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## **TREE PRESERVATION ORDER (2 of 2024) REGARDING LAND NORTH OF THE OLD GOLF HOUSE, NEWBATTLE, DALKEITH**

Report by Chief Officer Place

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### **1 PURPOSE OF REPORT**

- 1.1 This report seeks the Committee's approval to confirm a Tree Preservation Order (TPO) 2 of 2024 issued on 18 January 2024 regarding one group of trees (G1) at land north of the Old Golf House, Newbattle, Dalkeith.

### **2 LOCATION AND SITE DESCRIPTION**

- 2.1 The group of trees, G1, is located on land north of Old Golf House, Newbattle, Dalkeith and south of houses on the southern side of Newbattle Abbey Crescent. The land lies west of, and adjacent to, Newbattle Road (B703) and approximately 100 metres from the entrance to Newbattle Abbey. The site is within the Newbattle Conservation Area, is part of the Newbattle Abbey site as listed in the Inventory of Gardens and Designed Landscapes and is within the Newbattle Strategic Greenspace Safeguard.
- 2.2 The group of trees comprises a small strip of semi mature broadleaf woodland (Oak, Lime, Sycamore, Beech, Ash, Wych Elm, Laurel) that widens out at its eastern end to form a triangular piece of land. The site is bound to the south by a linear group of dwellings, namely Old Golf House, which lies immediately adjacent the site, The Mill and Barondale House. Barondale Cottages are also in the same cluster of dwellinghouses. The River South Esk is located approximately 75 metres to the south of the site, separated by the aforementioned dwellings. To the north the site is bound by an access track with with contemporary properties (constructed in the second half of the 20th century) at Newbattle Abbey Crescent beyond.
- 2.3 The tree group is clearly visible from Newbattle Road (B703), from users of core path 4-47/1 and from the dwellings adjacent to the site, including The Stables and Riverside Cottage (both listed buildings) on the east side of Newbattle Road.

### **3 BACKGROUND**

- 3.1 At its meeting in November 2023 the Committee considered a report regarding the wilful destruction of trees within the Newbattle Conservation

Area and the non-compliance with a planning contravention notice issued in relation to land adjacent to Old Golf House, Eskbank, Dalkeith and the Committee determined to instruct the Planning, Sustainable Growth and Investment Manager (or an alternatively appropriately appointed officer) to refer the case to the Crown Office and Procurator Fiscal Service for consideration of prosecutorial action pursuant to Sections 126 and 172 of the Town and Country Planning (Scotland) Act 1997 as amended. This action is ongoing (A copy of the November Committee report is attached as Appendix A for quick reference).

- 3.2 In December 2023 Council officers were advised that holes had been drilled into a number of trees and weedkiller poured into the holes. On inspection of the site, 10mm drilled holes were found towards the base of the stem of a number of trees, at least 12 trees, and a 5-litre pressure spray bottle with spray lance containing pink liquid was found on the site.
- 3.3 On Monday 8 January 2024 the Council received a tree condition survey and covering letter regarding the site, which proposed works to trees including felling and pruning of trees for reasons of health and safety or structural reasons, and the removal of ivy attached to trees to allow for further inspection. A subsequent work to tree application (24/00050/WTT) was registered by the Council on 12 January 2024 – this application set out an intention to carry out felling and pruning works on site. The Council considered that the proposed works are likely to be detrimental to the landscape amenity of the Newbattle Conservation Area, the Newbattle Abbey Gardens and Designed Landscape and the setting and amenity of adjacent dwellings, without recourse to secure replacement planting. As a consequence, an emergency TPO was issued to take effect on 18 January 2024 – on this basis any support for a work to tree application can secure replacement planting.
- 3.4 The site of the TPO is not the subject of a planning application.
- 3.5 The TPO came into effect on 18 January 2024 and continues in force for six months (until 18 July 2024) or until the Order is ‘confirmed’, which is the process of making the TPO permanent (until it is removed).
- 3.6 Following the service of the TPO the landowners were given the opportunity to make representation. Furthermore, in accordance with the Regulations, a notice was published in the Midlothian Advertiser and on the Council’s website and the Eskbank and Newbattle Community Council and Scottish Forestry were also notified of the decision to issue the TPO and invited to make a representation.
- 3.7 The Council also notified the following neighbours of the TPO:
  - 1-2 Barondale Cottages;
  - 1-5 The Stables;
  - Barondale House;
  - Old Golf House;
  - The Mill; and
  - 1-3 and 13-19 Newbattle Abbey Crescent.

