

Report to the Area Planning Sub-Committee



**Epping Forest
District Council**

**Report reference:
PL/16758/TPO16/90/2007**

Date of meeting: 21 March 2007

**Subject: Exemption of Oak Tree Subject to Tree Preservation Order TPO 16/90
Oak Trees, High Ongar Road, High Ongar**

Officer contact for further information: Christopher Neilan (01992 56 4117)

Democratic Services – Mark Jenkins: (01992 56 4607)

Recommendations/Decisions Required:

That it be agreed that the felling of the oak tree would be exempt in the context of damage to the adjacent property and that officers be agreed to confirm this to the agents, the owners of the adjacent property, and to not contest the current appeal.

Background:

- 1)** An oak tree at Oak Trees, High Ongar Road, Ongar, Essex is subject to a tree preservation order dated 16/90. The Tree Preservation Order was made having regard to the local importance of the tree, its age and historic significance, and because of an impending change of ownership of the property. At the time the Tree Preservation Order was made there were no allegations of subsidence.
- 2)** Subsequent to the Tree Preservation Order the oak has been pruned on at least two occasions, with consent. The tree is an ancient pollard; with a hollow stem. The stem is short, and there is a relatively small, well-shaped crown controlled by pruning.
- 3)** On 6 September 2006 an application was received for felling of the tree on grounds of subsidence to the adjacent property, The Cedars, High Ongar Road, Ongar by representatives for their insurers. Advice was sought from the engineer; a meeting was arranged at the property, and advice received.
- 4)** The engineer's advice was that while there was no doubt that the adjacent property was suffering from subsidence, and that the subsidence was linked to root activity of the oak tree in the adjacent property, the reason for the damage was that the foundations were sub-standard. In the opinion of the engineer, the correct solution would be to make good the foundations, which would allow the tree to be retained.
- 5)** On investigation it was discovered that no application for planning permission had been received for the damaged part of the adjacent building, which is a front extension. The area to the rear had previously been a garage, and planning permission had been received for conversion of the garage to living accommodation, but so far as can be discovered, not for the additional front extension, which is now failing. Furthermore, no record could be found for any application for Building Control approval for the details of the foundations design.
- 6)** In relation to solutions, it appears that a proper foundation design would have prevented the damage occurring. It could have been foreseen that the tree would

cause problems, and therefore it would be expected that proper foundations would be put in place.

Tree Preservation Order Application TRE/EPF/1976/06:

- 7) It was intended that the application to fell the tree should be reported to Committee for refusal.
- 8) The applicants were informed of this, following the site visit and receipt of the engineering advice, however, the issue was then appealed for non-determination before the matter could be presented to Committee. The Hearing is set for Tuesday, 1 May 2007.

Exemption:

- 9) On 18 December 2006 a letter was received from the appellants stating that a decision on a recent case, Perrin & Ramage v Northampton Borough Council and Others (2006), led to the conclusion that the current case should be treated as exempt. Essentially, it was argued that the latter fell into the exemption in the Tree Preservation Order where it is stated that the consent of the Council will not be required for the abatement of a nuisance.
- 10) The case in question was one where that the felling of the tree would be a remedy was not at dispute; what was resolved was that it was not open to the Council (or indeed the Secretary of State) to say that it would be possible to resolve the issue by such measures as a root barrier or improved foundations. The only issues open to the Council to consider were effectively those that involved only pruning or felling the tree.
- 11) In the case in question it is argued for the tree owners that it is not open to the Council to argue that the foundations should be improved; nor is it open to the Council to argue that the defectiveness of the foundations is an issue in relation to the exemption, nor can the Council argue that it would be an effective remedy for the tree to be more heavily pruned than it has been in the past, since there is not a reasonable likelihood that this would in fact prevent the possibility of future damage.
- 12) This argument by the appellants has been the subject of a legal opinion specially commissioned on behalf of the Council. Effectively this opinion has confirmed the submission of the appellants in all major respects.
- 13) The opinion confirmed that there is no likelihood of the Council succeeding in a case that the tree is not exempt as a result of the failure to construct proper foundations. There may be the possibility of a counter claim against the original builder, if the builder could be found, but this does not alter the Council's position in respect of the Tree Preservation Order.
- 14) This remedies the legal process of the appeal redundant since the Council cannot argue that the case falls within its jurisdiction to agree; logically therefore it also does not fall within the jurisdiction of the Secretary of State.
- 15) In the event that the Council wishes to argue the appeal, and wishes to retain the tree, the Secretary of State might agree to determine the application. It appears from Perrin versus Northampton that this could be challenged at the High Court. Alternatively, the decision could be accepted, but a claim for costs be made against the Council at the Lands Tribunal, for the compensation in respect of improved foundations to the adjacent property. From the advice received, it appears unlikely that this could be successfully resisted.

Conclusion

- 16)** The oak must be considered exempt from the need for permission to fell, in respect of the subsidence to Cedarwoods. While the council could present a case to defend the tree at appeal, there is no benefit, since felling is exempt, and the possibility of a claim for compensation under the Order might arise.