

Report to the Development Committee

Date of meeting: 26 April 2005

Portfolio: Planning and Economic Development

Subject: Tree Preservation Order applications in respect of subsidence

Officer contact for further information: Chris Neilan
Committee Secretary: Simon Hill



Recommendations/Decisions Required:

- (1) That the protocol, “Handling applications in respect of Preserved Trees and Subsidence” and the proforma, “Information to be provided for subsidence – related TPO applications” be approved;**
- (2) That the protocol and proforma should both continue to be developed in line with legislative developments, subsequent advice or appeal results;**
- (3) That applications which are not supported by adequate information as defined in the protocol should be rejected as invalid.**

Introduction

- 1.1 The report presents for approval a proforma of information requirements and a protocol for dealing with applications in respect of subsidence related damage by preserved trees, which have been under development over the past year. The protocol and proforma are attached as Appendix (1) and (2). The aim of the documents is to allow officers to take a consistent approach to handling applications for felling trees in respect of allegations of subsidence, to allow Members to be sure that all such applications have been carefully scrutinised and that the evidence is of a consistent standard.
- 1.2 By giving clear guidance as to the information required it should be possible to encourage applications with a satisfactory standard of information, such that decisions can be made by the Council confident that work is required and will be beneficial; the processing of applications should therefore be speedier and in particular, unnecessary refusals (on the basis of lack of information) would be avoided.
- 1.3 At present, however, insurance companies are proving unwilling to present the supporting data that is being requested. They also dispute the legality of the Council’s position whereby applications lacking sufficient supporting data are being rejected as invalid.
- 1.4 It is important therefore that Members take a view on the issue of evidence, which is addressed in the protocol and proforma. Members should, however, be aware of the significant financial risks that exist in respect of compensation in respect of TPO applications, particularly in respect of applications related to potential subsidence.

Background

- 1.5 Tree root related subsidence occurs from several causes but probably the most common being extraction of soil moisture by tree roots. Damage occurs to superstructure of houses etc as the result of a differential foundation movement. Subsidence related damage is insured under most buildings insurance policies.
- 1.6 Tree root related subsidence occurs on shrinkable clays; London clay forms the most

common soil in the majority of the district and is highly shrinkable. Boulder clays found in the north of the district are shrinkable, but to a lesser and varying extent. Other causes of similar damage to properties include leaking drains and, more rarely, soil heave as the result of removal of trees.

- 1.7 Tree root related subsidence can be distinguished from other kinds of damage to buildings, providing sufficient evidence has been submitted. It is also important to have sufficient evidence to understand how significant the damage is.
- 1.8 The effects of subsidence damage on properties can be severe. However, even minor damage can affect the value of properties and both the costs of remedial works such as underpinning or loss of value may be a basis for compensation under the Tree Preservation Order.

Recent Cases

- 1.9 In March 1999 an application in respect of two trees at Highfield Green, Epping was appealed for non-determination, in 2000 the property was sold at a loss of £50,000 and ultimately the Council was found liable for that loss, minus some necessary repair costs, in the sum of £44,500 plus the cost of the appeal and the Lands Tribunal case.
- 1.10 In September 2002 an application to fell an Oak tree at Burnam Lodge, Nursery Road, Loughton in relation to damage to that and one other property, was refused. Because of concerns in respect of possible financial costs to the Council, the matter was referred to the District Development Committee and ultimately Full Council. However, Full Council ratified the original decision of the Planning Sub Committee that the application should be refused and the tree certified as having special amenity value. At Full Council it was made clear that Members were concerned that the evidential base was unsatisfactory and that, at least in part, this was the reason for their decision.
 - 1.1. In this case an appeal was lodged against both the certificate and the Council's decision. The certificate was overthrown, as was the Council's decision. The Oak was felled and a replacement Birch tree has been planted. No compensation arose. However, had the property been sold in the interim, or had underpinning been undertaken, then undoubtedly a claim for compensation would have been received. It is a standard requirement for all TPO's that compensation is payable for a loss suffered as a consequence of the Council's decision – or of a "deemed refusal" as a result of non-determination, or from the result of an appeal.
 - 1.2. Contested claims are heard by the Lands Tribunal, which as a body appears not to be sympathetic to local authorities. In some cases the Council can be protected from claims, in cases related to old TPO's by certificates of special or outstanding value, and in relation to new TPO's by demonstrating that any loss arises from a failure on another party's account, for example to take proper preventative action other than tree felling. In the case of Burnam Lodge, the claim would have had to have been met by the Council, since the certificate had been overthrown. Since two properties were involved a claim would have been substantially over £250,000 and would have been difficult to resist.
 - 1.3. Nationally claims in respect of tree related subsidence are known to have been increasing dramatically, particularly in the last few years. This is somewhat unexpected given the improved foundation design of modern houses. A more important cause therefore appears to be a much-reduced tolerance of cracks by householders and a corresponding loss of value in damaged properties. Historically Epping Forest District Council has received no more than one or two subsidence based application most years; in the year April 2004 to March 2005 no less than 15 such applications were received.

