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**SECTION 42 APPLICATIONS (18/00150/S42 AND 18/00151/S42) TO REMOVE CONDITION 5 OF PLANNING PERMISSIONS 201/83 AND 590/83 WHICH RESTRICTS THE OCCUPANCY OF 19A DAMHEAD, LOTHIANBURN.**

Report by Head of Communities and Economy

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**1 SUMMARY OF APPLICATION AND RECOMMENDED DECISION**

- 1.1 This report covers two planning applications which seek to remove condition 5 of planning permission 201/83 and condition 5 of planning permission 590/83 which restrict the occupancy of the dwellinghouse erected at 19A Damhead, Lothianburn.**
- 1.2 There have been three representations and a consultation response from the Damhead & District Community Council.**
- 1.3 The relevant development plan policies are policy 12 of the Edinburgh and South East Scotland Strategic Development Plan 2013 (SESplan) and policies RD1, ENV1 and ENV4 of the Midlothian Local Development Plan 2017 (MLDP).**
- 1.4 Material considerations in the assessment of the application include; the Scottish Government Chief Planner's letter dated November 2011 issued to all Councils in Scotland regarding *Occupancy Restrictions and Rural Housing*, and the Scottish Government's planning policy position set out in Scottish Planning Policy (SPP) and Planning Circular 4/1998: The use of conditions in planning permissions.**
- 1.5 The recommendation is to grant planning permission for both applications subject to an amended condition to restrict the occupancy of 19A Damhead.**

**2 LOCATION AND SITE DESCRIPTION**

- 2.1 The application site is located within the green belt 1.5km to the west of Loanhead. The application dwelling fronts Burnside Road which is located between the A703 and Pentland Road, Damhead.**
- 2.2 The application site comprises a single storey dwellinghouse with a pitched roof and a single storey flat roof garage; both of which are**

finished in facing brick. The application dwelling 19A Damhead is associated with approximately 1.82 ha (4.5 acres) of agricultural land.

### **3 PROPOSAL**

- 3.1 The applications, made under Section 42 of the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006 (hereafter referred to as the Act), seek to remove an occupancy condition attached to two grants of planning permission for the erection of a single dwellinghouse.
- 3.2 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 which will supersede the original permission(s) if implemented. Therefore if planning permission is granted for these applications it will replace planning consents 201/83 and 590/83.
- 3.3 Two separate section 42 applications have been submitted, the first is to remove condition 5 of planning permission 201/83 and the second is to remove condition 5 of planning permission 590/83.
- 3.4 Condition 5 of planning applications 590/83 and 201/83 states:
- The new house shall be occupied only by a person employed, or last employed, full-time locally in agriculture, as defined in Section 275(1) of the Town & Country Planning (Scotland) Act 1972 (including any dependants of such a person residing with him/her), or by the widow or widower of such person.*
- 3.5 The definition of agriculture, as defined in Section 275(1) of the Town & Country Planning (Scotland) Act 1972 states “agriculture” includes horticulture, fruit growing, seed growing, dairy farming, the breeding of and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of the land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of the land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and “agricultural” shall be construed accordingly.
- 3.6 The applicant has submitted supporting statements to justify the removal of the conditions.

### **4 BACKGROUND**

- 4.1 Pre-application advice was provided to the applicant in February 2018 with regards to the removal of the occupancy condition. The applicant was advised that there was no policy support or other material planning

considerations that would justify the removal of the occupancy condition.

- 4.2 Application 17/00746/LA to discharge the planning obligation associated with the erected house built under planning permission 201/83, which contained an occupancy restriction, was approved 19 December 2017. It was agreed to remove the legal agreement because it duplicated the restrictive planning condition.
- 4.3 Planning application 00/00284/FUL for the removal of Condition 5 (of planning permission 201/83 and 590/83) restricting the occupancy of the dwellinghouse was refused by the Committee at its meeting of 14 December 2000 for the following reasons:
  1. *The house to which the application relates is within an area subject to greenbelt and countryside policies in the development plan. The house was given planning permission solely on the basis that it was essential to agricultural activity on the forty hectares of land with which it was associated.*
  2. *The applicants have not demonstrated to the satisfaction of the Council that the house and associated land cannot be sold as a going concern or as a farm unit that has potential to be economically viable.*
  3. *Justification of the application in terms of the current difficulties in agriculture generally, if accepted, would open the way for an application for further houses if there were revival in agricultural activity after the present house had been separated from the agricultural unit and disposed of as a private residence.*
- 4.4 Planning permission, 590/83 for the erection of a dwellinghouse was approved subject to conditions on the 13 August 1984.
- 4.5 Outline planning permission, 201/83 for the erection of a dwellinghouse was approved subject to conditions and a legal agreement on the 2 August 1984.
- 4.6 An occupancy condition was attached to both planning permissions 201/83 and 590/83 to restrict the occupancy of the dwellinghouse.
- 4.8 The applications have been called to Committee for consideration by Councillor Winchester to discuss the advice provided by the Chief Planner for Scotland by way of a letter issued in 2011 in relation to occupancy conditions.

