

APPENDIX (3)

AH_73LN | TPO00 | FEB | 26.07.2017



TREE PRESERVATION ORDER OBJECTION

ON BEHALF OF

ACCESS HOMES LLP

RELATING TO

BROMSGROVE DISTRICT COUNCIL TREE PRESERVATION ORDER (11) 2017

AT

LAND AT SIDE AND REAR OF:
73 LINTHURST NEWTOWN, BLACKWELL

Prepared by: Paul Barton MSc, TechCert (ArborA), MArborA
Reference: AH_73LN

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REVISIONS:

Date	Rev	Description of revision	Initials
28.07.17	-	First issue	PEB

1. INTRODUCTION

- 1.1 A Tree Preservation Order (TPO) has recently been served by Bromsgrove District Council.
- 1.2 This is the second TPO made on the land within one year; TPO (13) 2016 was previously made in August 2016 and confirmed in January 2017 but has been quashed by a consent order from the High Court following an application for Judicial Review by the landowner.
- 1.3 The title of the new TPO is:
- Bromsgrove District Council Tree Preservation Order (No 11) 2017, trees adjoining 73 Linthurst Newtown, Blackwell
- 1.4 The above address is hereafter referred to as 'the site'.
- 1.5 The TPO specifies the following in the schedule:
- Nineteen individual trees (T1 – T19)
 - Six groups of trees (G1 – G6)
 - One woodland (W1)
- 1.6 The stated reasons for serving the Order, as contained in the attached regulation 5 notice are as follows:
- "The trees provide special amenity value and the Tree Preservation Order is made in the interests of amenity"
- 1.7 The TPO was made on 4th July 2017 and takes provisional effect for six months from this date. After this time, if the TPO has not been formally confirmed by the Local Planning Authority (LPA) its provisional effect will lapse and a new Order must be served.
- 1.8 The deadline for objections to be received by the LPA in relation to this Order is stated as 4th August 2017.
- 1.9 I have been instructed to prepare this representation as part of an objection to the TPO by the Directors of Access Homes LLP.
- 1.10 The TPO, and this objection, must be considered on its own merits; it does not relate to a planning application for development but simply relates to the merits of trees and whether or not they are of sufficient value to warrant protection.
- 1.11 The objection is made in accordance with Regulation 6 of the Town and Country Planning (Tree Preservation) (England) Regulations 2012. It states the reasons for the objection and specifies the trees, groups of trees or woodlands in question.

2. GUIDANCE

2.1 Guidance is provided to Local Planning Authorities by the Department for Communities and Local Government through the online Planning Practice Guidance suite which replaced previous guidance contained in the document 'Tree Preservation Orders: A Guide to the Law and Good Practice' commonly referred to as 'the Blue Book'. This guidance sets out the grounds on which a TPO might be made. For clarity, the relevant elements of this guidance are reproduced below and the pertinent elements of the guidance in relation to this objection shown in bold:

2.2 Power to make a TPO:

Local planning authorities can make a Tree Preservation Order if it appears to them to be 'expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area'.

When deciding whether an Order is appropriate, authorities are advised to take into consideration what 'amenity' means in practice, what to take into account when assessing amenity value, what 'expedient' means in practice, what trees can be protected and how they can be identified.

'Amenity' is not defined in law, so authorities need to exercise judgment when deciding whether it is within their powers to make an Order.

Orders should be used to protect selected trees and woodlands if their removal would have a significant negative impact on the local environment and its enjoyment by the public. **Before authorities make or confirm an Order they should be able to show that protection would bring a reasonable degree of public benefit in the present or future.**

When considering whether trees should be protected by an Order, authorities are advised to develop ways of assessing the amenity value of trees in a structured and consistent way, taking into account the following criteria:

Visibility

The extent to which the trees or woodlands can be seen by the public will inform the authority's assessment of whether the impact on the local environment is significant. **The trees, or at least part of them, should normally be visible from a public place, such as a road or footpath, or accessible by the public.**

Individual, collective and wider impact

Public visibility alone will not be sufficient to warrant an Order. The authority is advised to also

assess the particular importance of an individual tree, of groups of trees or of woodlands by reference to its or their characteristics including:

- size and form;
- future potential as an amenity;
- rarity, cultural or historic value;
- contribution to, and relationship with, the landscape; and
- contribution to the character or appearance of a conservation area.

Other factors

Where relevant to an assessment of the amenity value of trees or woodlands, authorities may consider taking into account other factors, such as importance to nature conservation or response to climate change. **These factors alone would not warrant making an Order.**

Although some trees or woodlands may merit protection on amenity grounds, it may not be expedient to make them the subject of an Order. It may be expedient to make an Order if the authority believes there is a risk of trees being felled, pruned or damaged in ways which would have a significant impact on the amenity of the area.

3. GROUNDS FOR OBJECTION

3.1 The grounds for objection are as follows:

- a) The TPO cannot be justified on the grounds of preserving public amenity
- b) The schedule of trees is incorrectly written.

