



SECTION 42 APPLICATION 23/00521/S42 TO AMEND CONDITION 1 (TO ALLOW A FURTHER TEMPORARY PERIOD FOR ON-SITE SOIL STORAGE) IMPOSED ON A GRANT OF PLANNING PERMISSION 18/00155/DPP FOR THE STORAGE OF SOIL AT SHAWFAIR SITE F, MONKTONHALL COLLIERY ROAD, DALKEITH

Report by Chief Officer Place

1 SUMMARY OF APPLICATION AND RECOMMENDED DECISION

- 1.1** In October 2018 planning permission was granted for the storage of soil (top soil and sub soil) at the application site for a temporary period of 5 years. The current application seeks to amend condition 1, which restricts the use to a temporary period of 5 years, in order to allow the storage use to continue for a further 5 years.
- 1.2** There have been no representations and consultation responses from the Coal Authority, Network Rail, the Scottish Environment Protection Agency (SEPA), the Council's Ecological Advisor, the Council's Senior Manager Neighbourhood Services (Roads) and the Council's Senior Manager Protective Services (Environmental Health).
- 1.3** The relevant development plan policies are policies 1, 2, 3, 5, 6, 9, 12, 22 and 23 of the National Planning Framework 4 (NPF4) and policies STRAT1, ENV7, ENV9, ENV10, ENV11, ENV16, ENV17, ENV18 and IMP3 of the Midlothian Local Development Plan 2017 (MLDP).
- 1.4** The recommendation is to grant planning permission subject to conditions.

2 LOCATION AND SITE DESCRIPTION

- 2.1** The application site is a 9.48 hectare area of land which was formerly used as a coal depot and prior to that the site formed part of the Monktonhall Colliery complex. The site is located to the west of Danderhall and to the north of Newton Village. It comprises two separate sections of concrete hard standing, one located in the centre-west of the site and the second located in the eastern part of the site.

The majority of the site is overlain by coal blaes which has been gradually vegetated with self-seeded trees and bushes.

- 2.2 The site has been used for limited amounts of soil storage over the majority of the last five years, however the last 18 months have seen a significant increase in soil storage. There are currently 5 piles of soil on the site measuring between 2 and 6 metres in height. There is a concrete surfaced yard at the eastern side of the site, this yard measures approximately 1.5 hectares in area and is currently being used for skip storage. There is no planning history for the skip storage use.
- 2.3 Vehicular access to the site is via the unclassified road leading from the A6106 to Shawfair railway station. The majority of the site boundary is defined by established tree planting. The only significant break in the tree planting is a 170 meters long section on the southeastern boundary of the site where the vehicular access to the site is located. A bund of 1 to 2 metres in height provides some screening of the site at the break in the trees and the embankment that carries the public road up to the road bridge over the Borders railway line also provides screening of the site in views from the south.
- 2.4 To the north and west of the site are agricultural fields. To the east is an area of open ground adjoining the Borders railway. To the southeast the site is bounded by the road to Shawfair station beyond which are agricultural fields and a sustainable urban drainage system (SUDS) basin.
- 2.5 The site is located within the wider Shawfair development area and comprises the majority of Site F, all of Site H and portions of Sites G and I. Site F is identified in the Shawfair Masterplan as being primarily medium density residential use with high density mixed use (residential or offices above ground floor shops or civic/community uses) at its southern edge. The settlement statement in the Midlothian Local Development Plan identifies the area in the vicinity of Site F as the location for a secondary school. Site G is identified in the Masterplan as the site of a primary school. Site H is identified as being high density mixed use with offices above ground floor leisure, retail or civic uses and flats above ground floor shops. Site I is identified as being medium to high density residential use.

3 PROPOSAL

- 3.1 The application, made under Section 42 of the Town and Country Planning (Scotland) Act 1997 (as amended by the Planning etc. (Scotland) Act 2006 and the Planning (Scotland) Act 2019) (hereafter referred to as the Act), is to amend the wording of condition 1 of planning permission 18/00155/DPP. The condition currently reads as follows:

Planning permission for the storage of topsoil and subsoil on the site is granted for a temporary period of 5 years from the date of the grant of this planning permission. The use shall cease and any stored material on the land shall be removed by 22 October 2023.

- 3.2 It is proposed that the condition be amended to read as follows:

Planning permission for the storage of topsoil and subsoil on the site is granted for a temporary period of 5 years from the date of the grant of this planning permission. The use shall cease and any stored material on the land shall be removed by 22 October 2028.