- 3.8 Newbattle Abbey was also notified due to the location of the site within the Newbattle Abbey Gardens and Designed Landscapes listing.
- 3.9 Interested parties were given until 29 February 2024 to make representations. Legislation requires that a period of at least 28 days is made available for representation to be submitted to the Council following a decision to make a Tree Preservation Order. One representation from an interested party was received.

## **4 PROCEDURES**

- 4.1 The provision for issuing a Tree Preservation Order is set out in the Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc. (Scotland) Act 2006 and the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 2010. A planning authority may make a TPO if it appears to them to be “expedient in the interest of amenity and/or that the trees, groups of trees or woodlands are of cultural or historic significance” (Scottish Government Planning Circular 1/2011: Tree Preservation Orders).
- 4.2 Following the service of a TPO the owner of the land and other interested parties have the opportunity to make representation. However, there is no right of appeal against a TPO.
- 4.3 The TPO shall be in effect for six months, during which time representations from the owner of the land and other interested parties will be considered. If the local planning authority wishes the TPO to stay in effect beyond the six months, it must ‘*confirm*’ the order.

## **5 PLANNING ISSUES**

- 5.1 The emergency TPO was made to protect local amenity and the character of the area. The trees within Group 1 are predominantly semi-mature and are important for the following reasons:
- The trees contribute to the character, amenity, and landscape setting of Newbattle Abbey including the listed buildings and the associated landscape which is included on the Inventory of Gardens and Designed Landscapes;
  - The trees contribute to the character and amenity of the Newbattle Conservation Area;
  - The trees contribute to the character and amenity of the River South Esk riparian woodland corridor, which is important for its biodiversity value and as a green network connection; and
  - The trees provide separation between older buildings on the bank of the River South Esk, including Old Golf House and the more contemporary residential properties of the Newbattle Abbey Crescent development.

- 5.2 The confirming of the TPO will be an important tool in perpetuating tree canopy cover in the area in order to help address the climate emergency, protecting the trees for their amenity and place functions/value, and preserving local biodiversity and habitat connectivity.

## 6 REPRESENTATIONS

- 6.1 The Council received one representation supporting the issuing of the TPO which is broadly in support of the making of the TPO but raises concern about the condition of some trees within the TPO group. The response also requested that a certain tree would be excluded from the TPO.

- 6.2: Response 1:

*“Whilst I am generally in favour of the trees being protected, I am concerned with the condition of some of the trees.... The tree in question, which appears in particularly poor condition, although it is not the only one, is tree number 0689. Can I ask if this has been structurally surveyed ...and I would question if this tree should be protected at all. Can you please advise if this tree can be excluded from the TPO, or any of the other trees which are in poor condition.”*

- 6.3 This representation is generally in support of the making of the TPO but raises concern over the condition of some of the trees. The additional information received via work to tree application 24/00050/WTT was produced by a qualified arboricultural consultant and the findings have therefore been accepted on this basis. This application requested permission to remove a number of trees on health and safety grounds. However, the tree raised in Response 1 was not one of the trees that was proposed for felling.
- 6.4 A response from the Council was sent in reply to Response 1 asking for confirmation if they were requesting that tree 0689 (the number is a reference to a particular tree located on site as set out in the tree survey) be excluded from the TPO, but no reply was received (note – the TPO is a Group TPO so an individual tree cannot be excluded).
- 6.5 The above representation is noted but should not prevent the confirmation of the TPO. It is considered that the tree safety concerns raised in the tree survey report submitted with the work to tree application (ref. 24/00050/WTT) has been resolved by the granting of tree works to enable appropriate woodland management and by securing replacement planting. The remaining trees would retain TPO protection should the Committee confirm the TPO, this in turn would ensure that the trees are protected and can continue to contribute to: local tree canopy cover; the landscape setting and amenity of Newbattle, local biodiversity; and climate change mitigation.