## 5 CONSULTATIONS

- 5.1 The **Damhead & District Community Council** submitted two letters of support for the planning applications. The Community Council are of

the opinion that the occupancy condition is contrary to the Scottish Government's planning policy position. Furthermore, circumstances regarding the house have changed in terms of its surroundings, in that there is planned housing development in the green belt (*it is unclear to which sites the Community Council are referring*). It is also noted that the original applicants are now deceased and therefore the use of an occupancy condition is no longer relevant.

## **6 REPRESENTATIONS**

- 6.1 There have been three representations supporting both planning applications. All three representations considered the use of occupancy conditions to be contrary to Scottish Planning Policy (SPP). All representations can be viewed in fully online.

## **7 PLANNING POLICY**

- 7.1 The development plan is comprised of the Edinburgh and South East Scotland Strategic Development Plan (June 2013) and the Midlothian Local Development Plan 2017 (MLDP). The following policies are relevant to the proposal:

Edinburgh South East Scotland Strategic Development Plan 2013 (SESPlan)

- 7.2 **Policy 12** (GREEN BELTS) requires Local Development Plans to define and maintain Green Belts around Edinburgh whilst ensuring that the strategic growth requirements of the Strategic Development Plan can be accommodated. Local Development Plans should define the types of development appropriate within Green Belts.

Midlothian Local Development Plan 2017 (MLDP)

- 7.3 Policy **ENV1**: Protection of the Green Belt advises that development will not be permitted in the Green Belt except for proposals that;
- A. are necessary to agriculture, horticulture or forestry; or
  - B. provide opportunities for access to the open countryside, outdoor sport or outdoor recreation which reduce the need to travel further afield; or
  - C. are related to other uses appropriate to the rural character of the area; or
  - D. provide for essential infrastructure; or
  - E. form development that meets a national requirement or established need if no other site is available.

Any development proposal will be required to show that it does not conflict with the overall objectives of the Green Belt which is to maintain the identity and landscape setting of Edinburgh and Midlothian towns by clearly identifying their physical boundaries and preventing coalescence.

The policy states that housing will normally only be permissible where it is required for the furtherance of an established Green Belt activity. The applicant will be required to show the need for the new dwelling is permanent; cannot be made within an existing settlement; and that the occupier will be employed full-time in the associated countryside activity. A planning condition limiting the occupancy of the house is likely to be attached in the event of approval.

- 7.4 Policy **ENV4** Prime Agricultural Land does not permit development that would lead to the permanent loss of prime agricultural land unless there is appropriate justification to do so.

#### National Policy

- 7.5 The **Scottish Planning Policy (SPP) 2014** supports the concept of promoting rural development. Stating the Planning system should encourage rural development that supports prosperous and sustainable communities and businesses whilst at the same time protecting and enhancing the environment. Development should be appropriate to the character of the particular rural area in which it is located and the challenges it faces.

- 7.6 The SPP also states that in the pressurised areas easily accessible from Scotland's cities and main towns, where ongoing development pressures are likely to continue, it is important to protect against an unsustainable growth in car-based commuting and the suburbanisation of the countryside, particularly where there are environmental assets such as sensitive landscapes or good quality agricultural land. Plans should make provision for most new urban development to take place within, or in planned extensions to, existing settlements.

