

Our reference: 090117 0555 ALLEN LET V2

FAO Ms Lesley Farrell
Head of Law and Governance
Cherwell District Council
Bodicote House
Bodicote
Banbury
Oxfordshire
OX15 5AA

9th January 2017

Dear Ms Farrell,

**TOWN AND COUNTRY PLANNING ACT 1990
TOWN AND COUNTRY PLANNING (TREE PRESERVATION) (ENGLAND)
REGULATIONS 2012
CHERWELL DISTRICT COUNCIL TREE PRESERVATION ORDER (No. 11) 2016
VARIOUS SPECIES OF TREE AT GRANGE PARK, STEEPLE ASTON**

Introduction

I write on behalf of the residents groups of Grange Park, Steeple Aston¹, in relation to the Cherwell District Council Tree Preservation Order (No. 11) 2016, protecting various trees at Grange Park, Steeple Aston. This detailed objection is in accordance with Regulation 6 of the Town & Country Planning (Trees Preservation) (England) Regulations 2012.

I refer to our meeting on 2nd December 2016 and subsequent walk around Grange Park to review and assess the Tree Preservation Order (TPO) made by Cherwell District Council (the Council) on 14th November 2016.

I also refer to letter dated 1st December 2016 from yourself, extending the time period for an objection to be made to 12th January 2017.

Further to this, I have also met with Patrick Prendergast, Arboricultural Officer from Cherwell District Council on 22nd December 2016. The meeting was to allow Mr Prendergast to assess the trees protected, as no Council officer has visited the site prior to this time to look at the TPO.

My understanding of the current situation, is that a new TPO has been made, following pressure from local residents for the Council to review their Area TPOs, which are charged on various parcels of land across the district.

There was an Area TPO charged on the land known as TPO 8/1970, made in November 1970. This TPO protected only those trees located within the boundaries of the area demarcated as A1, on the TPO plan and within the First Schedule. Any tree that was not in situ in November 1970, therefore approximately 46 years ago, would not have been protected.

¹ Under the direct instruction from Mr Allen, 4 Grange Park, Steeple Aston, Bicester, Oxfordshire, OX25 4SR

Following a recent assessment of trees by an external consultant, engaged with by the Council and a review of the 1970 TPO, the Council has made a new TPO to replace the Area order. Best practice would be that this had been undertaken in the 1970s prior to confirming the original TPO, as recommended within TPO guidance. However, as in many instances Area TPOs are simple to make and generally all encompassing, when it is considered that trees, which significantly contribute to the amenity of the area may be under threat. In this instance, it would appear to be housing development orientated.

The reasons for this objection are set out below.

The 2016 Tree Preservation Order

The new TPO, which now overrides the 1970s Order, has been made to specifically protect 38no. individual trees and 2no. groups of trees. The new TPO has been made following an amenity assessment of the trees, by an arboricultural consultant on behalf of the Council. When making a TPO there are two main tenets, which underpin the legislation, these are;

- that it is expedient in the in the interests of amenity; and
- to ensure continuity of tree cover in an area.

It would appear that this particular TPO has been rushed in relation to its imposition and application. It protects trees in instances that provide no public amenity, which do not significantly impact on the local environment or enjoyment by the public, and do not contribute to the local area. Following a meeting with the Councils' Arboricultural Officer this view has been shared.

Tree Preservation Order Administration

The Secretary of State provides a Model Order, which should be followed when making a new TPO. The Model Order should be followed or at least substantially follow its format.

The current TPO provides a First Schedule, which is known as Article 3, however does not follow the correct format. The Council has altered the First Schedule to provide an amenity assessment criteria, as opposed to specifically describing the situation/location of the trees. This provides ambiguity in relation to the location of some trees where there are two of a particular species and only one is protected. This applies particularly to T11.

This significant administrative issue and adaption of the Model Order, does provide an element of doubt in relation to the enforceability of the Order. This procedural matter has been discussed with the Arboricultural Officer for the Council to review.

In addition to this, it is noted that your Regulation 6 information for objections refers to Regulation 64 within the title of the document. Regulation 64 relates specifically to planning applications, to determine if planning permission is required. This further illustrates the rushed nature of this TPO and maladministration of this and potentially other TPOs.

Tree Protection in the Interests of Amenity

There is no formal definition of amenity within the current TPO legislation. It is interpreted as visual amenity from a public perspective, to create a pleasant setting or contributing to the attractiveness of a place.

