

The Town and Country Planning (Scotland) Act 1997

The Midlothian Council Tree Preservation Order No 2 (2021)

The Midlothian Council make the following Tree Preservation Order in exercise of the powers conferred by section 160 of the Town and Country Planning (Scotland) Act 1997 and all other powers enabling them to do so.

Citation, commencement and interpretation

1. (1) This Order may be cited as the The Midlothian Council Tree Preservation Order No 2 of 2021 and takes effect on Wednesday 31st March 2021.

(2) In this Order –
“the 1992 Order” means the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (¹);
“the Act” means the Town and Country Planning (Scotland) Act 1997;
“protected tree” has the meaning given in article 2;
“the planning authority” means The Midlothian Council incorporated under The Local Government etc. (Scotland) Act 1994 and having its Principal Office at Midlothian House, Buccleuch Street, Dalkeith EH22 1DN.

Protected Trees

2. (1) A protected tree is a tree specified in Schedule 1 to this Order or comprised in a group of trees or in a woodland specified that Schedule.

(2) The position of such trees, groups of trees or woodlands is identified in the manner indicated in Schedule 1 and on the map annexed to this Order.

(3) Where any ambiguity as to the identification of a protected tree arises between the map and the specification in Schedule 1 to this Order, the map is to prevail.

Prohibited acts

3. Subject to the provisions of the Act and the exemptions specified in article 4, no person is except with, and in accordance with, the consent of the planning authority —
 - a) to cut down, top, lop, uproot, wilfully damage or wilfully destroy; or
 - b) to cause or permit the cutting down, topping, lopping, uprooting, or wilful damage or wilful destruction of, a protected tree.

¹ [S.I. 1992/223].

Exemptions

4. Nothing in article 3 is to prevent—

- a) the cutting down of a tree in accordance with a felling permission granted by Scottish Ministers under the Forestry and Land Management (Scotland) Act 2018⁽²⁾;
- b) the cutting down, uprooting, topping or lopping of a tree on land in the occupation of a planning authority when this is done by or with the consent of that authority;
- c) the cutting down, uprooting, topping or lopping of a tree having a diameter not exceeding 75 millimetres;
- d) the cutting down or uprooting in a woodland of a tree having a diameter not exceeding 100 millimetres where this is done to improve the growth of other trees;
- e) the cutting down, uprooting, topping or lopping of a tree by, or on behalf of, Scottish Minister on land placed at their disposal in pursuance of the Forestry and Land Management Act (Scotland) 2018 or otherwise under their management or supervision;
- f) the cutting down, topping, lopping or uprooting of a tree by or at the request of a statutory undertaker, where the land on which the tree is situated is operational land⁽³⁾ of the statutory undertaker and the work is necessary—
 - (i) in the interests of the safe operation of the undertaking;
 - (ii) in connection with the inspection, repair or renewal of any sewers, mains, pipes, cables or other apparatus of the statutory undertaker; or
 - (iii) to enable the statutory undertaker to carry out development for which planning permission is granted by the 1992 Order, provided that notice in writing of the proposed operations is given to the planning authority as soon as practicable after the operations become necessary
- g) the cutting down, topping, lopping or uprooting of a tree cultivated for the production of fruit in the course of a business or trade where such work is in the interests of that business or trade;
- h) the pruning, in accordance with good horticultural practice, of any tree cultivated for the production of fruit;
- i) the cutting down, topping, lopping or uprooting of a tree where that work is required to enable a person to carry out works to implement a planning permission (other than an outline planning permission or planning permission in principle) granted on an application under Part 3 or section 242A of the Act⁽⁴⁾, or deemed to have been granted (whether for the purposes of Part 3 of the Act or otherwise); or
- j) the cutting down, topping, lopping or uprooting of a tree by, or at the request of, SEPA to enable SEPA to carry out development for which planning permission is granted by the 1992 Order.

² 2018 c. 25

³ See sections 214 and 215 of the Act respectively for the meaning of statutory undertaker and operational land.

⁴ Section 242A was inserted by section 92(1) of the Planning and Compulsory Purchase Act 2004 (c.5) and amended by section 54(13) of the Planning etc. (Scotland) Act 2004 (asp 17)

Directions as to replanting

5. (1) Where consent is granted under this Order for the felling in the course of forestry operations of any part of a woodland area, the planning authority may give to the owner of the land on which that part of the woodland is situated a direction in writing specifying the manner in which and the time within which the owner must replant trees on that land.
- (2) Where a direction is given under paragraph (1) and trees on the relevant land are felled (pursuant to the consent), the owner of that land must replant trees on the land in accordance with the direction.
- (3) Any direction given under paragraph (1) may include requirements as to—
- (a) species;
 - (b) number of trees per hectare;
 - (c) the erection and maintenance of fencing necessary for the protection of the replanting;
 - (d) the preparations of ground, draining, removal of brushwood, lop and top; and
 - (e) protective measures against fire.