- 7.7 Inaccessible or pressured rural areas, where there is a danger of unsustainable growth in long-distance car-based commuting or suburbanisation of the countryside, a more restrictive approach to new housing development is appropriate, and plans and decision-making should generally:

- guide most new development to locations within or adjacent to settlements; and
- set out the circumstances in which new housing outwith settlements may be appropriate, avoiding use of occupancy restrictions.

This position set out in the 2014 SPP post-dates the position set out in the Scottish Government Chief Planner's letter dated November 2011 issued to all Councils in Scotland regarding *Occupancy Restrictions and Rural Housing*.

- 7.8 Scottish Government advice **Circular 4/1998 (The use of conditions in planning permissions)** sets out six tests which planning conditions must comply with:

- Necessary;
- Relevant to planning;
- Relevant to the development to be permitted;
- Enforceable;
- Precise; and
- Reasonable in all other respects.

7.9 The circular states that where appropriate, development plans should specify the policies which the authority proposes to implement regularly by means of planning conditions. In many parts of Scotland planning policies impose strict controls on new residential development in the green belt/countryside. However there are circumstances where planning permission for a dwellinghouse is granted to support agriculture or forestry. In these circumstances, it will often be necessary to impose an agricultural or forestry worker occupancy condition in support of those industries.

7.10 Planning authorities will wish to take care to frame agricultural occupancy conditions in such a way as to ensure that their purpose is clear. In particular, they will wish to ensure that the condition does not have the effect of preventing future occupation by retired agricultural workers or the dependants of the agricultural occupant.

7.11 Where an agricultural occupancy condition has been imposed, it will not be appropriate to remove it on a subsequent application unless it is shown that circumstances have materially changed and that the agricultural need which justified the approval of the house in the first instance no longer exists.

7.12 Further to the above policy position, the Scottish Government **Chief Planner** wrote to all Councils in Scotland regarding *Occupancy Restrictions and Rural Housing*, in November 2011. Whilst this letter was not originally considered as planning policy, circular 03/2012 (Planning Obligations and Good Neighbour Agreements) required it to be treated as such when it was issued in December 2012. In any event it did indicate the Scottish Government's position regarding occupancy restrictions.

7.13 The letter sets out the following position (which is reflected in the later SPP):

“A number of issues have arisen with the use of occupancy restrictions, some of which have been exacerbated by the current economic situation. Some people have found it difficult to get a mortgage to buy a house with an occupancy restriction. Others have found it difficult to sell the house, or have the restriction lifted, when they are forced by necessity to move.

Scottish Planning policy promotes a positive approach to rural housing. It states that development plans should support more opportunities for

small scale housing development in all rural areas, including housing which is linked to rural businesses. It does not promote the use of occupancy restrictions. The Scottish Government believes that occupancy restrictions are rarely appropriate and so should generally be avoided.

In determining an application for a new house in the countryside, it may be appropriate for the planning authority to consider the need for a house in that location, especially where there is the potential for adverse impacts. In these circumstances, it is reasonable for decision-makers to weigh the justification for the house against its impact, for example on road safety, landscape quality or natural heritage, and in such circumstances it may be appropriate for applicants to be asked to make a land management or other business case. Where the authority is satisfied that an adequate case has been made, it should not be necessary to use formal mechanisms to restrict occupancy.

The Scottish Government believes that a vibrant populated countryside is a desirable objective and that new housing to realise this aim should be well sited and designed, and should not have adverse environmental effects that cannot be readily mitigated. In areas, including green belts, where, due to commuter or other pressure, there is a danger of suburbanisation of the countryside or an unsustainable growth in long distance car-based commuting, there is a sound case for a more restrictive approach.”

## **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 representations and consultation response received are material considerations.

### The Principle of Development

- 8.2 The original planning applications (201/83 and 590/83) for the erection of a dwellinghouse were approved in 1984 in support of an agricultural business. The agricultural occupancy condition was attached to the planning permissions so as to ensure that the new house complied with development plan policy.
- 8.3 The aim of policy ENV1 of the MLDP is to protect the landscape setting, character and identity of Edinburgh and the settlements of Midlothian by preventing coalescence and the suburbanisation of the green belt/countryside. The local development plan was adopted in November 2017 following a local plan examination - the policy is therefore considered robust and reflective of the Scottish Government's position set out in SPP. The use of a planning condition limiting its occupancy meets the policy criteria, enabling development in support

of rural business whilst also protecting the characteristics of the green belt. This reflects the sentiment of the Scottish Government Chief Planner letter to all Councils in Scotland regarding *Occupancy Restrictions and Rural Housing*, in November 2011.