## **7 RECOMMENDATION**

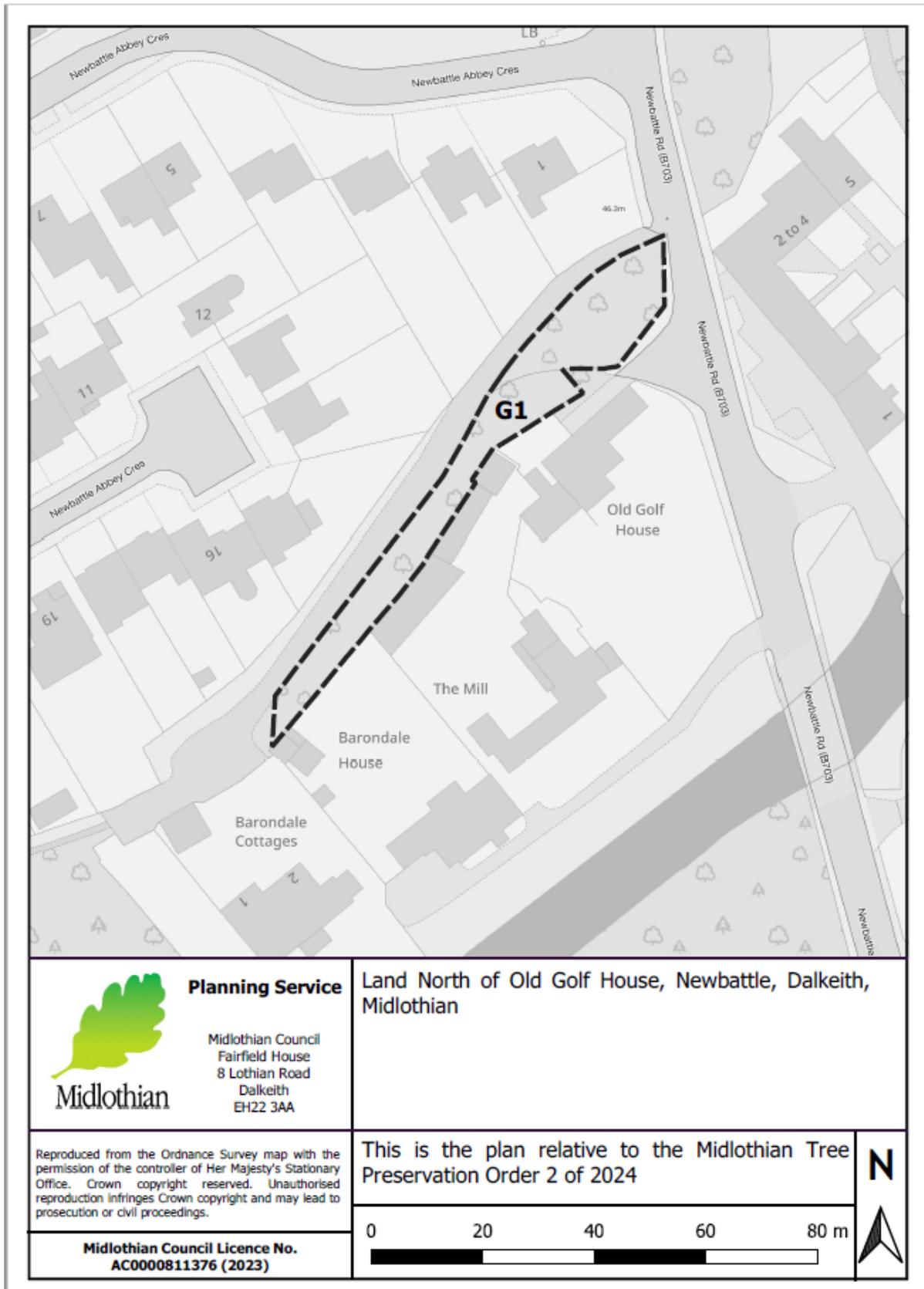
7.1 It is recommended that Committee:

- a) Confirm the Tree Preservation Order (2 of 2024) for one group of trees (G1) at land north of Old Golf House, Newbattle, Dalkeith; and
- b) Instruct the Planning, Sustainable Growth and Investment Service Manager to carry out the necessary procedures, following confirmation and endorsement of a tree preservation order, which are required by the Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc. (Scotland) Act 2006 and the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 2010.

