the application. A proposal should be made by a forum member and seconded before a vote is held.

5.3 Members of the forum may propose an alternative proposal or amendment of a previously passed motion.

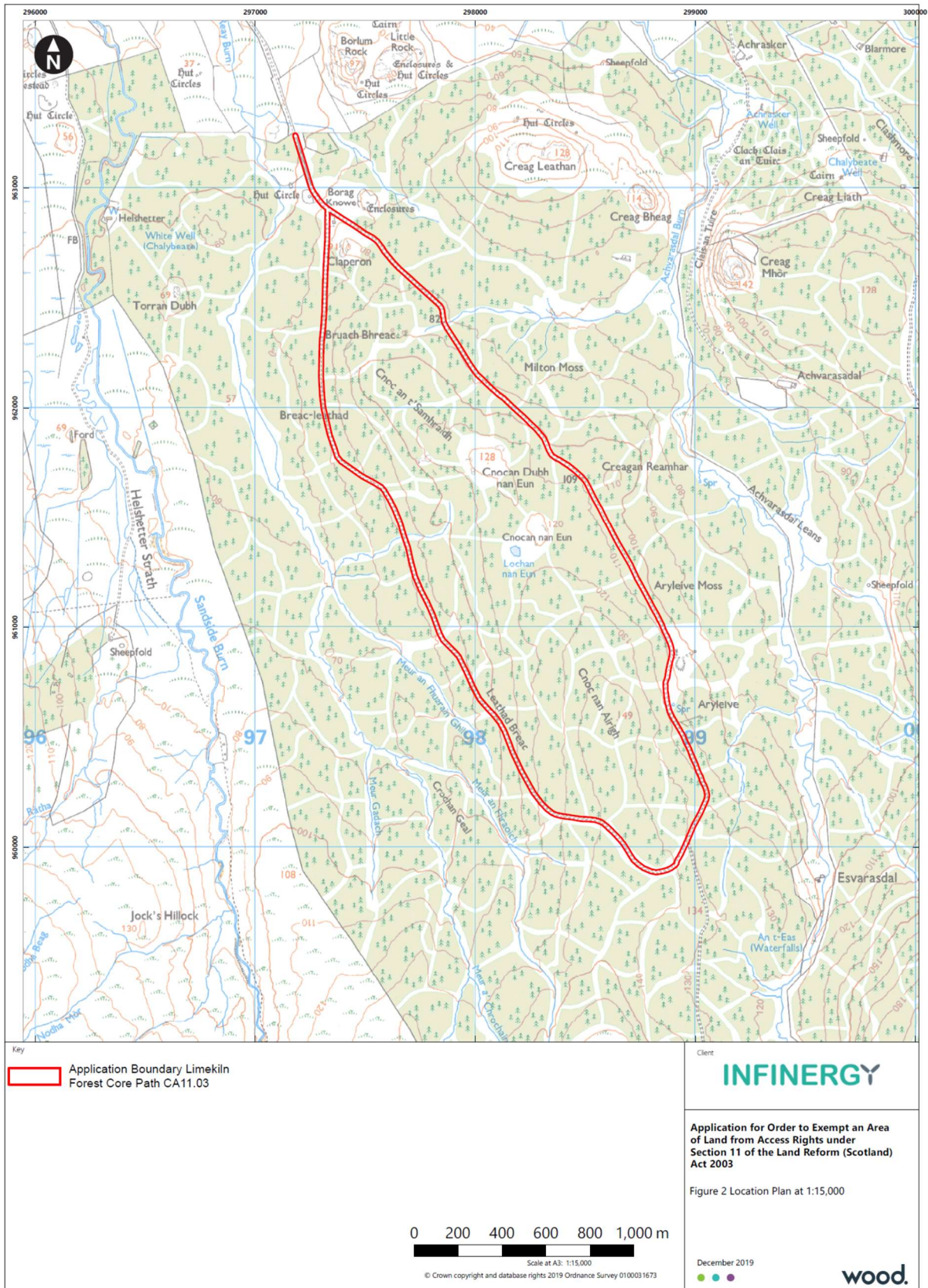
ACCESS OFFICER, CAITHNESS AND SUTHERLAND

MATTHEW DENT

2nd MARCH 2020

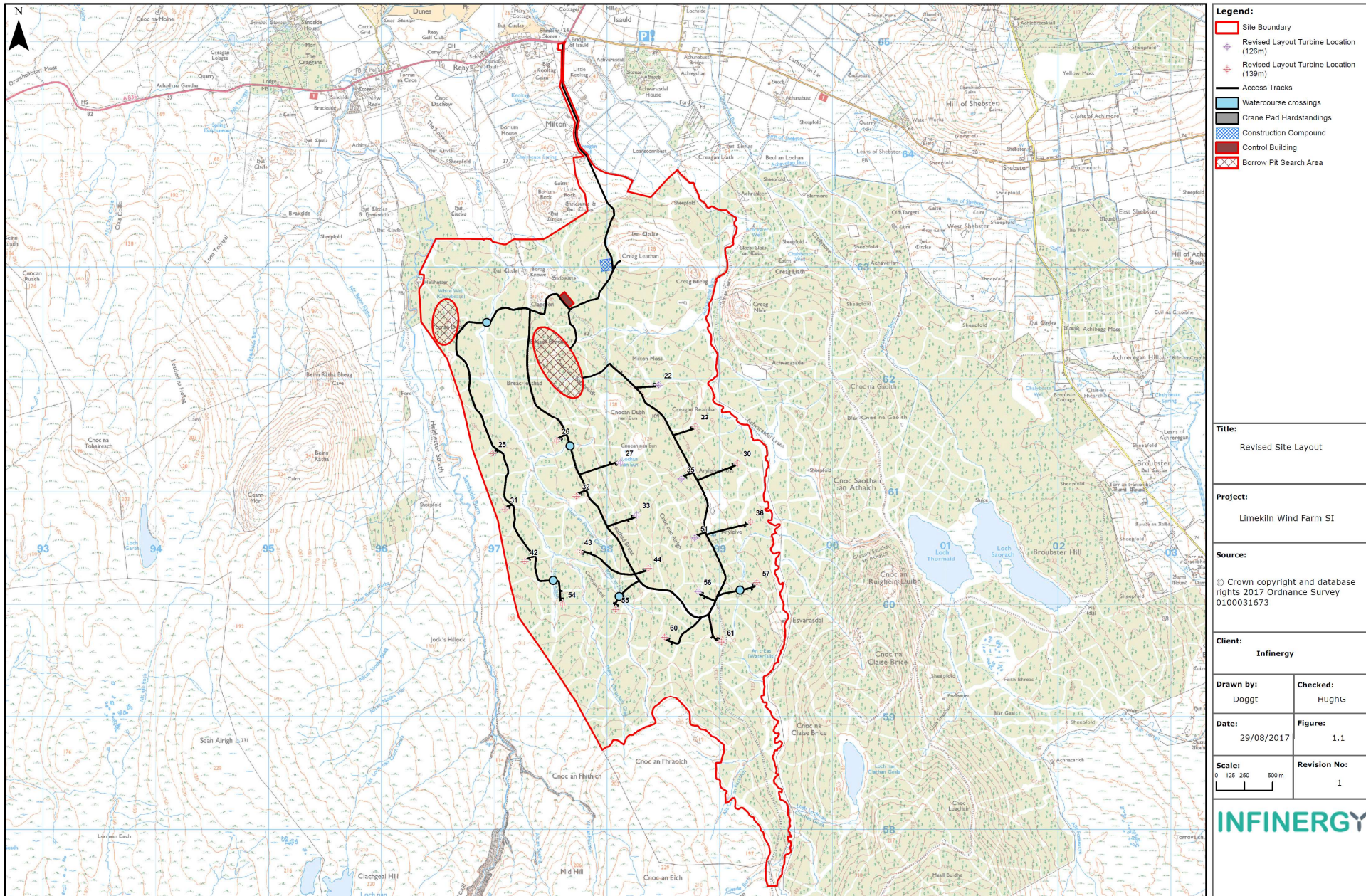
Appendix 1

Figure 2 Location Plan at 1:15,000



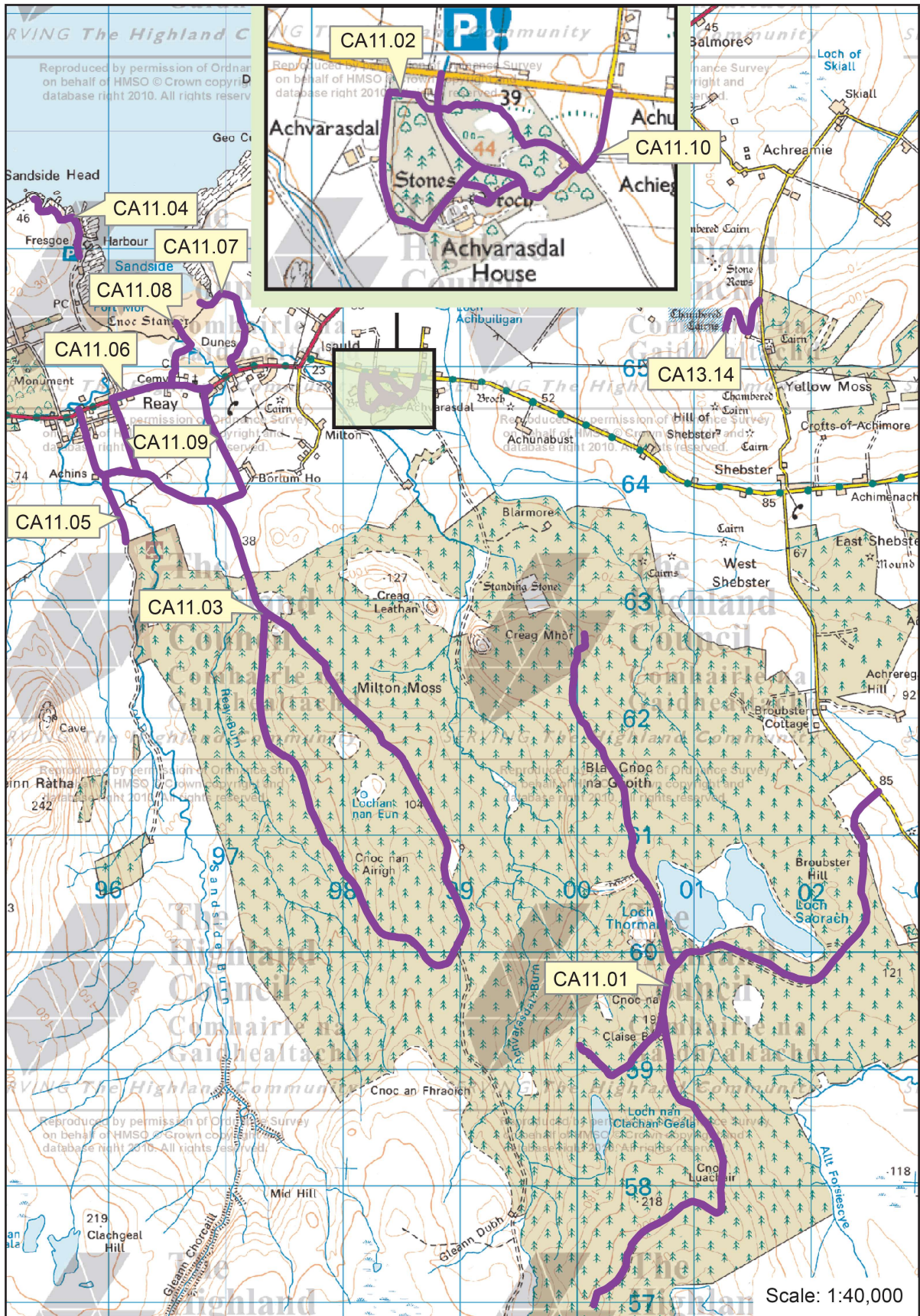
Appendix 2

Figure 1.1 Site Layout



Appendix 3

Map of Core Paths



Section 11 Power to exempt particular areas of land from access rights

11(1) *The local authority may (whether on application made to them or not) by order under this section made in respect of a particular area of land specified in the order exempt it for a particular purpose specified in the order from the access rights which would otherwise be exercisable in respect of it during such times as may be specified in the order.*

Section 11 of the Act enables local authorities, whether on applications from third parties or on their own initiative, by order, to exempt a particular area of land and/or inland water from access rights.