- 8.4 The SPP seeks to achieve a balance between promoting a positive approach to rural housing whilst delivering sustainable development and protection of the green belt. This approach is reflected in the Council's development plan policies and in response new houses in the green belt must be linked to an appropriate countryside activity. This is based on sustainability principles and means that the landscape being impacted upon is benefiting economically. Where an acceptable case has been put forward for a dwelling in the green belt, a planning condition limiting the occupancy is still appropriate in support of rural businesses. This is compatible with local development plan policy and national planning policy with regard green belt areas faced with development pressure and the risk of becoming suburbanised.
- 8.5 Removal of the occupancy condition attached to the planning permissions would result in a dwellinghouse in the green belt which is not required in support of a rural business, resulting in commuter pressure contrary to the MLDP and SPP. In response to the Scottish Government's position regarding occupancy conditions the planning authority is moving away from their use when considering applications for new dwellings and are making decisions in terms of approve or refuse, rather than having a middle ground of approve subject to an occupancy condition. However, the current applications relate to a dwellinghouse already in situ.

#### Viability

- 8.6 The applicant's supporting statement advises that 19A Damhead is not a viable agricultural unit. The smallholding includes approximately 4.5 acres of Grade 3(1) agricultural land as defined by the James Hutton Institute's *Land Capability for Agriculture Classification*; which means it is capable of producing a variety of crops. This means that the acreage and quality of pasture is sufficient to support 1 livestock unit per acre which is the equivalent to 1 cow or 6 sheep; although it is noted that there are no livestock housing facilities on the site.
- 8.7 Furthermore, it is advised that as the holding is smaller than 3 hectares it would not be eligible for an agricultural subsidy and on the basis that agricultural subsidies play a critical role in the profitability of farms the site's size alone ensures the smallholding is not viable.
- 8.8 The supporting statement concludes that whilst the land quality in the area is known for its fertility, the economics of modern agriculture means that the property is unable to be classed as a viable unit.



- 8.9 A case has been put forward which demonstrates that 19A Damhead may not be viable for livestock or crops due to its size. However, it has not been demonstrated that the applicant has investigated all options available in advance of seeking to remove the occupancy conditions. There is a demand for housing at an affordable price for agricultural workers and labourers who are often paid at the lower end of the wage scale. A residential property with a restrictive agricultural occupancy condition actively helps to meet this housing need in support of the agriculture and forestry industries.
- 8.10 The lack of viability/profitability of the holding does not necessarily justify the requirement for the conditions to be removed. The occupancy conditions attached to the planning permissions do not restrict the occupancy of the dwelling to only be linked to the farm land associated with 19A Damhead. The occupancy condition allows the house to be occupied by someone who is either employed full-time in local agriculture or is retired and whose last full-time job was in local agriculture.
- 8.11 Within the supporting statement the agent advises that the application was openly marketed for 11 weeks from the 28 September 2017 to the 14 December 2017. The supporting statement advised that agents received 16 enquiries and six viewings; it was noted that all parties who viewed the property had no current or previous connection with agriculture.
- 8.12 The Particulars stated that 'there is an occupancy restriction on the property at 19A Damhead and that an application to remove this occupancy restriction has been lodged with Midlothian Council following changes to national planning policy in recent years. It is anticipated that this will be removed prior to sale'. The occupancy restriction refers to the legal agreement that was discharged on the 19 December 2017 after the closing date of the sale. No reference was made to the planning condition attached to the planning permissions.
- 8.13 There is an argument that can be made that the application site had been marketed on the presumption that the occupancy restrictions would be removed. However, as previously noted it has not been demonstrated that the applicant has investigated all options available in advance of seeking to remove the occupancy condition. The site could be marketed at the agricultural and forestry industry at a reduced value to reflect the occupancy restriction – this may attract a potential purchaser.

#### The Use of Conditions in Planning Permissions

- 8.14 Planning conditions must satisfy the tests within circular 4/1998. The circular states that conditions should not be imposed unless they are both necessary and effective, and do not place unjustifiable burdens on applicants. The circular sets out six tests, namely that a condition shall

only be imposed where it is necessary, relevant to planning, relevant to the development permitted, enforceable, precise and reasonable in all other respects.