3.2 This objection relates to the following trees included in the order:

- T5 (Ash)
- T6 (Oak)
- T18 (Oak)
- T19 (Apple)
- G4 (1 x Pear, 4 x Apple)
- G5 (3 x Silver Birch)
- G6 (1 x Oak, 1 x Holly, 1 x Ash)
- W1 (Mixed species)

Objection relating to public visual amenity

3.3 In the LPA's reasons for making the TPO it is stated that:

"The trees provide special amenity value and the Tree Preservation Order is made in the interests of amenity".

3.4 This reason has been applied to all the trees that are the subject of the TPO. Whilst some of the trees that are present on the site are visible to the general public, notably those along the frontage to Linturst Newtown, many are not. It cannot be the case that trees have 'special amenity value' if they cannot be seen.

3.5 As noted above, the Planning Policy Guidance on the making of TPO's states:

'The trees, or at least part of them, should normally be visible from a public place, such as a road or footpath, or accessible by the public'.

3.6 I have requested a copy of the tree officer's assessment of the trees but have not received a reply. I understand that the council use an evaluation method called 'TEMPO' (Tree Evaluation Method for Preservation Orders) authored by Julian Forbes-Laird in 2006. The scoring system in this method is weighted to favour trees that have a high degree of visibility, as follows:

c) Relative public visibility & suitability for TPO <i>Consider realistic potential for future visibility with changed land use</i>	
5) Very large trees with some visibility, or prominent large trees	Highly suitable
4) Large trees, or medium trees clearly visible to the public	Suitable
3) Medium trees, or large trees with limited view only	Suitable
2) Young, small, or medium/large trees visible only with difficulty	Barely suitable
1) <u>Trees not visible to the public, regardless of size</u>	<u>Probably unsuitable</u>

3.7 The land covered by the Order adjoins the road Linthurst Newtown on the southeast side. This is the only road that provides an uninterrupted view of some trees within the site. It is accepted therefore that the row of trees along the roadside do have visual amenity as they are easily seen. The view from Foxes Close to the west gives visibility to the tops of some trees in the centre of the site.

3.8 The mature trees in the internal square shaped area immediately to the rear of the garden (G3 of the TPO) can be partially viewed, as the top of their crowns are visible over the roofs of adjacent houses.



Figure 1: snapshot of Google aerial photo showing the site in relation to local roads and footpaths. Photos taken from locations 1, 2 3 and 4 are provided below to show the visibility in to the site. The blue circle represents the area of the site which cannot be viewed from any nearby public areas.



Photo 1: from location 1 on the railway bridge. The tops of G3 are the visible.



Photo 2: view from location 2. Hollies T13 & T14 in the foreground amongst overgrown Laurel. G3 is visible beyond the house to the right.



Photo 3: from location 3. Top of T1 visible behind garage.



Photo 4: Google streetview image from Foxes Close. The tops of trees within G3 are visible.

3.9 There are no public rights of way within the fields to the west, north or east of the site, so views of the trees at the top of the site are extremely restricted.

3.10 Due to the limited viewpoints of the site, the following trees cannot be seen, and therefore have no public visual amenity:

- T5 (Ash)
- T6 (Oak)
- T18 (Oak)
- T19 (Apple)
- G5 (3 x Silver Birch)
- G6 (1 x Oak, 1 x Holly, 1 x Ash)
- W1 (Mixed species)

3.11 In addition to the above, most of the trees within G4 (1 Pear and 4 Apple) cannot be seen; only the Pear tree at the southern end of the group is possibly visible. The planning guidance states that "the group category should be used to protect groups of trees where the individual category

would not be appropriate and the group's overall impact and quality merits protection". It is therefore unreasonable to protect five trees based on the public visibility of just one.

- 3.12 The guidance notes that accompany TEMPO do make provision for the possibility that changes in site use can affect the future potential for public visibility, for example where trees that are currently hidden from view are exposed following clearance of surrounding land.
- 3.13 Not only are these trees not currently visible, but the realistic potential for their visibility to increase is very low as the trees further down the site are protected from removal thereby providing a natural visual buffer separating the road and houses from the trees at the top (north) of the site.

Objection relating to incorrect TPO schedule

- 3.14 The schedule has been incorrectly written as it lists the six 'groups' of trees under the heading 'trees specified by reference to an area', instead of listing them under 'groups of trees'. Under the 'groups of trees' heading, the schedule states "none".
- 3.15 This error appears to be an administrative mistake. The Town and Country Planning (Tree Preservation) (England) Regulations 2012 state in para 3 (4) that "In the case of any discrepancy between the map contained in, or annexed to, an order and the specification contained in the Schedule to that order, the map shall prevail".
- 3.16 This point of objection is therefore a minor one, as it is still clear from the order which trees are to be protected. However, in the interests of serving a clear and unambiguous order, it would be preferable if the schedule were amended.

4. CONCLUSIONS

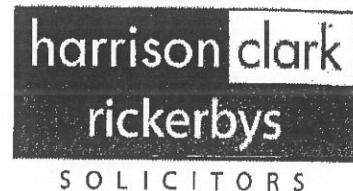
- 4.1 It is requested that the provisional TPO No 11 (2017) is modified to remove from it T5, T6, T18, T19, G4, G5, G6 and W1 for the reasons listed above, before confirming the order.
- 4.2 It is also requested that the TPO schedule is amended to place the 'groups' of trees in the correct section.