A local planning authority, may only make a Tree Preservation Order (TPO), where it appears to the authority that it is expedient to do so in the interests of amenity (Mynors, 2011)². With reference to current Government guidance:

“In the Secretary of State’s view, tree preservation orders should be used to protect selected trees and woodlands if their removal would have a significant impact on the local environment and its enjoyment by the public. Local planning authorities should be able to show that a reasonable degree of public benefit would accrue before orders are made or confirmed. The trees, or at least part of them should therefore normally be visible from a public place, such as a road or footpath, although, exceptionally, the inclusion of other trees may be justified.”

It is further stated that:

“LPAs should be able to explain to landowners why their trees or woodlands have been protected by a TPO. They are advised to develop ways of assessing the ‘amenity value’ of trees in a structured and consistent way, taking into account the following key criteria:

(1) visibility: the extent to which the trees or woodlands can be seen by the general public will inform the LPA’s assessment of whether its impact on the local environment is significant. If they cannot be seen or are just barely visible from a public place, a TPO might only be justified in exceptional circumstances;

(2) individual impact: the mere fact that a tree is publicly visible will not itself be sufficient to warrant a TPO. The LPA should also assess the tree’s particular importance by reference to its size and form, its future potential as an amenity, taking into account any special factors such as its rarity, value as a screen or contribution to the character or appearance of a conservation area. As noted in paragraph above, in relation to a group of trees or woodland, an assessment should be made of its collective impact;

(3) wider impact: the significance of the trees in their local surroundings should also be assessed, taking into account how suitable they are to their particular setting, as well as the presence of other trees in the vicinity”.

The above advice is also echoed within similar advice from 1949³. It emphasizes, in particular, that orders should in general only be made to protect trees that are publicly visible, and only rarely those in rear gardens.

Recent case law of *Wilkson Properties v RB Kensington & Chelsea (2010)* it was noted by the Deputy Judge:

Visibility from a public place is the normal way of establishing that there is a reasonable degree of public benefit, but it is not the only way.

The case clarifies that a TPO may be made where a tree is not visible from a public place; however, in such cases the authority should indicate the basis on which it considers that there is, an exceptional degree of public benefit. This appears not to have occurred in relation to a number of trees within the current TPO, particularly trees T28, T29 and G2 where they are either situated on a private road and/or only visible from a rear garden with no public amenity.

Furthermore as a result of the above, the Council is required to define the circumstances as to why trees T6-T10, T12-T20 and T22 are protected, given with the exception of fleeting views, only the upper canopies can be viewed from a public place. This would suggest that the aforementioned trees are protected due to their

² C Mynors (2011) *The Law of Trees, Forests and Hedgerows*, 2nd Edition, Chapter 22. Sweet and Maxwell London.
³ Memorandum on the Preservation of Trees and Woodlands, 1949, paras 4, 5; 2nd edition, 1996, para 5; Dept of the Environment Circ 36/78 (WO 64/78, paras 40, 41

scarcity/rareness or other reasoning, which is not provided. Further to this as discussed with the Arboricultural Officer a number of trees have not been protected which although not significant in size are not common trees to expect in residential gardens.

Amenity, in this instance of visual amenity, can be subjective, as it is very simple to state that every tree provides an element of visual amenity. It would however be unreasonable to protect every tree. Therefore, applying knowledge of tree species, overall impact on a landscape and having an assessment criterion is critical in making a TPO. The element of visual amenity, which is not subjective, is that when a tree cannot be viewed or clearly identified from a public place i.e. public road or footpath. This is the case in relation to T28, T29 and G2.

Expediency of Making a TPO

Beyond the amenity value of a tree, another test that local planning authorities should apply is whether it is 'expedient' to do so. It could be argued in some form all trees have an element of amenity value based on their contribution of urban/suburban canopy cover. However it is not appropriate or reasonable to have a general policy in favour of the protection of all trees.

Although there is no judicial authority directly considering the issue of expediency, current Government advice in relation to this is as follows:

“Although a tree may merit protection on amenity grounds, it many not be expedient to make it subject to a TPO. For example, it is unlikely to be expedient to make a TPO in respect to trees, which are under good arboricultural management or silvicultural management.

It may be expedient to make a TPO if the authority believes that there is a risk of the tree being cut down or pruned in ways, which would have a significant impact on the amenity of the area. It is not necessary for the risk generally from development pressures. The authority may have some other reason to believe that trees are at risk; changes in property ownership and intentions to fell trees that are not always known in advance, and so the protection of selected trees by a precautionary TPO might sometimes be considered expedient”

The above advice suggests that it would not often be expedient to make an Order in relation to land that is in the ownership of a body, which is well informed and capable of implementing regular tree management. Therefore, it could be that Grange Park Residents Group implement a good management program, to illustrate that all trees in the area are under good management. This could be submitted to the Council or Parish Council and agreed, removing a layer of bureaucracy, however this would need appropriate management.