Legislative Position

- 1.14 Since January 2004, based on advice from Head of Legal and Admin, the Head of Planning Services has been taking the view that applications supplied with inadequate information such that no reasonable decision could be given in 8 weeks other than refusal are invalid and will not be dealt with. Of those applications received in that time 2 (both in respect of the same tree) were determined following a site visit; one was agreed to be exempt based on the poor condition of the tree and several have been withdrawn. Several others, however, are outstanding and subject to appeal for non-determination.
- 1.15 On these applications even if additional information has been supplied or a site visit undertaken, it has still been insufficient for the application to be determined. The appeals for non-determination are effectively to test the Council's stance and require the Office of the Deputy Prime Minister to give guidance and thus additional advice on evidential requirements. This is something that up to the present time they have been unwilling to do.
- 1.16 The general position regarding responsibility is that an owner needs to be able to foresee a risk of damage; the trees need to be an effective and substantial cause of damage (but not the sole cause); whether a property has shallow foundations however is not an issue; a homeowner has to act reasonably in giving the tree owner reasonable notice and reasonable opportunity of abatement, however, the tree owner must demonstrate in court that it would have acted, had it been given notice.
- 1.17 Cases under Tree Preservation Order law will be judged on a similar basis; however, it is reasonable for the Council to expect to be given at least the minimum information necessary to undertake the balancing function, which is its duty under the Town and Country Planning Act. While a Tree Preservation Order application is not the same as, and does not benefit from some of the requirements of a planning application, nevertheless there is at least a general requirement for supply of relevant information.
- 1.18 However, the Tree Preservation Order legislation and the guidance is weak in this regard. It is specifically stated that the Tree Preservation Order application must:
1. Be made in writing to the Local Planning Authority;
 2. state the reasons for making the application;
 3. identify the trees; and
 4. specify the operations for which consent is sought.

The Government advice does not deal with what additional information can be required. The two agents for the several insurance companies who have submitted applications recently both, however, dispute that the Council is entitled to ask for more than the minimum of information. One has said that the Council is 'ultra vires' and will not submit further information in principle until and unless applications are registered. The other company has been prepared to submit some extra information, and to arrange for some properties to be visited, but also takes the position that the Council should consider all applications supplied with the minimum information specified in the TPO and if necessary refuse for lack of information.

- 1.19 The relevant policy is LL9 in the Local Plan; this states that "the Council will not give consent to fell a tree protected by a Tree Preservation Order unless it is satisfied that this is necessary and justified" 'Necessary' in this instance is intended to mean that there is a reason and that felling the tree will resolve a particular problem; 'justify' means that the Council is satisfied that the reason given is sufficient to justify felling, taking account of the amenity value of the tree.
- 1.20 Given this policy it is essential that sufficient information be given so that both tests, i.e.

firstly that felling is necessary and secondly that felling is justified may be applied.

Recommendation for Applications Handling

- 1.21 The proforma sets out the information, which would, in all cases, allow applications to be determined. This is information which cannot reasonably be submitted within an 8 week period, and by and large, is not information which the Council could obtain for itself, other than by employing a specialist consultant to investigate the case as if it were itself responsible for the tree or the property. However, since the Local Planning Authority is in a special situation it is reasonable to expect the applicant to supply sufficient information to resolve the case. Since January 2004 a specialist consultant has been appointed to advise on each case, but only insofar as checking and validating the case of the applicant and the information submitted in support of it.
- 1.22 The proforma as presented for approval has been through a number of drafts. The most recent alteration has been to clarify that it is intended to ensure only that the minimum information required is submitted.
- 1.23 The proforma is intended for internal use, but also to be made available to applicants.
- 1.24 The protocol sets out how information submitted will be assessed and the key criteria that need to be satisfied so that clear recommendations can be made to the relevant Planning Committee. Information required includes sufficient information to discount other potential causes, information to allow the seriousness of the damage to the property to be assessed; taken together these determine whether an application is valid. The protocol includes the offer to inspect properties pre-registration of applications; this may allow for precise advice to be given as to the information required in particular cases, or provide sufficient information to determine applications based on the particular circumstances.
- 1.25 The risks of the approach, at least until new advice is given, is that the Council may be liable for compensation for events which happen in the interim until advice is given and the appeals for non-determination are either rejected, on the basis that the original applications were invalid and that the appeals are also invalid, or may be heard.

However, if the Council were to refuse applications on the basis that the evidence is weak, firstly this would lead to more appeals but additionally there would still be a potential for compensation against the Council as a result of the Secretary of State's decision.

Options for action: 1, To accept the recommendation; 2, to defer consideration pending further work on the documents, or 3, to reject the protocol and proforma and accept that applications be dealt with the minimum of information.

Statement in support of recommended action: To ensure that the Council is able to consider Tree Preservation Order applications in respect of subsidence in the light of sufficient evidence.

Consultation undertaken: Extensive informal external consultation.

Resource implications:

Budget provision: Consultancy advice, up to £5,000 pa.

Personnel:

Land:

Community Plan/BVPP reference:

Relevant statutory powers: Duty to protect trees under the TCPA 1990, s 197 & 198; compensation, s 203/205.

Background papers:

Environmental/Human Rights Act/Crime and Disorder Act Implications:

Key Decision reference: (if required)