Paul Barton, *MSc, MArborA*

28th July 2017

Your reference:
Our reference: RA03.ACC0014-0001
Direct email: randrews@hclaw.com



6th July 2017

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PLANNING TEAM

BY POST AND EMAIL: t.lovejoy@bromsgroveandredditch.gov.uk

Dear Sirs,

**Bromsgrove District Council Tree Preservation Order (11) 2017 dated 4th July 2017
Land Adjoining 73 Linthurst Newton Blackwell**

We write on behalf of Access Homes LLP and further to Bromsgrove District Council's decision to make Tree Preservation Order (11) 2017 on 4th July 2017 ("the TPO").

We also write further to the quashing of Tree Preservation Order (13) 2016 on 20th June 2017 following the High Court of Justice's endorsement of the Consent Order in the matter of Access Homes LLP vs Bromsgrove District Council (Court Reference CO/867/2017) ("the Consent Order").

We wish to put Bromsgrove District Council ("the Council") on notice of a number of concerns our client has regarding the actions and conduct of the Council in relation to the above matters. These include:

1. The Council's failure to serve notice of the TPO on all parties with an interest in the land affected by the TPO, in breach of Regulation 5(1) of the Town and Country Planning (Tree Preservation) (England) Regulations 2012;
2. The TPO being made by the Council in a form which is, in part, more restrictive than the form of Tree Preservation Order annexed to the Consent Order, and so therefore being in breach of the Consent Order; and
3. The Council's failure to pay our client's legal fees as set out in the Consent Order within a reasonable time frame.

As the Council is well aware from the Court proceedings, Access Homes LLP is the registered owner of the land affected by the TPO. Access Homes LLP has, however, not been served with the TPO.

Birmingham T. 0121 454 0739 F. 0121 455 7211 53 Colthorpe Road, Edgbaston, Birmingham B15 1TH
Cheltenham T. 01242 224422 F. 01242 518428 Filtenborough House, Wellington Street, Cheltenham GL50 1YD
Hereford T. 01432 349670 F. 01432 349660 Thorpe House, 29 Broad Street, Hereford, HR4 9AR
Homes Valley T. 0118 925 6100 200 Brook Drive, Green Park, Reading RG2 6UB
Worcester T. 01905 612001 F. 01905 744899 5 Deansway, Worcester, WR1 2JG
Wye Valley T. 01989 562377 F. 01989 565961 Overcross House, Ross Park, Ross-on-Wye, HR9 7US

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Access Homes LLP is a limited liability company registered in England. The company is a member of the Local Authorities Association for Planning and Development (LAAPD). The company is a member of the Local Authorities Association for Planning and Development (LAAPD). The company is a member of the Local Authorities Association for Planning and Development (LAAPD).

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Instead, the Council appears to have served the TPO on the previous owners, Freefield Investments Limited, who have no legal interest in the land affected by the TPO.

We are also aware that, despite the omission to serve the landowners with copies of the TPO in accordance with the statutory requirements, the Council has served adjoining landowners with copies of the TPO.

In the circumstances, we require:

1. The Council provides us with copies of the correspondence sent to the adjoining landowners and any other parties, with a list of all parties served with a copy of the TPO.
2. The Council pays our client's legal costs in accordance with the Consent Order within the next two working days.

We also reserve our client's position with regard to the TPO being, in part, more restrictive than the form of tree preservation order annexed to the Consent Order, in breach of the Consent Order. In particular we draw your attention to the trees identified as "G2" on the TPO Schedule and Plan, being three Ash Trees which were not identified in the document annexed to the Consent Order.

We look forward to receiving the copies of correspondence requested and payment of legal costs by return.

Yours faithfully

Harrison Clark Rickerbys

HARRISON CLARK RICKERBYS LIMITED

Your reference:
Our reference: RA03.ACC0014-0001
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4th August 2017

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DELIVERED BY HAND AND EMAIL: r.sultana@bromsgroveandredditch.gov.uk

Dear Sirs,

OBJECTION to Bromsgrove District Council Tree Preservation Order (11) 2017 dated 4th July 2017

Land Adjoining 73 Linthurst Newton Blackwell

We write on behalf of Access Homes LLP to **OBJECT** to Bromsgrove District Council Tree Preservation Order (11) 2017 which was made by Bromsgrove District Council on 4th July 2017 ("the TPO").

Access Homes LLP are the freehold owners of the Land Adjoining 73 Linthurst Newton Blackwell, to which the TPO relates ("the Site").

This objection is made on two main grounds:

1. The making of the TPO in its current form does not meet the required legal and planning policy tests; and
2. The actions of Bromsgrove District Council ("the Council") over the last twelve months throughout both the process of assessing the merits of protecting the Site by way of a Tree Preservation Order, and also dealing with associated matters, have contained repeated errors, inconsistencies, and fundamental legal flaws.

The basis for these objections is set out substantively below.

1. Objection to the extent and form of the TPO

No substantive justification has been given by the Council for the extent of the protection in the TPO, nor has an assessment of the trees selected for protection been provided.