Adaption and Modification of the Act

6. (1) The provisions of the Town and Country Planning (Scotland) Act 1997 mentioned in column 1 of Part 1 of Schedule 2 to this Order are to have effect, in relation to consents under this Order and applications for such consent, subject to the adaptations and modifications specified in column 2 of Part 1 of that Schedule.
- (2) The provisions referred to in paragraph (1), as so adapted and modified, are set out in Part 2 of Schedule 2 to this Order.

Compensation

7. (1) Subject to paragraphs (2) to (5), any person who has suffered loss or damage caused or incurred in consequence of—
- (a) any refusal of consent required under this Order; or
 - (b) any grant of any such consent subject to conditions, is entitled to recover from the planning authority compensation in respect of such loss or damage.
- (2) A claim for compensation under this Order shall be made by serving on the planning authority a notice in writing stating the grounds of the claim and the amount claimed.
- (3) The time within which any such notice shall be given is a period of six months—
- (a) from the date of the decision of the planning authority; or
 - (b) where an appeal has been made to Scottish Ministers against the decision of the planning authority, from the date of the decision of Scottish Ministers on the appeal.
- (4) No claim may be made under this article if the amount in respect of which the claim would otherwise have been made is less than £1,000.

- (5) No compensation shall be payable to a person—
- (a) for loss of development value or other diminution in the value of the land;
 - (b) for loss or damage which was not reasonably foreseeable when consent was refused or was granted subject to conditions;
 - (c) for loss or damage reasonably foreseeable by that person and attributable to failure to take reasonable steps to avert the loss or damage or to mitigate its extent; or
 - (d) for costs incurred in appealing to the Scottish Ministers against the refusal of any consent required under this Order or the grant of any such consent subject to conditions.
- (6) In this article—
- “development value” means an increase in value attributable to the prospect of development and, in relation to any land, the development of it shall include the clearing of it.

Application of tree preservation order to future planting

8. This Order applies to any tree specified in Schedule 1 to this Order which is to be planted in pursuance of a condition imposed by virtue of section 159(a) of the Act as from the time when those trees are planted.

IN WITNESS WHEREOF these presents are, together with the two Schedules and Plan annexed, subscribed for and on behalf of The Midlothian Council at Dalkeith on Wednesday 31st March 2021 as follows;

Name	Name (Witness)
Signature	Signature
Title	Title

Midlothian House
Buccleuch Street
DALKEITH

SCHEDULE 1

Trees Specified Individually (coloured green on the map)

No. on Map	Description	Situation
NONE	NONE	NONE

Trees Specified by Reference to an Area (within a continuous black line on the map)

No. on Map	Description	Situation
NONE	NONE	NONE

Groups of Trees (within a broken black line on the map)

No. on Map	Description	Situation
G1	Scots Pine, Beech	Land at Little Moss, Penicuik registered in the Land Register of Scotland under Title Number MID72204
G2	Scots Pine, Beech	ALL and WHOLE that area of ground adjacent to the A6094 road at Nether Moss in the former Parish of Penicuik and now County of Midlothian more particularly described in, disposed by and shown delineated and shaded pink on the detailed plan annexed to Disposition by Alexander Calder Urquhart Morris in favour of Robert Ernest Frank Hobson and Mrs Linda Hazel Elizabeth Hobson dated 19 July 1995 and recorded in the Division of the General Register of Sasines for Midlothian on 16 October 1995.