- 3.3 Development in the Shawfair area has not proceeded as quickly as was envisaged at the time of the 2018 application and consequently the site is still required in order to accommodate the excess soils from development sites over the next five years.
- 3.4 As part of the wider Shawfair development a materials management plan is used to ensure that all soils generated during the development works are handled and used in an appropriate way. Due to the complex development timelines and phasing requirement a longer-term site storage facility is required to allow soils to be stored until such time as they can be reused on development sites.
- 3.5 The soils stored at the site are placed directly on the current site surface with the bottom 250mm designated as sacrificial. The soil stockpiles are proactively managed to ensure the materials are clearly identifiable and available for reuse when the phasing of the development areas require. Subsoil is stored in a stockpile with a maximum height of eight metres and topsoil is stored in stockpiles with a maximum height of three metres.
- 3.6 The proposed development will not result in the closure, or part closure, of any local roads.
- 3.7 A Section 42 application, is in itself a planning application - a particular kind of planning application for development without complying with a condition/s previously imposed on an earlier grant of planning permission. A grant of planning permission under Section 42 results in an entirely new planning permission. Granting of the current application would grant planning permission for the temporary use for a further 5 years.
- 3.8 Although a Section 42 application is a new planning application in law the Act states *“on such an application the planning authority shall consider only the question of the conditions subject to which planning permission should be granted”*. The principle, layout and form of development are not subject to assessment. Planning authorities should attach to the new permission all of those conditions from the previous permission, where it is intended these should still apply.

4 BACKGROUND

- 4.1 Outline planning Application 02/00660/OUT for residential, industrial and commercial floor space, community facilities (including new primary schools), associated landscaping with the provision for sport and recreation and new transport facilities at land bounded by A720, Old Dalkeith Road and The Wisp, Millerhill was granted planning permission in August 2014. The application site, Site F, is a component part of the wider Shawfair development.
- 4.2 The Pre Application Consultation 17/00859/PAC regarding the use of Shawfair Site F, Monktonhall Colliery Road, Dalkeith for the storage of soil was reported to the Committee at its meeting in February 2017. Section 42 applications are exempt from the formal pre-application consultation process and consequently no consultation was required prior to the submission of the current application.
- 4.3 A Section 42 application (reference 17/00650/S42) was submitted in August 2017 and granted planning permission in September 2019. The application amended condition 4 of planning permission 02/00660/OUT and thereby changed the means by which the Master Plan and Design Guide (and related addenda) for Shawfair can be amended. This Section 42 application in effect became the new planning permission in principle for the Shawfair development.
- 4.4 Planning permission 18/00155/DPP for the storage of soil (top soil and sub soil) was granted in October 2018 for a temporary period of 5 years.
- 4.5 Whilst the soil stored at the site meets the definition of waste in Article 3(1) of the Waste Framework Directive 2008/98/EC, the operations meet the definition of recovery (Article 3(15)) and not disposal (Article 3(19)). The project is therefore not an installation for the disposal of waste (as per Category 11 (b) of Schedule 2 of The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017) and hence it is not Schedule 2 development. The application does not require screening for an Environmental Impact Assessment.
- 4.6 The application site exceeds 2 hectares and therefore the application would ordinarily be treated as a Major Development as defined in the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009. In this instance as the application relates to facilities for managing secondary materials and would otherwise be considered to be a Major Development it is considered to be a National Development under National Planning Framework 4. All applications for National Development must be determined by the Planning Committee.

5 CONSULTATIONS

- 5.1 The **Coal Authority** does not object to the application subject to a condition to ensure the provision of a 25 metre buffer zone around the recorded mine entry sited within the application site.
- 5.2 **Network Rail** does not object to the application and considers the development will have no impact on railway infrastructure.
- 5.3 The **Scottish Environment Protection Agency (SEPA)** does not object to the application - the site is already licensed for the storage of soils from the wider Shawfair development and has been operating in a way that has not caused any problems.
- 5.4 The **Council's Ecological Advisor** does not object to the application. The Council's biodiversity screening process has identified the biodiversity protections that apply to the site and due to the nature of the application the proposal will not have any effect on the biodiversity issues highlighted.
- 5.5 The **Council's Senior Manager Neighbourhood Services (Roads)** does not object to the application. The proposed extension of time does not raise any transportation or road safety issues.
- 5.6 The **Council's Senior Manager Protective Services (Environmental Health)** does not object to the application subject to conditions being used to restrict the height of topsoil stockpiles to no more than 3 metres in height and subsoil stockpiles to no more than 8 metres in height.
- 5.7 **Danderhall and District Community Council** was consulted on the application but offered no comment on the proposal.