Birmingham	T. 0121 454 0739	F. 0121 455 7211	53 Colthorpe Road Edgbaston Birmingham B15 1TH
Cheltenham	T. 01242 224422	F. 01242 518428	Ellenborough House Wellington Street Cheltenham GL50 1YD
Hereford	T. 01432 349670	F. 01432 349660	Thorpe House 29 Broad Street Hereford HR4 9AR
Thames Valley	T. 0118 911 1206	F. 0118 900 7874	100 Longwater Avenue Green Park Reading RG2 6GF
Worcester	T. 01905 612001	F. 01905 744899	5 Deansway Worcester WR1 2JG
Wye Valley	T. 01989 562377	F. 01989 565961	Overross House Ross Park Ross-on-Wye HR9 7US

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This failure is a breach of the requirements of Regulation 5(2)(a) of the Town and Country Planning (Tree Preservation)(England) Regulations 2012 ("the Regulations"), which require the "reasons for making the order" to be served on all parties with a legal interest in the land affected.

Firstly, it is important to note that the Council did not serve notice of the TPO on Access Homes LLP as freehold owner in breach of Regulation 5(1) of the Regulations. The Council is well aware from the Court proceedings relating to the previous tree preservation order for the Site that Access Homes LLP is the registered owner of the land affected by the TPO, however the Council still failed to serve it.

Secondly, even if the Council had served notice of the TPO on Access Homes LLP, the only justification given in the notice accompanying the TPO (which Access Homes LLP has now obtained following a direct request to the Council) was in the form of a generic statement, which simply stated:

"The trees provide special amenity value and the Tree Preservation Order is made in the interests of amenity".

The Council's failure to provide substantive reasons for making the TPO is also, in our view, a failure to carry out a lawful consultation. It is settled law that, if a consultation exercise is undertaken, then it must be carried out properly (see the case of *R v North East Devon HA ex p Coughlan*). This means that it must, amongst other things, include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration of the same and thus enable an intelligent, and fully-informed, response.

The Council is under a duty to address relevant arguments raised during the consultation exercise. It is not entitled to assume that, because it has complied with the statutory timescales for consultation, that the consultation exercise is automatically sufficient. This is particularly the case where there is clear evidence to the contrary, for example our client's persistent requests for further information, as set out further below.

The failure to provide substantive "reasons" for making the TPO is also grounds for reasonable doubt as to whether the TPO has been made in accordance with the Council's legal powers to make tree preservation orders as provided by Section 198 of the Town and Country Planning Act 1990 ("TCPA 1990"), or whether the making of the TPO is ultra vires.

The legal power for the Council to make the TPO in Section 198(1) of the TCPA 1990 expressly requires that tree preservation orders may only be made where it appears to the local planning authority that "**it is expedient in the interests of amenity to make provision for the preservation of trees or woodlands**".

It would be irrational, and therefore, unlawful for the Council consider it expedient to protect trees without the Council having considered in detail the Government's planning policy guidance in relation to the making of tree preservation orders.

This guidance is provided by the Planning Practice Guidance ("PPG"), which makes clear that prior to making the TPO, the Council should be able to "**show that protection would bring a reasonable degree of public benefit in the present or future**" (PPG para 36-007-20140306).

The PPG also makes clear that in assessing amenity "**trees or at least part of them should normally be visible from a public place such as a road or footpath, or accessible by the public**" (PPG para 36-008-20140306), and further that "**Orders should be used to protect selected trees and woodlands if their removal would have a significant negative impact on the local environment and its enjoyment by the public**" (PPG para 36-007-20140306).

We are aware that the Council's Tree Officers have undertaken numerous visits to the Site over the last twelve months, and so a reasoned justification for the making and extent of the TPO in accordance with the PPG should be available and disclosed. We are also aware that the justification and 'TEMPO' scores have been requested by our client's Arboricultural Consultant on a number of occasions, and the Council has failed to provide these repeatedly.

In fact, a large number of attempts have been made by our firm, our client's Arboricultural Consultants, and our clients directly to engage with the Council in relation to the appropriate level of protection of trees on this Site, but the Council has consistently declined to engage.

Our clients have also made a formal request for the disclosure for information pursuant to the Environmental Information Regulations 2004, which the Council has failed to respond to within the required statutory timeframes (discussed further below). The result of these repeated errors on the part of the Council has meant that there has been no way of our clients obtaining the reasoned assessment of the Council's perceived merits of the TPO in advance of needing to submit this Objection. This puts our client at a considerable disadvantage, and is in breach of the various legal requirements set out above and below.

Due to the lack of information provided by the Council, we enclose an assessment of the TPO prepared on behalf of Access Homes LLP by Barton Hyett Arboricultural Consultants. This sets out our client's objection to the extent of the TPO on the basis of the failure to meet the requirements of the PPG guidance in assessing the amenity value of the trees on the Site.

The enclosed document prepared by Barton Hyett should be treated as a formal part of our client's objection to the extent of the TPO.