Good tree management does not revolve around the retention of all trees, but a balance between canopy management, garden and house management and continuity of tree cover, which is defined by having a diverse mix of species and maturity. Currently the latter elements are not being managed as there is limited species diversity, and the majority of trees are mature, due to the historic land use as a park.. A good management plan would include an implemented tree-planting plan for suitable trees in good locations based on land use, which has significantly altered since the 1970s Area TPO was originally made.

During the meeting with Council's Arboricultural Officer, it was discussed what tree work would be reasonable and potentially acceptable. It was agreed that with suitable proposals specific trees could be both pruned and/or removed. This was specifically in relation to trees T1, T2, T4, T5, T9, T12, T15, T17-T20, T26, T27 and T29.

Therefore almost half of the trees contained within the order.

It was also expressed by the Officer that in certain circumstances, the TPO may have been imposed to secure replanting in the event of tree removal. This is not strictly the correct use of TPOs, as it can restrict reasonable tree management. Furthermore the Council may need to vary the Order each time a tree is removed, as it is reasonable to assume that different tree species and locations would be more appropriate. This is based on the fact that since many of the trees were planted the area has altered from parkland to residential use.

It has been accepted by the Arboricultural Officer that a number of the gardens are small and have numerous large trees situated within them that could impact upon the reasonable enjoyment of the space. This is specifically pertinent to properties no. 2, 3, 4 and 11. The Officer expressed that the Council would not be opposed to applications for reasonable removal based on good evidence and replanting proposals. Given these facts, it does bring into doubt how much impact these trees ultimately have on the amenity of the area and public enjoyment.

Councils Assessment of Trees

As detailed above it appears that the Council has employed an external arboricultural consultant to undertake the assessment of trees at Grange Park. The assessment has been made with limited if any prior consultation of residents and as such the issue of expediency relating to the actual implementation of good tree management has not been explored. Given the likely public interest in relation to the TPO it would have been advisable that the Council engaged positively and proactively with residents to ensure there was mutual understanding.

Councils' TEMPO Assessment - Expediency

In making the new TPO, the Council has undertaken a TEMPO⁴ assessment of the trees. This is a system of assessing trees for TPOs, which is utilised by many Councils, however it is a subjective assessment method. It is a method that considers many different factors and should not be used in isolation and should not be used to then remove the surveyors' own judgment.

Beyond the general tree assessment in relation to condition and longevity there is specifically a section Part 2 designed for the expediency assessment. The expediency element of TEMPO relates to the threat to the tree as detailed below:

- Immediate threat to the tree
- Foreseeable threat to the tree
- Perceived threat to the tree
- Precautionary only

All of the assessments of trees contained within the current TPO have been considered precautionary with no basis to suggest the trees are under any threat. As a result it would seem reasonable to consider the final paragraph within the TEMPO Guidance Notes, which states:

“As a final note on this point, it should be stressed that the method is not prescriptive except in relation to zero scores: TEMPO merely recommends a course of action. Thus a tree scoring, say, 16, and so ‘definitely meriting’ a TPO, might not be included for protection for reasons unconnected with its attributes.”

Further to the expediency element of the TEMPO assessment undertaken by the Council, there appears to have been a disregard for the other guidance, in instances relating to condition and longevity of trees.

⁴ Tree Evaluation Method for Preservation Order, 2009, Forbes-Laird Arboricultural Consultancy

Councils' TEMPO Assessment – Condition

Given that the surveyor has not been in a position to assess the trees from the base, and thus not able to assess the structural condition of the trees in detail, it would seem sensible to only class them as fair condition. The surveyor cannot assess if a tree has any defects as the stems cannot be viewed and therefore it would be wise to err on the side of caution.

Only physiological condition has been assessed as opposed to structural condition and defects.

Councils' TEMPO Assessment – Retention Span

In a number of instances trees have been considered very suitable for protection based on their retention span. Firstly there are different methods of tree assessment. If the categorisation of trees was considered using the criteria within British Standard *BS5837:2012 Trees in relation to design, demolition and construction – Recommendations* it is likely that the surveyor would not have given the trees a greater category than C category. In this category trees are defined as low quality with a minimum of remaining life expectancy of at least 10 years. They are considered to be trees of very limited merit. This would specifically relate to trees T4, T5, G1, T10 and potentially many of the other horse chestnuts given the issues of disease relating to their species.