- 8.15 Whilst each planning application must be considered on its own individual merits, the Council must reasonably consider the potential impact one decision has on future considerations. A core objective of the Council's green belt policy is to protect the landscape setting, character and identity of Edinburgh and the settlements of Midlothian by preventing coalescence and the suburbanisation of the countryside by restricting unjustified development. To ensure the benefits of the green belt are safeguarded, it is important that strong controls are maintained over the remaining designated areas.
- 8.16 In assessing whether the condition was necessary, relevant to the development to be permitted and relevant to planning policy on housing development in the green belt the Council accepted the requirement for a house based upon the argument that it was required for the furtherance of agricultural activity. The occupancy condition was required so as to ensure that the new dwelling complied with the planning policy that was in force at the time of approval. Furthermore, adopted policy ENV1 also requires a planning condition limiting the occupancy of the house. The local development plan was adopted in November 2017 which emphasises that the policy is robust and demonstrates that the occupancy condition is necessary and relevant.
- 8.17 The remaining tests relate to whether the condition is enforceable, precise and reasonable in all other respects. The condition is flexible in terms of the occupancy restrictions that have been placed on 19A Damhead. The occupancy condition was required so as to ensure the dwelling complied with the planning policy in force at the time of the approval and the current adopted policy, ENV1. It is therefore considered to be reasonable.
- 8.18 However, condition 5 could be more precise which would make it more enforceable; the condition lacks a definition of the term 'locally' which does not provide certainty by which the applicant can ascertain what is required. Furthermore, the current condition refers to legislation which is no longer in force. It is therefore appropriate to use the opportunity these applications present to update the conditions for the benefit of the applicant, the Council and future occupants of the property.
- 8.19 The removal of the occupancy condition would result in a development contrary to the development plan and undermine the implementation of the Council's green belt policy as set out in the adopted local development plan. The proximity of the site to Edinburgh would make the house and area subject to pressure for commuter housing, instead of serving Damhead, other local agriculture businesses or local agricultural workers.

- 8.20 The other conditions (excluding condition 5) attached to planning permission 201/83 and 590/83 were pre-commencement conditions and were discharged as part of the process of building the house.

## 9 RECOMMENDATION

- 9.1 That planning permission for both applications be approved for the following reason:

*The house to which the application relates is within an area that is subject to green belt policies within the adopted Midlothian Local Development Plan 2017 and it is considered that the fundamental issue underpinning the requirement for the condition covering the occupancy restriction is the need to safeguard the character and appearance of the Midlothian countryside and green belt. It is considered that condition 5 attached to the planning permissions 201/83 and 590/83 does not meet all of the test of the Scottish Government's Planning Circular 4/1998 (The use of conditions in planning permissions) in terms of being precise or enforceable. The removal of the condition is only recommended on the basis that a more precise and enforceable condition is attached to limit the occupancy of the dwellinghouse so as to comply with the policy in force at the time of approval and the current adopted policy ENV1.*

Subject to the following condition:

1. The new house shall be occupied only by a person employed, or last employed, full-time in Midlothian, as defined in the adopted Midlothian Local Development Plan 2017, in agriculture, as defined in Section 277 (1) of the Town & Country Planning Scotland Act 1997 (or any Order revoking and re-enacting that Order), including any dependants of such a person residing with him/her or by the widow or widower of such person.

**Reason:** *It has not been demonstrated, to the satisfaction of the planning authority, that the applicant has investigated all options available in advance of removing the occupancy condition. In the absence of this justification, the planning authority have significant and serious concerns regarding the sustainability of the house in this sensitive landscape which is under increasing pressure from creeping suburbanisation. To ensure that the dwellinghouse complies with the policy in force at the time of approval and the current adopted local development plan policy ENV1. To clarify the scope of the occupancy restriction of the dwellinghouse and to clarify the definition of agriculture in terms of current legislation so as to meet the all of the tests within planning circular 4/1998 (The use of conditions in planning permissions).*