2. Unlawful Actions and Errors of Bromsgrove District Council

As the Council is aware, our client has already incurred considerable inconvenience and expense as a result of the Council's unlawful actions in relation to the making of tree preservation orders and other related failings in relation to the Site.

We are aware that Council has also incurred considerable expense due to its actions, which costs will have been met at public expense.

In particular the Court action which resulted in the original tree preservation order made by the Council in relation to the Site last year, Bromsgrove District Council Tree Preservation Order (13) 2016, being quashed by Court Order on 20th June 2017 ("the Court Order"), due to the Council's unlawful actions in the making of that tree preservation order.

The High Court of Justice also ordered the Council pay from public money our client's legal costs due to the nature of the Council's errors.

In addition to the errors identified in the Court action, there have been a number of further issues as regards to the actions and conduct of the Council in connection with the TPO and related matters. These include:

1. The Council's failure to serve notice of the TPO on all parties with an interest in the land affected by the TPO, in breach of Regulation 5(1) of the Regulations;

2. The Council's failure to provide reasons for the making of the TPO in breach of Regulation 5(2)(a) of the Regulations and potentially Section 198(1) of the TCPA 1990;
3. The TPO being made by the Council in a form which is, in part, more restrictive than the form of Tree Preservation Order annexed to the Court Order, and so therefore being in breach of the Court Order;
4. The Council's failure to pay our client's legal fees as set out in the Court Order within the timeframe required by Civil Procedure Rules Part 44.7;
5. The Council's failure to act fairly, consistently, and impartially with regard to the consultation of persons interested in the tree preservation orders at the Site, and in particular the illogical selection of consultees, and the inconsistent redaction of names, addresses, and signatures of consultation responses; and
6. The Council's failure to respond to our client's formal request for the disclosure of information relating the making of the tree preservation orders at the Site dated 21st June 2017 in breach of Regulation 5(2) and 7(1) of the Environmental Information Regulations 2004.

The above are all clear breaches of the Council's legal obligations under statute and / or Court Order which have occurred since the High Court quashed the previous tree preservation order.

It is unclear whether the errors are sheer incompetence or are a deliberate and unlawful attempt to frustrate due process in relation to the TPO, but in either case, this letter illustrates a number of clear failings on the part of the Council which our client will consider challenging in Court.

We hope that, in the circumstances, the Council will scrutinise its reasons for making the TPO in accordance with the national policy in the PPG, and will by return disclose the Council's formal assessment of the perceived amenity of the trees proposed to be protected on the Site to our client, together with a reasoned justification for the making of the TPO.

The failings of the Council in relation to the request for disclosure under the Environmental Information Regulations are being pursued separately, and our client reserves its position with regard to taking further action in relation to the Council's failings through the Courts.

Yours faithfully

Harrison Clark Rickerbys

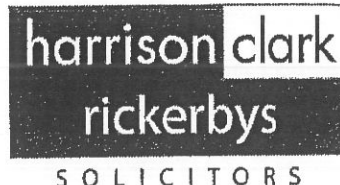
HARRISON CLARK RICKERBYS LIMITED

Encl - Barton Hyett objection

Your reference:

Our reference: RA03.ACC0014-0001.RA

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2 November 2017

BY SPECIAL DELIVERY BY 1PM

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PLANNING TEAM

BY POST AND EMAIL

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Dear Sirs

LETTER BEFORE ACTION – CONTEMPT OF COURT AND SECTION 288 CHALLENGE

**TREE PRESERVATION ORDER (NO. 11) 2017
TREES ON LAND ADJACENT TO 73 LINTHURST NEWTOWN, BLACKWELL**

We are instructed by Access Homes LLP in relation to Bromsgrove District Council's ("the Defendant") unlawful actions in reporting to its Planning Committee on the merits of Tree Preservation Order (No. 11) 2017 ("the TPO").

The consent order dated 20 June 2017 ("the Order") includes a requirement that any replacement TPO "*shall be no more restrictive than the plan and schedule attached to [the Order] at Schedule 3*". As such, any new TPO is required by the Order to be no more restrictive than the TPO quashed as a result of that Order. However, the proposed new TPO seeks to include three Ash trees within group 'G2' which were not included on the quashed TPO. As such, the new TPO includes additional trees which were previously not protected and is accordingly 'more restrictive' in direct contravention of the Order.

Breach of a court order is a serious matter and renders the Council in contempt of court. Any adoption of the proposed new Order would therefore put the Council at risk of an application by Access Homes LLP for committal for contempt of court.

Additionally, the Council has failed to advise the Committee in a way which is impartial, transparent, fair, or provides adequate (or any proper) reasoning for the recommendation made. The Council is promoter of the TPO and is also determiner of the TPO and therefore has an enhanced duty to act judiciously and without prejudice, which it has not.

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In addition to the potential liability for contempt, should the Council proceed to adopt the TPO on the basis of the officer's report as written, any decision based upon such a report would be vulnerable to challenge pursuant to s.288 of the Town and Country Planning Act 1990 on the bases set out within the draft letter below.

What follows is a draft letter before claim in accordance with the pre-action protocol under the Civil Procedure Rules. Should the Council proceed to make the TPO on Monday 6 November, the letter will be issued formally and Access Homes will also consider service of an application based on the Council's contempt of court.