G3

Beech

Land at Little Moss,
Penicuik registered in the
Land Register of Scotland
under Title Number
MID93520 and Land at
Nether Moss Penicuik
registered in the Land
Register of Scotland under
Title Number MID31023

Woodlands (within a continuous red line on the map)

No. on Map

Description

Situation

NONE

NONE

NONE

SCHEDULE 2

PART I PROVISIONS OF THE TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997 APPLIED WITH ADAPTATIONS OR MODIFICATIONS

Provision of the Town and Country Planning (Scotland) Act 1997	Adaptation or Modification
Section 36 (Registers of applications etc.)	<p>For subsections (1) to (3) substitute –</p> <p>“(1) The planning authority shall in relation to this Order keep a register of all applications for consent under this Order, containing–</p> <ul style="list-style-type: none"> (a) information as to the nature of such applications, the decisions of the planning authority thereon, (b) information as to any appeal to Scottish Ministers and the decisions of Scottish Ministers thereon, any compensation awarded in consequence of the decisions of the planning authority or Scottish Ministers; and (c) any directions as to the replanting of woodlands.”
Section 37 (determination of applications: general considerations)	<p>(a) In subsection (1) –</p> <ul style="list-style-type: none"> (d) for “planning permission” where those words first appear;” substitute “consent under a tree preservation order”; (e) for “sections 27B(2) and 59(1)(b) substitute “subsections (1A) and (1B)”; (f) for “planning permission” in both of the other places where those words appear substitute “consent under the order” (g) after “think fit”, insert, “(including conditions limiting the duration of the consent or requiring the replacement of trees)”; <p>(b) After subsection (1) insert -</p> <p>“(1A) Where an application relates to an area of woodland, the authority shall grant consent so far as accords with the practice of good forestry, unless they are satisfied that the granting of consent would fail to secure the maintenance of the special</p>

	<p>character of the woodland or the woodland character of the area.</p> <p>(1B) Where the authority grant consent for the felling of trees in a woodland area they shall not impose conditions requiring replacement where such felling is carried out in the course of forestry operations (but may give directions for securing replanting)."</p> <p>(c) Omit subsections (2) and (3); and</p> <p>(d) In subsection (4) for paragraphs (a) to (c) substitute -</p> <p>“(a) consent under a tree preservation order; or</p> <p>(c) any consent, agreement or approval required by a condition imposed on the grant of such consent.”</p>
Section 44 (effect of planning permission)	<p>(a) references to ‘planning permission’ are to be treated as references to ‘consent required by a tree preservation order’;</p> <p>(b) for ‘the permission’ substitute ‘the consent’;</p> <p>(c) for ‘to develop land’ substitute ‘to carry out works’; and</p> <p>(d) after ‘land’ insert ‘on which the tree or trees to which the consent relates are situated’.</p> <p>(e) Omit subsections (2) and (3).</p>
Section 47 (right to appeal against planning decisions and failure to take such decisions)	<p>(a) For subsection (1) substitute -</p> <p>“(1) Where a planning authority –</p> <p>(a) refuse an application for consent under a tree preservation order or grant it subject to conditions;</p> <p>(b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of consent under such an order;</p> <p>(c) give a direction under a tree preservation order, or refuse an application for any consent, agreement or approval of that authority required by such a direction; or</p> <p>(d) have not given notice of their decision on such an application within the period of 2 months beginning with the date on which the application was received by the authority [or within such extended period as may at any time be agreed upon in writing between the applicant and the authority],</p>

	<p>the applicant may by notice appeal to the Scottish Ministers”.</p> <p>(c) Omit subsections (1A), (2) and (4).</p> <p>(d) For subsection (3) substitute –</p> <p>“(3) Any appeal under this section shall be made in writing, specifying the grounds on which the appeal is made; and such notice shall be served on the Scottish Ministers within a period of three months beginning with, in the case of an appeal made under –</p> <p>(a) an appeal under paragraphs (a) to (c) of subsection (1), the date of the decision notice or the direction, as the case may be; and;</p> <p>(b) paragraph (d) of that subsection, the date of expiry of the period mentioned in that paragraph,”.</p> <p>(e) For subsection (5) substitute–</p> <p>“(5) For the purposes of the application of section 48(1), in relation to an appeal made under subsection (1)(d), it shall be assumed that the authority decided to refuse the application in question.”.</p>
Section 47A	
Section 48 (determination of appeals)	<p>(a) In subsection (5)(a) -</p> <p>(i) for “sections 33, 37(1) to (3), 38(1) to (3), 41(1) and (2) and 42 and Part 1 of Schedule 3” “section 37(1), (1A) and (1B)”; and</p> <p>(ii) for “planning permission” substitute “consent under a tree preservation order”.</p> <p>(b) Omit subsections (5)(b) and (6) to (8)</p>

PART II
PROVISIONS OF THE TOWN AND COUNTRY PLANNING (SCOTLAND) ACT
1997, AS ADAPTED AND MODIFIED BY PART I

The following provisions of the Town and Country Planning Act 1997, as adapted and modified by Part I of this Schedule, apply in relation to consents, and applications for consent, under this Order.