**Ian Johnson**  
**Head of Communities and Economy**

**Date:** 8 May 2018

**Application No:** 18/00150/S42 and 18/00151/S42

**Applicant:** Mr Robert Lawrie

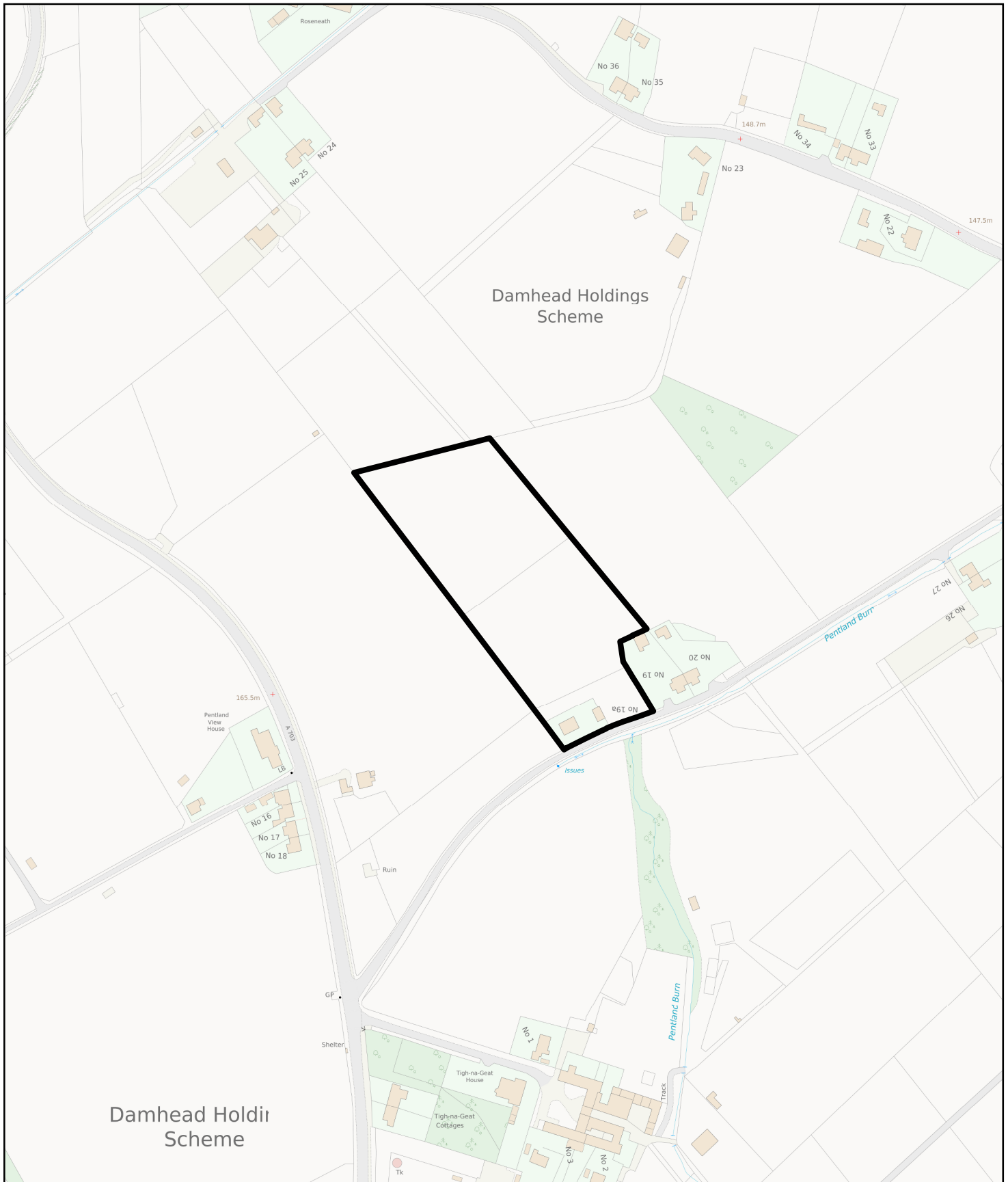
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**Validation Date:** 06 March 2018 (both applications)

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**Background Papers:** 17/00746/LA, 201/83 and 590/83.



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Section 42 applications to remove condition 5 of Planning  
Permissions 590/83 (18/00150/S42) and 201/83 (18/00151/S42)

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Scale: 1:3,500