**Peter Arnsdorf**  
**Planning, Sustainable Growth and Investment Manager**

**Date:** 19 April 2024  
**Contact Person:** Grant Ballantine  
grant.ballantine@midlothian.gov.uk  
**Background Papers:** November 2023 Committee Report (Appendix A)  
Site Location Plan and Site Photographs (attached)

**LOCATION PLAN**  
**MIDLOTHIAN COUNCIL TREE PRESERVATION ORDER 2 of 2024**  
**Land North of Old Golf House, Newbattle**



**Planning Service**

Midlothian Council  
 Fairfield House  
 8 Lothian Road  
 Dalkeith  
 EH22 3AA

Land North of Old Golf House, Newbattle, Dalkeith, Midlothian

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This is the plan relative to the Midlothian Tree Preservation Order 2 of 2024

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**SITE PHOTOS**

**MIDLOTHIAN COUNCIL TREE PRESERVATION ORDER 2 OF 2024**

**Land North of Old Golf House**

**Photo 1**

**Location:** Land north of Old Golf House, Newbattle Road, Dalkeith EH22 3LX  
55.880391, -3.071200 What3Words: ///flanked.anode.offstage

**Date and time:** 13:53, 06/06/22

**Description:** View from within north-eastern part of site looking Southwest. Showing felled and partially felled trees and remaining trees within site.



**Photo 2**

**Location:** Land north of Old Golf House, Newbattle Road, Dalkeith EH22 3LX  
55.880391, -3.071200 What3Words: ///flanked.anode.offstage

**Date and time:** 13:53, 06/06/22

**Description:** Stacked timber and remaining trees along northern site boundary as viewed from access track to north of site:

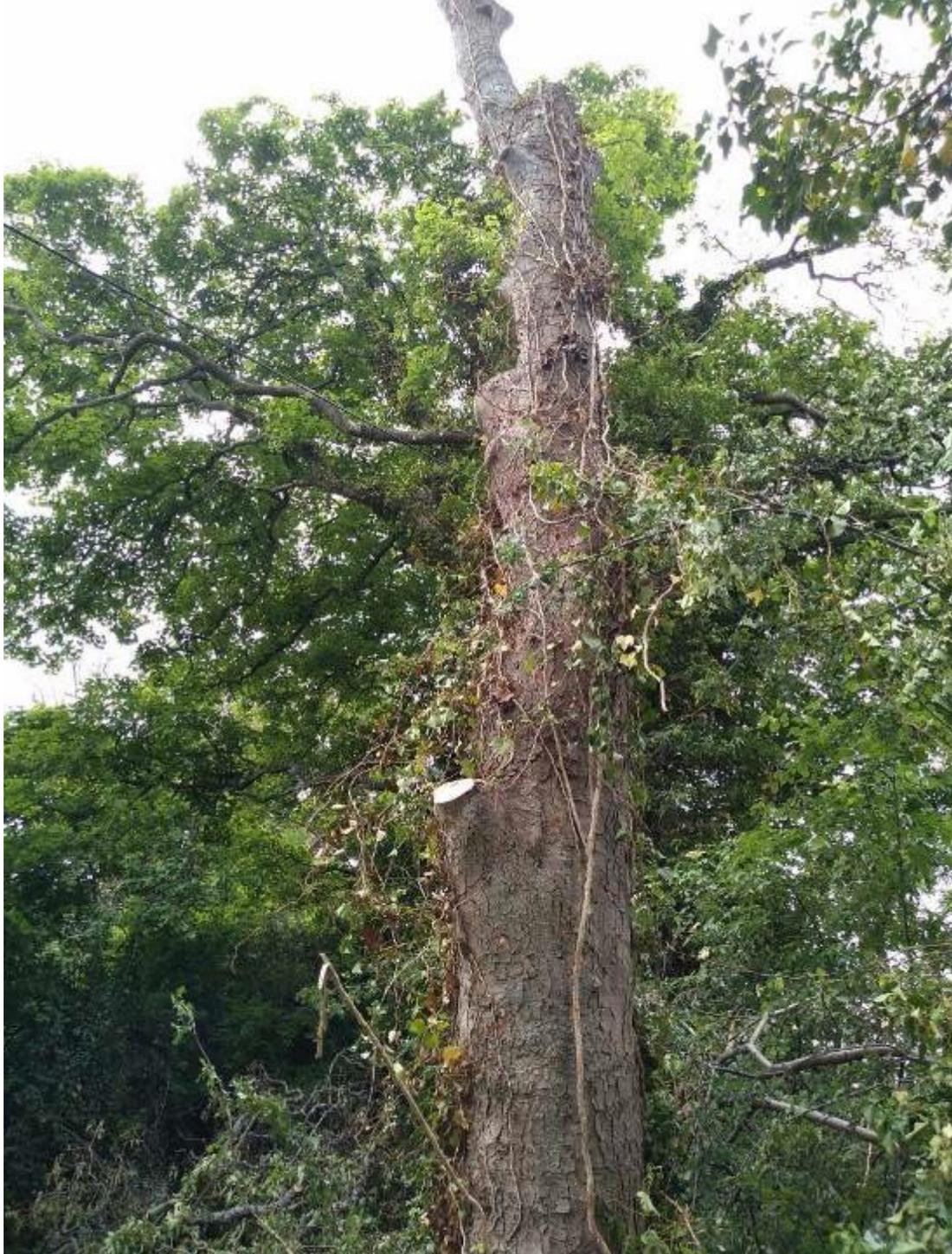


**Photo 3**

**Location:** Land north of Old Golf House, Newbattle Road, Dalkeith EH22 3LX  
55.880391, -3.071200 What3Words: ///flanked.anode.offstage

**Date and time:** 13:52, 06/06/22

**Description:** Partially felled tree left as a monolith after sectional felling ceased and tree surgeons left the site abruptly. Photo shows unpruned trees in the background.



**Photo 4**

**Location:** Land north of Old Golf House, Newbattle Road, Dalkeith EH22 3LX  
55.880391, -3.071200 What3Words: ///flanked.anode.offstage

**Date and time:** 18/12/23

**Description:** View from within site looking east towards Newbattle Road showing remaining trees on eastern part of site.



**Photo 5**

**Location:** Land north of Old Golf House, Newbattle Road, Dalkeith EH22 3LX  
55.880391, -3.071200 What3Words: ///flanked.anode.offstage

**Date and time:** 18/12/23

**Description:** View from within site looking west showing some of remaining trees on western part of the site and Heras fencing stacked on site



**Photo 6**

**Location:** Land north of Old Golf House, Newbattle Road, Dalkeith EH22 3LX  
55.879685, -3.072241 What3Words: ///registers.mammoths.slim

**Date and time:** 18/12/23

**Description:** View from access track by site's southwestern end, looking northeast into the site and along the adjacent access track, showing untouched trees on southwestern part of the site



**Photo 7**

**Location:** Land north of Old Golf House, Newbattle Road, Dalkeith EH22 3LX  
55.879685, -3.072241 What3Words: ///registers.mammoths.slim

**Date and time:** 18/12/23

**Description:** View from access track adjacent to site, looking along site's northern edge





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### **WILFUL DESTRUCTION OF TREES WITHIN THE ESKBANK AND IRONMILLS CONSERVATION AREA AND NON-COMPLIANCE WITH A PLANNING CONTRAVENTION NOTICE REGARDING LAND ADJACENT TO OLD GOLF HOUSE, ESKBANK, DALKEITH**

Report by Chief Officer Place

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#### **1 REPORT SUMMARY AND RECOMMENDATION**

- 1.1 This report relates to the wilful destruction of trees within the Eskbank and Ironmills Conservation Area and the non-compliance with a planning contravention notice issued in relation to land adjacent to Old Golf House, Eskbank, Dalkeith.**
- 1.2 This report recommends that the Committee instruct the Planning, Sustainable Growth and Investment Manager to refer the case to the Crown Office and Procurator Fiscal Service for consideration to be given to prosecutorial action against those parties who have carried out the wilful destruction of trees within the Eskbank and Ironmills Conservation Area pursuant to Section 172 of the Town and Country Planning (Scotland) Act 1997 as amended, and have not complied with a planning contravention notice, pursuant to Section 126 of the Town and Country Planning (Scotland) Act 1997 as amended, hereafter referred to as the Act. The maximum penalty on successful prosecution is a fine of up to £20,000 with regard the destruction of trees in a conservation area and £5,000 per offence with regard non-compliance with a planning contravention notice.**

#### **2 BACKGROUND**

- 2.1 The site the subject of this report is an area of woodland on land adjacent to Old Golf House, Eskbank, Dalkeith – the land fronts onto Newbattle Road. The land is separated from housing at Newbattle Abby Crescent by a narrow un-adopted lane which provides access to a small number of houses. The land is adjoined by the Old Golf House, The Mill, Barondale House and Barondale Cottages. However, the land is not in the same ownership of any of these properties. Opposite the site on the other side on Newbattle Road are further residential properties. The land is located within the Eskbank and Ironmills Conservation Area.**