6 REPRESENTATIONS

- 6.1 No representations have been received.

7 PLANNING POLICY

- 7.1 The development plan is comprised of National Planning Framework 4 (2023) and the Midlothian Local Development Plan 2017.

- 7.2 The following policies are relevant to the proposal:

National Planning Framework 4 (NPF4)

- 7.3 Policy 1 **Tackling the climate and nature crisis**; sets out to encourage, promote and facilitate development that addresses the global climate emergency and nature crisis.

- 7.4 Policy **2 Climate mitigation and adaptation**; sets out to encourage, promote and facilitate development that minimises emissions and adapts to the current and future impacts of climate change.
- 7.5 Policy **3 Biodiversity**; sets out to protect biodiversity, reverse biodiversity loss, deliver positive effects from development and strengthen nature networks.
- 7.6 Policy **5 Soils**; sets out to protect carbon-rich soils, restore peatlands and minimise disturbance to soils from development. The policy also sets out acceptable scenarios for development on prime agricultural land.
- 7.7 Policy **6 Forestry, woodland and trees**; sets out to protect and expand forests, woodland and trees.
- 7.8 Policy **9 Brownfield, vacant and derelict land and empty buildings**; sets out to encourage, promote and facilitate the reuse of brownfield, vacant and derelict land and empty buildings, and to help reduce the need for greenfield development.
- 7.9 Policy **12 Zero Waste**; sets out to encourage, promote and facilitate development that is consistent with the waste hierarchy.
- 7.10 Policy **22 Flood risk and water management**; sets out to strengthen resilience to flood risk by promoting avoidance as a first principle and reducing the vulnerability of existing and future development to flooding.
- 7.11 Policy **23 Health and Safety**; sets out to protect people and places from environmental harm, mitigate risks arising from safety hazards and encourage, promote and facilitate development that improves health and wellbeing.

Midlothian Local Development Plan 2017 (MLDP)

- 7.12 Policy **STRAT 1: Committed Development** seeks the early implementation of all committed development sites and related infrastructure, facilities and affordable housing, including sites in the established housing land supply. Committed development includes those sites allocated in previous development plans which are continued in the MLDP. The site is part of a larger site identified in the MLDP as established strategic housing site h43 (Shawfair) with an indicative capacity of 3,500 dwellings.
- 7.13 Policy **ENV7: Landscape Character** states that development will not be permitted where it significantly and adversely affects local landscape character. Where development is acceptable, it should respect such character and be compatible in terms of scale, siting and design. New development will normally be required to incorporate proposals to maintain the diversity and distinctiveness of the local

landscapes and to enhance landscape characteristics where they have been weakened.

- 7.14 Policy **ENV9: Flooding** presumes against development which would be at unacceptable risk of flooding or would increase the risk of flooding elsewhere. It states that Flood Risk Assessments will be required for most forms of development in areas of medium to high risk but may also be required at other locations depending on the circumstances of the proposed development. Furthermore, it states that sustainable urban drainage systems will be required for most forms of development, so that surface water run-off rates are not greater than in the site's pre-developed condition, and to avoid any deterioration of water quality.
- 7.15 Policy **ENV10: Water Environment** requires that new development pass surface water through a sustainable urban drainage system (SUDS) to mitigate against local flooding and to enhance biodiversity and the environment.
- 7.16 Policy **ENV11: Woodland, Trees and Hedges** states that development will not be permitted where it could lead directly or indirectly to the loss of, or damage to, woodland, groups of trees (including trees covered by a Tree Preservation Order, areas defined as ancient or semi-natural woodland, veteran trees or areas forming part of any designated landscape) and hedges which have a particular amenity, nature conservation, biodiversity, recreation, landscape, shelter, cultural, or historical value or are of other importance.
- 7.17 Policy **ENV16: Vacant, Derelict and Contaminated Land** states that the redevelopment of vacant and derelict land will be supported provided it does not conflict with other local development plan policies. It also states that the use of the land must be suitable in relation to any potential risks from prior contamination and land instability.
- 7.18 Policy **ENV17: Air Quality** states that the Council may require further assessments to identify air quality impacts where considered requisite. It will refuse planning permission, or seek effective mitigation, where development proposals cause unacceptable air quality or dust impacts.
- 7.19 Policy **ENV18: Noise** requires that where new noise sensitive uses are proposed in the locality of existing noisy uses, the Council will seek to ensure that the function of established operations is not adversely affected.
- 7.20 Policy **IMP3: Water and Drainage** require sustainable urban drainage systems (SUDS) to be incorporated into new development.