It is likely that the main use of these powers will be to exclude land from access rights for short periods of time in connection with admission charging for an event. However, it is recognised that there may be occasions where longer term exclusions will be required (examples are provided below). Issues relating to safety or security are other reasons why local authorities may consider it appropriate to exempt areas of land from access rights are in the interests of safety or security.

In general the reasons for exemptions under section 11 should be limited to: -

- Allowing a charge to be levied for admission to a particular event;
- In the interests of safety and security; and
- Ensuring the protection of privacy, where the provisions of section 6 of the Act are not deemed sufficient in individual circumstances and the local authority considers the exclusion necessary.

Circumstances where exemption should not usually be considered include: -

- Reasons of land management (the Act provides sufficient exclusions and further guidance on the responsible exercise of access rights over agricultural land is provided in the Code);
- Large country houses or estates seeking an extensive exclusion for their whole estate well outwith any reasonable expectation of what is needed for privacy;
- An area of land that is already subject to some management measure prohibiting or restricting access, e.g. where an existing byelaw is in place that deals with the issue;
- Where a charge for admission is proposed and the charge is for access only and not for an event.

Where authorities are in doubt they should seek advice from their local access forum and/or the Scottish Executive, although any legal advice should be sought from a local authority's own legal advisors.

There is no time limit set for when someone is required in advance to apply to their local authority for exemptions under section 11. For larger events where an admission charge is to be imposed and where dates are set well beforehand, such as for example a professional golf tournament then there should be scope for making an application well in advance. Clearly, when there is a requirement to consult on a draft Order then applications have to be made in time to allow for this. For smaller events such as local village fetes where the duration of the order is such that

consultation is not required, an application nearer to the date of the requested exemption may be acceptable. Local authorities are best placed to issue their own guidance on practical issues such as timing.