- 2.2 On the 25 September 2023 the Council received reports of a potential breach of planning control taking place on the said land – following a site inspection on the same day it was identified that engineering works (excavations and other earthworks) were taking place using mechanical equipment. Those parties undertaking the said works were advised that there was a breach of planning control and works should cease - the works constitute an engineering operation and any works to the trees constituted an offence as they are in a conservation area. The parties undertaking the works declined to cease work.
- 2.3 On 27 September 2023 (11:00) the Council served a Temporary Stop Notice (TSN) pursuant to S144A of the Act as amended. The notice was posted at the site (in two locations) by Sheriff Officers acting on behalf of the Council and also served on the persons identified to be the landowners as a result of detailed title search. Officers were also in attendance at the site and observed the notice being displayed. At that time it appeared that there had been limited further engineering work beyond that which had been observed on the 25 September 2023 and no specific works to trees had taken place. The TSN required the cessation of the engineering works.
- 2.4 On returning to the site later on the 27 September 2023 (14:00) following complaints from local residents, officers identified large piles of branches lying in the adjoining road after works to trees had taken place - Officers of Police Scotland were also on site in response to concerns raised from local residents. In the company of the Police Officers two persons were interviewed under caution by Planning Officers on suspicion of an offence being committed pursuant to S172 of the Act (unauthorised works to trees in a conservation area). It was also identified that the two copies of the TSN posted at different places on the site at 11:00 that day had been removed by persons unknown (although it should be noted that the act of serving the notice in the first place brought its provisions into effect and the removals did not obviate that).
- 2.5 On 28 September 2023 Sheriff Officers served the TSN on the home addresses of the two persons interviewed under caution the previous day. The TSN was also reposted at the site. In addition, given the engineering operations that were judged to have taken place, Planning Contravention Notices (a formal request for information) were also served on the two persons interviewed under caution.
- 2.6 The works to the trees were subsequently assessed by the Council's Landscape officers who confirmed two healthy trees had been felled.
- 2.7 A TSN has effect for 28 days from the date it is served – in this case the TSN was complied with and no further engineering works were undertaken once the TSN was issued.

- 2.8 The unauthorised engineering works were subsequently modified as not to cause harm and as such it is not expedient to instigate any further action.

### **3 THE LEGISLATIVE POSITION**

#### Trees in Conservation Areas

- 3.1 Trees in conservation areas which are under the protection of a Tree Preservation Order (TPO) are also subject to controls under the TPO regulations – the trees subject to the works set out in this report are not covered by a TPO but are in a conservation area.
- 3.2 The Act makes special provision for trees in conservation areas which are not the subject of a TPO (as in this case). Under Section 172 of the Act anyone proposing to cut down or carry out work to a tree in a conservation area is required to give the planning authority six weeks prior notice. The purpose of this requirement is to give the planning authority an opportunity to consider whether a TPO should be made in respect of the tree/s. Any notified works must be carried out within two years from the date of the notice. It is an offence not to comply with these requirements.
- 3.3 Some of the works were in relation to shrubs and bushes which do not fall within the scope of the Act. However, 1 Witch Elm tree and 1 Ash tree, both with diameter in excess of 75 mm were felled. No notification to undertake such work as required by the Act was given to the Council and none of the exemptions (health and safety justifications) that exist in relation to conservation area trees are applicable in this case. Therefore an offence was committed.
- 3.4 A person/s found guilty of an offence in this regard are liable to a fine up to £20,000.

#### Planning Contravention Notice

- 3.5 Planning authorities may serve a Planning Contravention Notice (PCN) on anyone who is the owner or occupier of land subject to a planning investigation into an alleged breach of planning control, or is a person with any other interest in the land, or a person who is using or carrying out operations on the land. Planning authorities may therefore serve several notices on different persons in respect of the same suspected breach of planning control.
- 3.6 There is no requirement for the planning authority to obtain clear evidence of a breach of control before issuing a PCN. It is sufficient for the planning authority to suspect that a breach may have occurred, for example, because they have received a complaint from a neighbour of the site regarding an alleged unlawful activity.