Additionally to the above, the guidance within TEMPO provides the life span of trees and assuming most of the trees were in place when the first TPO was made or immediately after the housing development works was completed, it would suggest that all of the birch, cherries, horse chestnuts (specifically given their current size would have been growing well before 1970) now have a limited life remaining. The trees are a minimum 40 years in age, therefore placing cherries and birch into the category of 50-70 years expected life, it would be reasonable for them to be placed as a maximum, in the suitable category or just suitable category based on remaining life span. They should certainly not be within the 40-100 year life span category as they are currently.

Moreover, there is also guidance that trees which are an existing or potential nuisance in the near-future, including those clearly outgrowing their context, or which are significantly negating the potential of other trees of better quality, should be scored as unsuitable. Again this would apply to a number of trees where development has now occurred and the tree location is simply unsuitable due to size and proximity. The Council prior to any planning approval should have considered this element and the previous decisions must be accepted, whether they were right or wrong. Elements the Council should have considered are the future pressure to undertake works and issues of excessive shading. Given the size of trees in relation to the size of gardens and proximity to buildings this has not been considered.

This issue has been discussed at length with the Councils' Arboricultural Officer and in some situations it has been agreed that a number of the trees remaining life span appears exaggerated.

Councils' TEMPO Assessment – Relative Public Amenity & Suitability

This section of the TEMPO assessment relates to the visual amenity provided by the tree and potential future amenity. It would appear that the surveyor has misjudged/misinterpreted what clearly visible and limited views only would be. Given that many of the views of the back garden trees within the TPO are only partial due to the obstructions by buildings, it would be correct to assess these are medium or large

trees with limited views only as only the upper third of the canopies is clearly visible to the public.

In addition to this, a number of trees have been protected where there are no public views and specified as being large or mature trees with limited views, particularly G2 of the TPO.

Amenity value is critical to TPO imposition. It can be stated that every tree has an element of amenity value. Therefore it is important to decide how amenity is assessed. The issue with TPOs is if it is expedient in the interests of amenity to protect a tree, would its loss be detrimental to the area? As discussed on site with the Arboricultural Officer, a very useful way to look at this, is, if the tree were located in Conservation Area and a Section 211 notice was given to the Council to fell the tree, would it be accepted, or would the Council make a new TPO to protect the tree to ensure its future retention? If the answer to this question when assessing any tree for a TPO is no, then it should not be protected. This answer could be applied to a number of these trees, particularly within the rear gardens.

Councils' Administrative Errors

Further to all of the above, there are also a number of administrative errors with the TPO and instances where it is not clear which trees are protected. This mainly revolves around the groups of trees where there are 2no. trees protected but 3no. when viewed. This suggests that the assessment of trees is poorly researched.

Conclusions and Recommendations

It appears that the assessment of trees has been poorly administered in relation to the overall condition, and their impact on the amenity of the area. Due to the previous refusals of work under the old TPO, the residents are concerned that no reasonable and responsible management can successfully occur.

A Council officer, until 22nd December 2016, had not been to the site to assess the recommendations made by the instructed Arboricultural Consultant. As a result a number of flaws have been observed with some of the trees protected and some, which have not been protected.

There are elements of maladministration of the TPO specifically in relation to the Frist Schedule and the Regulation 6 information. This gives rise to ambiguity in relation to which trees are protected.

The TPO protects a number of trees, which have no, or very limited impact on the visual amenity of the area from a public perspective. Furthermore they do not enhance or contribute to the enjoyment of the area and in some instances, are having an impact upon the reasonable enjoyment of the garden and property space.

It has been discussed at length with the Council that the TPO has been made, in part, to secure replanting. This is not a main purpose of TPOs and their imposition. It has also be discussed that with good supporting information, the Council would consider favorably the options of removal and replacement of trees where considered close to properties and there is sufficient space to undertake replanting of suitable tree species for a residential area.

It is my understanding from the Arboricultural Officer that his recommendation at this stage will be to not confirm the TPO, however this objection is submitted for completeness.

We strongly object to the confirmation of this Order. At the same time, we are pleased to offer the owner's cooperation in seeking a positive way forward and would recommend a joint site meeting with the Council's Arboricultural Officer before any further action is taken.

Kind regards,

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Peter Wharton', with a large, stylized initial 'P' at the start.

Peter Wharton *BSc(Hons) Arb, FArborA, MICFor (Chartered Arboriculturist)*