Section 36

- 36.** (1) The planning authority shall in relation to this Order keep a register of all applications for consent under this Order, containing –
- (a) information as to the nature of such applications, the decisions of the planning authority thereon,
 - (b) information as to any appeal to Scottish Ministers and the decisions of Scottish Ministers thereon, any compensation awarded in consequence of the decisions of the planning authority or Scottish Ministers; and any directions as to the replanting of woodlands.”
- (4) Every register kept under this section shall be available for inspection by the public at all reasonable hours.

Section 37

- 37.** (1) Where an application is made to a planning authority for consent under a tree preservation order—
- (a) subject to subsections (1A) and (1B) they may grant consent under the order, either unconditionally or subject to such conditions as they think fit (including conditions limiting the duration of the consent or requiring the replacement of trees); or
 - (b) they may refuse consent under the order.

(1A) Where an application relates to an area of woodland, the authority shall grant consent so far as accords with the practice of good forestry, unless they are satisfied that the granting of consent would fail to secure the maintenance of the special character of the woodland or the woodland character of the area.

(1B) Where the authority grant consent for the felling of trees in a woodland area they shall not impose conditions requiring replacement where such felling is carried out in the course of forestry operations (but may give directions for securing replanting).

- (4) The date of the grant or refusal of—
- (a) consent under a tree preservation order; or
 - (b) any consent, agreement or approval required by a condition imposed on the grant of such consent, shall be the date on which the notice of the planning authority's decision bears to have been signed on behalf of the authority.

Section 44(1)

- 44.** (1) [Without prejudice to the provision of this Part as to the duration, revocation or modification of consent required by a tree preservation order], any grant of consent required by a tree preservation order shall (except in so far as the consent otherwise provides) enure for the benefit of the land on which the tree or trees to which the consent relates are situated and all persons for the time being interested in it.

Section 47

- 47.** (1) Where a planning authority
- (a) refuse an application for consent under a tree preservation order or grant it subject to conditions;
 - (b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of consent under such an order;
 - (c) give a direction under a tree preservation order, or refuse an application for any consent, agreement or approval of that authority required by such a direction; or
 - (d) have not given notice of their decision on such an application within the period of 2 months beginning with the date on which the application was received by the authority [or within such extended period as may at any time be agreed upon in writing between the applicant and the authority], the applicant may by notice appeal to the Scottish Ministers ”.

“(3) Any appeal under this section shall be made in writing, specifying the grounds on which the appeal is made; and such notice shall be served on the Scottish Ministers within a period of three months beginning with, in the case of an appeal made under

- (a) an appeal under paragraphs (a) to (c) of subsection (1), the date of the decision notice or the direction, as the case may be; and;
- (b) paragraph (d) of that subsection, the date of expiry of the period mentioned in that paragraph,”.

(5) For the purposes of the application of section 48(1), in relation to an appeal made under subsection (1)(d), it shall be assumed that the authority decided to refuse the application in question.

Section 47A

- 47A.** (1) In an appeal under section 47(1), a party to the proceedings is not to raise any matter which was not before the planning authority at the time the decision appealed against was made unless that party can demonstrate-
- (a) that the matter could not have been raised before that time, or
 - (b) that its not being raised before that time was a consequence of exceptional circumstances.
- (2) Nothing in subsection (1) affects any requirement or entitlement to have regard to-

- (a) the provisions of the development plan, or
- (b) any other material consideration.

Section 48

- 48.** (1) On an appeal under section 47 the Scottish Ministers may↓
- (a) allow or dismiss the appeal, or
 - (b) reverse or vary any part of the decision of the authority (whether the appeal relates to that part of it or not),
- and may deal with the application as if it had been made to them in the first instance.
- (3) If the Scottish Ministers propose to reverse or vary any part of the decision of the planning authority to which the appeal does not relate, they shall give notice of their intention to the planning authority and to the appellant and shall give each of them an opportunity of making representations about their proposal.
- (5) In relation to an appeal to the Scottish Ministers under section 47—
- (a) sections 37(1), (1A) and (1B) shall apply, with any necessary modifications, in relation to an appeal to the Scottish Ministers under section 47 as they apply in relation to an application for consent under a tree preservation order which falls to be determined by the authority.
- (9) Schedule 4 applies to appeals under section 47, including appeals under that section as applied by or under any other provision of this Act.