Short term exclusions

The Act establishes rights of access over all land except that specifically excluded by section 6. Where an event is to be held on land over which access rights can be exercised, there may be a need to exclude the land from access rights for the duration of the event, and possibly periods immediately before and after. The exclusion might be to avoid interference in the event, for example a wedding, or to allow an entry fee to be levied, for example a village fete or highland games.

Where an entry fee is to be levied it is not envisaged that an order will be required for all such events. It is only where there is considered likely to be a problem in imposing a charge for entry from those attending that an order should be considered.

At some sporting events there could be other issues, such as security, where there might be a need to control access. For example, some major golf tournaments might justify an order not only to allow spectators to be charged but to help ensure the safety of the players.

Longer term exclusions

Longer exclusions again could relate to entry charges for an event lasting several days or to a permanent visitor attraction. There may be a need to have a mechanism to introduce entry charges where there has been no charge in the past. This might be needed so as not to undermine the ability of organisations such as the National Trust for Scotland to agree to take on new properties if there is no facility to charge visitors in order to offset the costs of upkeep of the property. There may also be circumstances where private landowners wish to establish a new business venture such as, for example, a country park or arboretum.

Another example might be an archaeological site of particular cultural heritage value which could possibly become an important local visitor attraction. If there existed no means of excluding the site from access rights to allow visitors to be charged, it might simply have to be filled in again. This would be a loss not only to the public generally, but also to the economy of the area. Local authorities are best placed to decide whether there is a good case for excluding land from access rights in such circumstances.

During discussion of the Bill in Parliament reference was made to the need to guarantee privacy to the clients of certain hotels and similar establishments. Section 6(1)(b)(i) of the Act specifically provides that access rights are not exercisable on land that forms the curtilage of a non-domestic building. It was argued that there may be particular circumstances where these provisions in the Act may not provide the degree of privacy necessary to the success of certain commercial enterprises, such as some hotels and estates whose financial viability depends on the guarantee of privacy for their clients. In cases such as these local authorities may be faced with applications from such parties to have particular areas of their land excluded from access rights.

Local authorities should treat these cases on an individual basis. They are best placed to weigh such issues as the threat of responsible access to the viability of the enterprise; the importance of the enterprise to the local economy; and the loss to the

public of excluding the land from access rights. It is likely that only in a very few circumstances is an order likely to be considered appropriate.

It should be emphasised that, given the duty of local authorities under the Act to uphold access rights, the power to exempt land for access rights under this section of the Act should be used sparingly and applied in respect of the minimum area of land, and for the minimum period, necessary.

When considering making an order local authorities should have regard to whether or not alternative routes exist or can be provided to facilitate access over or around land affected by such an order.

Consultation

Local authorities need not consult in respect of any proposed order which would have the effect of excluding land from access rights for a period of less than 6 days although it is expected that in all cases where an order is proposed that local authorities seek advice from their local access forums, established under section 25 of the Act, since they will play an important role in advising the local authority on the appropriateness of any proposed order.

However, where a proposed order would exclude land from access rights for 6 days or longer, the formal consultation requirements set down in section 11(2) shown below must be adhered to: -

(2) Before making an order under this section which would have effect for a period of six or more days, the local authority shall—

(a) consult the owner of the land to which it would relate, the local access forum established by them and such other persons as they think appropriate; and

(b) give public notice of the intended purpose and effect of the proposed order, inviting objections to be sent to them within such reasonable time as is specified in the notice; and shall consider any such objections and any other representations made to them.

It should also be pointed out that section 11 requires that any order having effect for 6 days or longer requires to be confirmed by the Scottish Ministers.

Ministerial consideration of orders with duration of more than 6 days

In considering whether to confirm any order the Scottish Ministers will wish to be satisfied that: -

- Where a charge is to be levied for admission that the charge is necessary to the viability of the visitor attraction and the loss of public access can be justified in terms of other benefits to the local community. Further information on this is provided in the Code;
- Adequate consideration has been given to the demand for access in the area affected by the proposed order;
- Consideration has been given to the provision of alternative routes;
- The local authority has provided the Scottish Ministers with copies of all objections or representations received on the proposed orders and that the authority can justify proceeding with the proposed order in light of any objection or representation;

- The local authority has undertaken the consultation requirements set out in section 11 of the Act on the proposed order prior to submitting it for confirmation;
- The purpose and effect of the order is clearly defined and is proportionate to the issue it seeks to address.

Once an order is confirmed the local authority will be informed by letter from the Executive.

It is also important to note that where a local authority revokes, amends or re-enacts an order and where the revoked, amended or re-enacted order has duration of 6 days or more, then the local authority must follow the procedures set out in section 11(2) to (9).