



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

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

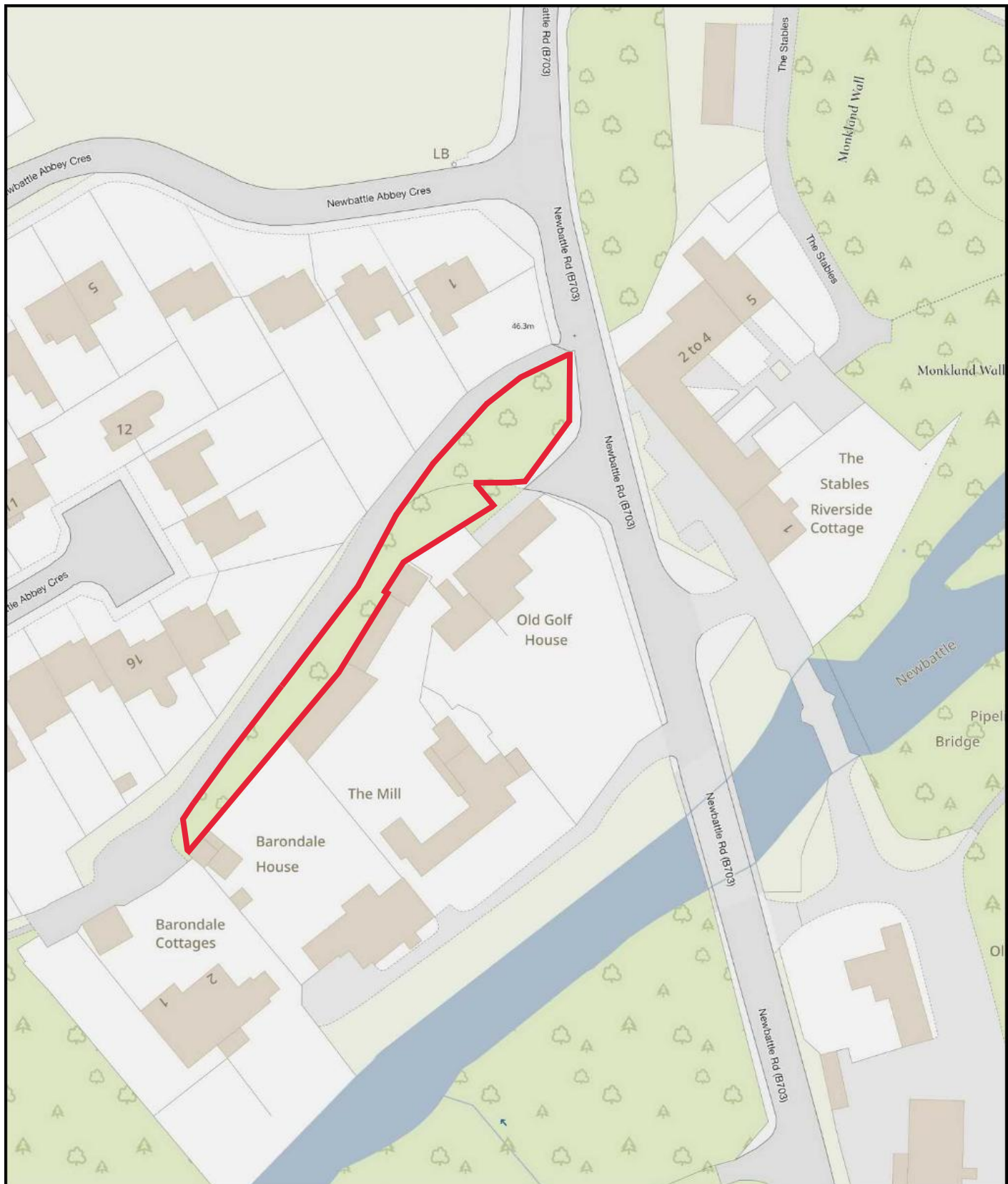
- 5.1 It is for COPFS to make the final decision with regard prosecutorial action against the wilful felling and damage to trees protected by reason of being located within a conservation area and in relation to non-compliance with a planning contravention notice. Two persons were caught in the act of 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
matthew.atkins@midlothian.gov.uk



**Education, Economy
& Communities**
Midlothian Council
Fairfield House
8 Lothian Road
Dalkeith
EH22 3AA

Land Adjacent to Old Golf House, Newbattle Road, Eskbank,
Dalkeith, Midlothian, EH22 3LX

Reproduced from the Ordnance Survey map with the permission of the
controller of Her Majesty's Stationary Office. Crown copyright reserved.
Unauthorised reproduction infringes Crown copyright and may lead to
prosecution or civil proceedings

Midlothian Council Licence No. 100023416 (2018)

File No.

Scale: 1:1,000