In any event, Access Homes also requests disclosure of the following documents which are considered to fall well within the Council's duties under the Environmental Information Regulations 2004 and will in any event become disclosable under the Council's duty of candour should proceedings be issued:

- (a) All written reports and site notes regarding the TPO and / or Bromsgrove District Council Tree Preservation Order (No. 12) 2016 – Tree/s on land at side and rear of 73 Linthurst Newton, Blackwell dated 12th January 2017, and the provisional Tree Preservation Order relating to the same site served in August 2016, relating to the visits made to site by tree officers Gavin Boyes and Andy Bucklitch or other officers involved. In particular, documentation relating to the assessment of the trees at the site as suitable for a tree preservation order (sometimes referred to as an amenity value assessment). The above request is for the disclosure of all written reports and site notes which are not annexed to the Report or the Committee Report dated 9th January 2017.
- (b) Any letters and emails sent to and received from the above officers and notes of any meetings or telephone conversation by or with the above officers in relation to the TPO and / or Bromsgrove District Council Tree Preservation Order (No. 12) 2016 – Tree/s on land at side and rear of 73 Linthurst Newton, Blackwell dated 12th January 2017, and the provisional Tree Preservation Order relating to the same site served in August 2016, and in particular communications to and / or from planning officers, local councillors (District and Parish), their clerks or staff, and residents. The above request is for the disclosure of all written reports and site notes which are not annexed to the Report or the Committee Report dated 9th January 2017.
- (c) A plan showing the locations from where all the photographs provided at Appendix 9 of the Report were taken, and confirmation of who took each of the photographs in question.

Given the proposed site visit and Planning Committee meeting are due to take place on Monday 6th November, the Council is required to confirm by no later than noon on Friday 3 November 2017 that this item will be withdrawn from the Planning Committee agenda for 6 November 2017 and that if the Council wishes to proceed to protect the trees on the site, steps will be taken to support any such new TPO with a legally compliant officer's report.

Yours faithfully

Harrison Clark Rickerbys

HARRISON CLARK RICKERBYS LIMITED

BY SPECIAL DELIVERY BY 1PM

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Dear Sirs

LETTER BEFORE ACTION – CONTEMPT OF COURT AND SECTION 288 CHALLENGE

TREE PRESERVATION ORDER (NO. 11) 2017

TREES ON LAND ADJACENT TO 73 LINTHURST NEWTOWN, BLACKWELL

1. THE CLAIMANT

Access Homes LLP, The Exchange, Haslucks Green Road, Shirley, Solihull, West Midlands, B90 2EL.

2. DEFENDANT'S REFERENCE DETAILS

Defendant's reference: Tree Preservation Order (11) 2017
Defendant's Legal Officer: Tracy Lovejoy

3. DETAILS OF THE CLAIMANT'S LEGAL ADVISERS

Harrison Clark Rickerbys Limited, 5 Deansway, Worcester, WR1 2JG.
Reference: RA03.ACC14-1

4. DETAILS OF THE MATTER BEING CHALLENGED

The decision taken by Bromsgrove District Council ("the Defendant") to report to its Planning Committee on the merits of Tree Preservation Order (No. 11) 2017 ("the TPO") in a way which is not impartial, transparent, nor fair, nor which provides adequate reasoning for the recommendation made.

5. DETAILS OF ANY INTERESTED PARTIES

None.

6. THE ISSUES

The Defendant has published a report to its Planning Committee to consider the confirmation of the TPO without modification ("the Report"), however the Report has not been prepared to the standard required by law.

The Report contains a number of misleading statements, inaccuracies, omissions, irrelevant and misleading photographs, and fails to provide adequate reasons for the recommendation made. Further, the Report clearly demonstrates that the applicable law has been misinterpreted and misapplied.

These legal errors include:

(a) Inaccurate and misleading statements:

- a. Tree Felling: At paragraph 3.6, the Report states that trees had been felled on the site prior to the making of the provisional Tree Preservation Order in August 2016. This is factually incorrect: it was primarily scrub clearance on the land and no mature trees had been felled, as was confirmed by the Defendant's Tree Officer on a site visit. Trees had been felled within the garden of 73 Linthurst Newtown, however this property is in separate ownership, and does not form part of the site covered by the TPO. This statement, together with the similar statement at paragraph 4.3, and the reference in paragraph 4.6 of the Report to the "**level of work that was being gradually undertaken**" is designed to mislead the Planning Committee in relation to the justification for the TPO and to justify the Tree Officer's perception of a 'threat' to any trees on the site as discussed below.
- b. Identity of landowner: At paragraph 3.6 the Report states that the owner of the site is a '**property development company who are understood to specialise in acquisition of land for then onward sale once outline planning permission has been granted**'. This statement is made without any evidential foundation and is extremely misleading. Although the Defendant is an investment company owning real estate, it primarily owns let residential properties. It has not applied for planning permission nor sold sites on for development. The Report also claims that the Defendant is '**under the management of the Fell Family**', which is a false statement – the Defendant is a partnership where 50% is owned by an unrelated party.
- c. Speculation about landowner and its intentions: Although the Planning Practice Guidance confirms that local planning authorities may consider development pressures and landowner's intentions when considering whether it is expedient to make a tree preservation order, the statements in paragraph 4.3 of the Report that "**the nature of the companies owning the land are understood to specialise in acquisition of land for then onward sale once outline planning permission has been granted**" and that "**it was reasonable to assume the site would be largely cleared of tree**