8 PLANNING ISSUES

- 8.1 The main planning issue to be considered in determining this application is whether the proposal complies with development plan

policies, unless material planning considerations indicate otherwise. The planning history and consultation responses received are material considerations.

National Developments

- 8.2 As noted in paragraph 4.6 the application site exceeds 2 hectares and therefore the application would ordinarily be treated as a Major Development as defined in the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009. National Developments are defined in Annex B of NPF4 which sets out 18 National Developments. Some of these are very area specific such as number 9 which is the Edinburgh Waterfront, but some relate to Scotland wide development. One such National Development is number 4 which relates to Circular Economy Materials Management Facilities and defines National Developments as:

A development contributing to ‘Circular Economy Materials Management Facilities’ in the location described, within one or more of the Classes of Development described below and that is of a scale or type that would otherwise have been classified as ‘major’ by ‘[The Town and Country Planning \(Hierarchy of Developments\) \(Scotland\) Regulations 2009](#)’ is designated a national development:

- a) Facilities for managing secondary materials; and*
- b) Recycling facilities.*

- 8.3 The definition of *Facilities for managing secondary materials* can be found in Annex F – Glossary of NPF4 and reads as follows:

Facilities where materials can be collected and sorted into the various component parts or consolidated into bulk quantities for re-use either in their original or an alternative function and for recovery.

- 8.4 The supporting letter submitted with the current application explicitly refers to “the keeping/storing of waste soils (topsoil and subsoil) for reuse on the Shawfair Development area”. That description clearly falls within Class a) as defined by NPF4 and consequently the proposal must be considered to be a National Development.

- 8.5 The key difference between a National Development and a Major Development is the need to comply with Regulation 27 (Pre-determination hearings) of The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013. Regulation 27 states:

27. - (1) Before determining an application for planning permission for a development within the classes of development specified in paragraph (2), the planning authority are to give to the applicant and to persons who submit representations to the planning authority in respect of that

application in accordance with these Regulations an opportunity of appearing before and being heard by a committee of the authority.

(2) The classes of development prescribed for the purposes of section 38A(1) of the Act (pre-determination hearings) are developments within the categories of—

(a) national developments; and

(b) major developments which are significantly contrary to the development plan.

- 8.6 The applicant was offered the opportunity to take part in a pre-determination hearing and to appear before and be heard by a committee of the planning authority. The applicant has declined this offer and consequently the application has passed straight to determination by the Committee. The application has not received any representations and therefore there are no representors who can be offered the opportunity of a pre-determination hearing.

Principle of Development

- 8.7 The principle of this form of development at this location was established by the granting of planning permissions 18/00155/DPP. Whilst NPF4 has come into force since the granting of the original permission, the policies in NPF4 do not represent material change in planning circumstances which would warrant refusal of the Section 42 application on the grounds of the principle of development.

Other Matters

- 8.8 The site has operated for the purposes of soil storage in recent years without causing any loss of amenity to residential properties in the surrounding area or disruption to the surrounding road network. The soil stockpiles are in keeping with the scale of development in the surrounding area and are not unduly prominent features. Conditions can be used to secure a safe buffer zone from the recorded mine entries and to secure road cleaning.

9 RECOMMENDATION

- 9.1 That planning permission be granted for the following reason:

The development site is an integral part of a committed development site, as allocated in the Midlothian Local Development Plan 2017, and the temporary use is an operational requirement to facilitate the wider development of Shawfair. The distance of the site from existing dwellinghouses, the nature and scale of the proposed development, the use and operations on the site and the temporary nature of the use means the development does not give rise to an unacceptable impact on amenity. The development does not conflict with the relevant

policies of National Planning Framework 4 and the Midlothian Local Development Plan 2017.

Subject to the following conditions:

1. Planning permission for the storage of topsoil and subsoil on the site is granted for a temporary period of 5 years. The use shall cease and any stored material on the land shall be removed by 22 October 2028.

Reason: *The temporary use is only acceptable on the site as it will facilitate the implementation of committed development sites at Shawfair including established strategic housing site h43 (Shawfair) of which the site lies within.*

2. No stockpile of topsoil shall exceed 3 metres in height above the ground level, prior to the soil storage use commencing.
3. No stockpile of subsoil shall exceed 8 metres in height above the ground level, prior to the soil storage use commencing.

Reason for 2 & 3: *In the interests of safeguarding the landscape character and visual amenity of the area and for the stability of the stored material.*

4. No soil shall be stored within 25m all recorded mine entries or within 25 metres of the boundary of the application site.