- 3.7 Serving a PCN does not constitute 'taking enforcement action' for the purposes of section 123 of the Act. It is an offence not to comply with any requirement in the notice – which is a request for information (not to cease or carry out works). It is an entirely discretionary procedure; there is no requirement to serve a notice before taking formal enforcement action, nor does the serving, or not (as the case may be), of a notice affect any other power exercisable in respect of any breach of planning control.
- 3.8 Failure to comply with a notice within 21 days of it being served is an offence which may be charged by reference to any day or longer period of time. Those found guilty of such an offence will be liable on summary conviction to a fine not exceeding level 3 (£5,000) on the standard scale. An offender may also be convicted of subsequent offences by reference to any period of time (e.g. each additional day) following a preceding conviction for such an offence (section 126 of the Act).
- 3.9 Section 125 of the Act provides that the notice may require the person on whom it is served, so far as s/he is able—
- (a) to state whether or not the land is being used for any purpose specified in the notice or any operations or activities specified in the notice are being or have been carried out on the land;
  - (b) to state when any use, operations or activities began;
  - (c) to give the name and postal address of any person known to him to use or have used the land for any purpose or to be carrying out, or have carried out, any operations or activities on the land;
  - (d) to give any information he holds as to any planning permission for any use or operations or any reason for planning permission not being required for any use or operation; and
  - (e) to state the nature of his interest (if any) in the land and the name and postal address of any other person known to him to have an interest in the land.
- 3.10 As noted above, notwithstanding the specific offence in relation to the wilful felling and damage to trees, Planning Officers identified that a breach of planning control appeared to have occurred with regard unauthorised engineering operations taking place on 25 September 2023 and furthermore the same persons involved in the authorised tree works were the persons involved in those engineering operations. Therefore, as noted above, planning contravention notices were served on 28 September 2023 on the persons apprehended at the site on 27 September 2023.
- 3.11 No response has been received to the notices within the prescribed 21 day period and therefore offences have been committed.
- 3.12 In Scotland the Crown Office and Procurator Fiscal Service (COPFS) are responsible for making decisions about prosecutorial actions. In the

majority of instances cases are referred to COPFS by Police Scotland. In addition other bodies known as Specialist Reporting Agencies (SRA's) who are the responsible regulatory organisation for particular legislative areas will also refer cases. This includes the Health and Safety Executive, the Scottish Environmental Protection Agency and local authorities in relation to planning and other matters.

#### **4 OTHER CONSIDERATIONS**

- 4.1 The Scottish Government Policy on planning enforcement is contained in Circular 10/2009: Planning Enforcement. It includes the following guidance that is particularly relevant to the consideration of this case:

*“Effective enforcement plays a significant part in protecting the rural and urban environment. In responding to complaints against unauthorised development, enforcement action maintains the integrity of the development control system. The range of enforcement powers allows the enforcement response to be more appropriate, speedier and more successful.”*

#### **5. CONCLUSION**

- 5.1 It is for COPFS to make the final decision with regard prosecutorial action against the wilful felling and damage to trees protected by reason of being located within a conservation area and in relation to non-compliance with a planning contravention notice. Two persons were caught in the act of wilfully felling trees in a conservation area - this was an offence. Furthermore, those persons having been served with a planning contravention notice, on the basis of unauthorised engineering operations taking place have not responded to the said notices, which is also an offence.
- 5.2 Therefore, having regard to the guidance provided by Scottish Ministers in Circular 10/2009, the serious nature of the breach of planning control and the Council's responsibility to uphold confidence and integrity in the planning system and the rule of law, it is considered to be in the public interest for the Council to refer this case to COPFS.

#### **6 RECOMMENDATION**

- 6.1 It is recommended that the Committee determine to instruct the Planning, Sustainable Growth and Investment Manager (or an alternatively appropriately appointed officer) to refer the case to the Crown Office and Procurator Fiscal Service for consideration of prosecutorial action pursuant to Sections 126 and 172 of the Town and Country Planning (Scotland) Act 1997 as amended.

**Peter Arnsdorf**  
**Planning, Sustainable Growth and Investment Manager**

**Date:** 17 November 2023

**Contact Person:** Matthew Atkins, Lead Officer Planning Obligations  
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**Education, Economy & Communities**  
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Land Adjacent to Old Golf House, Newbattle Road, Eskbank, Dalkeith, Midlothian, EH22 3LX

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