stock to accommodate development on the site" are without evidential basis. The Report also justifies the making of the TPO at paragraph 4.6 by reference to "*the known nature of the companies who own the land*", and so this speculation has clearly played a large part in the Officer's decision-making process. The Report fails to mention the fact that the landowners have cooperated and engaged with the Claimant throughout, and were prepared to accept a tree preservation order over a number of trees on the site. These statements and omissions are designed to mislead the Planning Committee and to taint the Planning Committee's perception of landowner.

- d. Previous legal challenge: The description of the previous legal challenge in paragraph 3.8 of the Report fails to note that the previous Tree Preservation Order was quashed as it was unlawfully made, and the Council paid the Claimant's costs of bringing the challenge. It must be made clear to the Planning Committee that the Claimant's actions in bringing the previous legal challenge were correct and justified due to the Defendant's legal errors. The wording of paragraphs 3.6 to 3.8 of the Report suggest that the Claimant was unjustified in bringing the legal challenge, which serves to further mislead the Planning Committee.

Moreover, the report is materially misleading in failing to draw the Committee's attention to the serious consequences should the Council adopt a TPO which is in breach of a court order. Far from being "not a relevant matter" (per paragraph 4.8 of the Report), this is a material consideration of considerable weight. Committee members should be made aware of the grave consequences of proceeding in contravention of a court order.

(b) Misinterpretation of law and planning policy:

- a. Visibility from private gardens: The Report refers to views of the trees proposed to be protected from private gardens in a number of places, including paragraphs 4.4, 4.7, 4.10, 4.17, and a number of the photographs provided at Appendix 9 to the Report. The merits of the TPO must be considered on the basis of the public amenity, and any amenity provided to private properties cannot provide a lawful consideration for the confirmation of the TPO. The Report is misleading the Planning Committee and there is a significant risk of the Planning Committee taking unlawful considerations into account as a result.
- b. Tempo Assessment: All the trees are marked in the Tempo Assessment has having an 'expediency' score of 3, which is the equivalent of a 'foreseeable threat'. If the threat were marked accurately, the 'expediency' score should be reduced, which would push a number of the trees below the threshold for suitability for inclusion in the TPO. Additionally, a degree of visibility is given to trees T5, T6, T7, T8, T9, T18, and T19, where these trees are not visible at all from public places.
- c. Guidance: Paragraph 3.5 of the Report provides a quote from the UK Forestry Standard and National Forestry Statistics which refers to the definition of woodland including '*woodland scrub*'. This is an incorrect quote, and this reference is in neither the 2011 nor 2017 versions of the guidance.

- (c) Failure to justify the extent of the TPO: No substantive justification has been given by the Council for the extent of the protection in the TPO, nor has an assessment of the trees selected for protection been provided, particularly in view of the clear and reasoned objection made on behalf of the Claimant by Barton Hyett Associates (attached at Appendix 3 to the Report). It has been admitted at paragraph 4.18 of the Report that "***not all the trees are visible from a public place***", but the Report concludes that the trees merit protection by reason of their "***future potential as an amenity, rarity, cultural or historic value, contribution to and relationship with the landscape and benefit they provide to the character of the area***". Any justification on these grounds must be explained to the extent that the reasoning cannot be adequately determined from the public documents prepared for the Planning Committee, which reasoning has not been provided in the Report.

It is further materially misleading to introduce the concept of 'rarity', 'cultural or historic value' and 'contribution to the landscape' within the conclusions of the Report without any evidence whatsoever to support an assertion that the trees are in any way rare, have cultural or historic value or make a contribution to the landscape (as distinct from visual amenity). The inclusion of this paragraph suggests to the Committee that some assessment has been made of these criteria, which does not appear to be the case, or in any event such assessment is not before the Committee.

The Planning Committee is due to consider the Report at its Committee Meeting on Monday 6th November 2017, however for the reasons set out above the Report is legally flawed. The errors made go to the heart of the matter which the Planning Committee will be considering, and so any decision made on the basis of the Report will be unlawful.

The effect of the Report is to significantly mislead the Planning Committee about material matters and the law relating to the TPO. The way the Report has been drafted, together with the photographs taken from neighbouring properties, raises questions about the impartiality of the author, and gives the appearance of bias.

The Court may properly exercise a higher degree of scrutiny of the Defendant's conduct in relation to tree preservation orders and apply an enhanced duty to deal with objectors fairly and openly on the basis that the Defendant is both promoting the TPO and determining objections made against it, in accordance with the case of *Wilkson Properties v Royal Borough of Kensington and Chelsea [2011]*.

There is a duty for the Defendant to give reasons for the recommendation given in the Report where the reasoning cannot be adequately determined from the public documents prepared for the Planning Committee, as was established by the case of *Oakley v South Cambridgeshire District Council [2017]*.