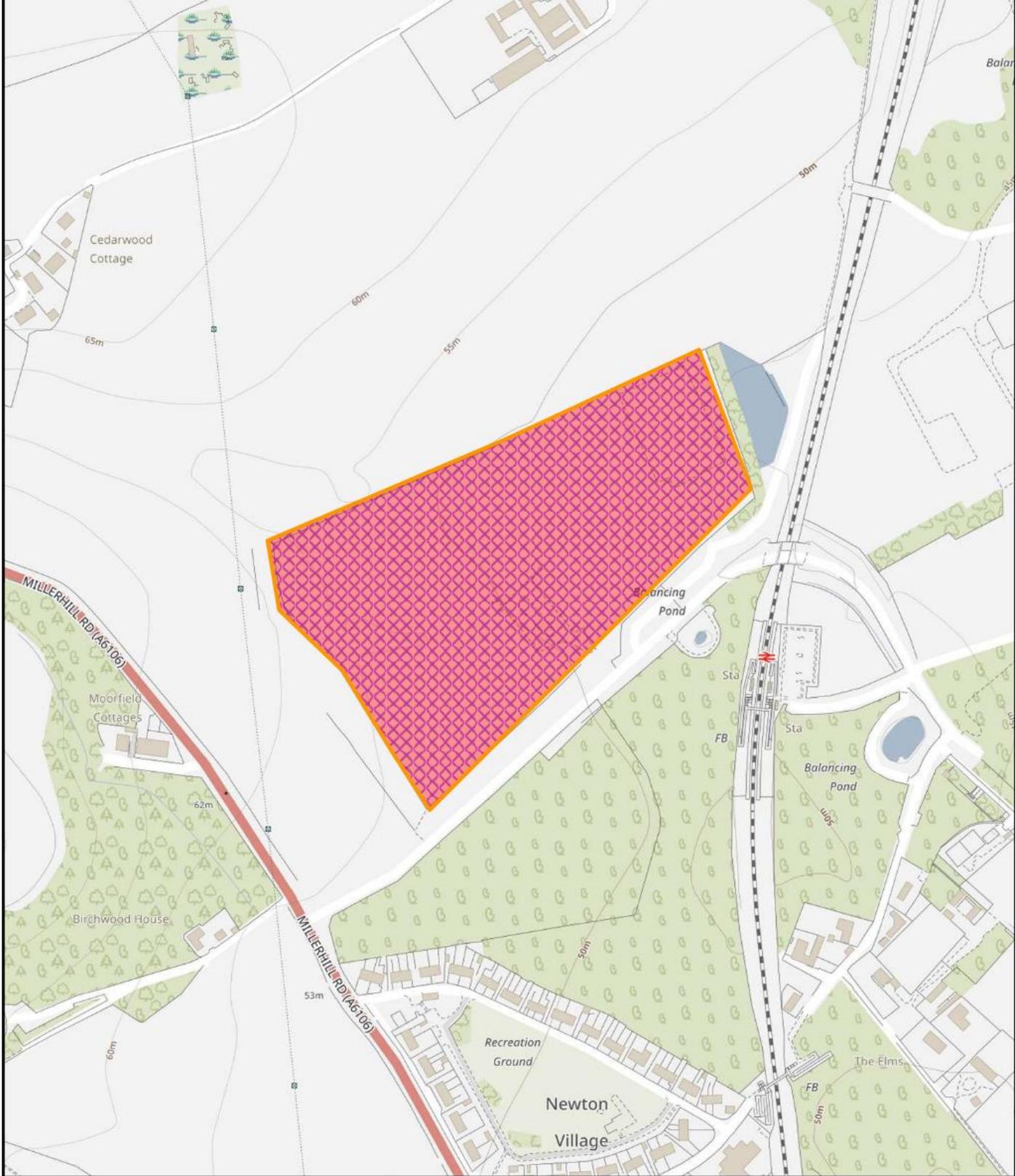
Reason: *In the interests of safety.*

5. A scheme of road washing/clearing shall be put into operation at times when material is being imported or exported to or from the site (when this planning permission is being implemented). The road washing operation shall ensure all sections of road within 100m of the boundary of the site are kept free from mud and debris.

Reason: *In the interests of road safety.*

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Date: 20 October 2023
Application No: 23/00512/S42
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Validation Date: 14 August 2023
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**Amend condition 1 of 18/00155/DPP
 Shawfiar Site F, Monktonhall Colliery Road, Dalkeith**

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