Tree Preservation Order No.2 (2021)

By

The Midlothian Council

Subjects

LAND AT LITTLE MOSS AND NETHER MOSS, HOWGATE, PENICUIK.

Legal Services Manager

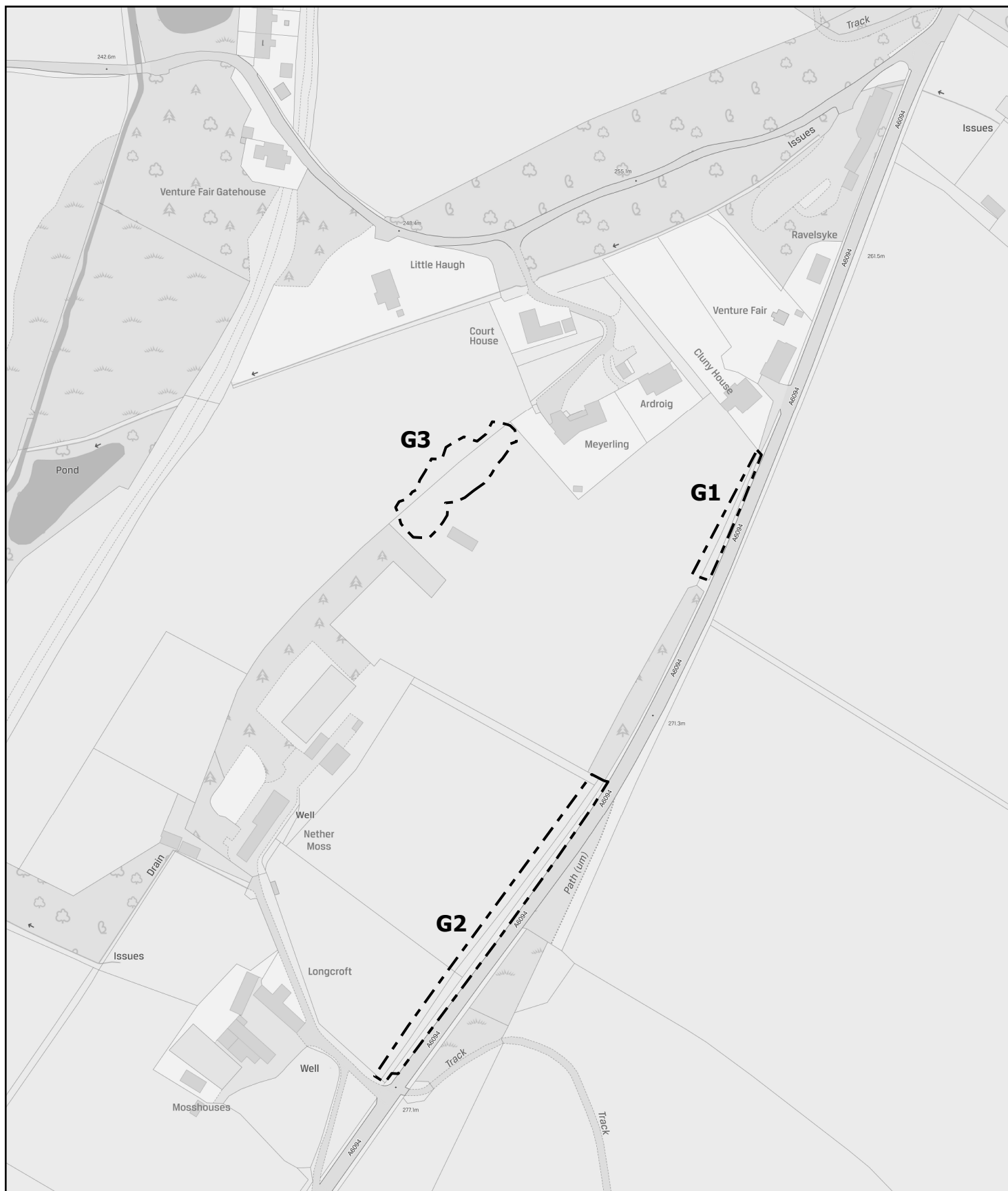
The Midlothian Council

Midlothian House

40-46 Buccleuch Street

Dalkeith

EH22 1DN



**Planning Service
Place Directorate**
Midlothian Council
Fairfield House
8 Lothian Road
Dalkeith
EH22 3AA

Little Moss and Nether Moss, nr Howgate, Midlothian. This is the plan relative to the Midlothian Council Tree Preservation Order No. 2 of 2021

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Scale: 1:2,500