If the Report were presented in a lawful way, it is highly likely that the Planning Committee would come to different decision.

7. ACTION THE DEFENDANT IS EXPECTED TO TAKE

The Council is expected to sign a consent order agreeing to the quashing of any new TPO made on 6 November 2017.

Given the clear prejudice shown by Tree Officers, Andy Bucklitch and Gavin Boyes, whose independence as promoters of the TPO is irrevocably tainted, any further TPO should be supported by a report authored by an alternative Tree Officer or alternatively an independent and appropriately qualified expert.

8. DETAILS OF ANY DOCUMENTS THAT ARE CONSIDERED RELEVANT AND NECESSARY

The Claimant asks the Defendant to provide within one week of the date of this letter (and before any consideration of this matter by Planning Committee):

- (d) All written reports and site notes regarding the TPO and / or Bromsgrove District Council Tree Preservation Order (No. 12) 2016 – Tree/s on land at side and rear of 73 Linthurst Newton, Blackwell dated 12th January 2017, and the provisional Tree Preservation Order relating to the same site served in August 2016, relating to the visits made to site by tree officers Gavin Boyes and Andy Bucklitch or other officers involved. In particular, documentation relating to the assessment of the trees at the site as suitable for a tree preservation order (sometimes referred to as an amenity value assessment). The above request is for the disclosure of all written reports and site notes which are not annexed to the Report or the Committee Report dated 9th January 2017.
- (e) Any letters and emails sent to and received from the above officers and notes of any meetings or telephone conversation by or with the above officers in relation to the TPO and / or Bromsgrove District Council Tree Preservation Order (No. 12) 2016 – Tree/s on land at side and rear of 73 Linthurst Newton, Blackwell dated 12th January 2017, and the provisional Tree Preservation Order relating to the same site served in August 2016, and in particular communications to and / or from planning officers, local councillors (District and Parish), their clerks or staff, and residents. The above request is for the disclosure of all written reports and site notes which are not annexed to the Report or the Committee Report dated 9th January 2017.
- (f) A plan showing the locations from where all the photographs provided at Appendix 9 of the Report were taken, and confirmation of who took each of the photographs in question.

The Defendant is reminded of its strict duty of candour in this respect.

9. THE ADDRESS FOR REPLY AND SERVICE OF COURT DOCUMENTS

Harrison Clark Rickerbys Limited, 5 Deansway, Worcester, WR1 2JG. Correspondence to be sent for the attention of Mrs R. Andrews, quoting reference: RA03.ACC14-1

Yours faithfully

HARRISON CLARK RICKERBYS LIMITED

Your reference:

Our reference: RA03.ACC0014-0001.RA

Direct email: randrews@hclaw.com



6 November 2017

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PLANNING TEAM

BY EMAIL

t.lovejoy@bromsgroveandredditch.gov.uk

Dear Sirs

**TREE PRESERVATION ORDER (NO. 11) 2017
TREES ON LAND ADJACENT TO 73 LINTHURST NEWTOWN, BLACKWELL**

We refer to your letter of today's date, received by email at 1pm.

Thank you for confirming that the group of trees named 'G2' will be removed from the TPO (11) of 2017, however your letter and the update to Committee published on the Council's website this afternoon fail to address the vast majority of legal issues raised in our letter of 2nd November 2017.

The update to Committee does, in fact, raise a number of new issues about the way this matter has been dealt with by the Council, including the inclusion of a number of new photographs taken on 10th August 2016. These photos are extremely misleading as the titles suggest they relate to works carried out in August 2016, where this is not the case.

The reason for the inclusion of these photographs is not explained in the update to Committee, however we presume that this is intended to be some sort of evidence of that works were taking place on the site which warranted the original TPO being imposed. In fact, these photographs show the works carried out in July 2016 prior to any TPO being made, which were entirely lawful and primarily scrub clearance, as was noted in Gavin Boyes' Statement appended to the Committee Report in January (copy annexed hereto for ease of reference), where he states the works carried out had "**no detrimental influence on tree stock in the area**".

The inclusion of these photographs is, again, intended to mislead the Planning Committee as to the nature of works carried out on site, which is unlawful.

It is also noted that this new information was only provided a few hours before the Committee Meeting, and after the site visit had taken place, and so did not give sufficient opportunity for our

clients to respond on the new documents provided. This clearly prejudices our client and its ability to take advice and respond.

We also note that Gavin Boyes is due to be present at the Committee Meeting which shows a total disregard for the issues we have raised in relation to the independence of the Council's Officers as promoters of the TPO and the TPO being irrevocably tainted as a result.

It is also noted that the photographs had failed to be disclosed as part of our client's previous request for information under the Environmental Information Regulations 2004, in breach of those regulations.

The Committee Report and Committee Update remain legally flawed for the reasons set out in the draft letter before claim attached to our letter of 2nd November 2017. The site visit made by the Planning Committee this morning is also legally flawed as a result of the errors, and any decision made by the Planning Committee based on the Report, the Update, and the site visit would also be unlawful and susceptible to legal challenge.

Yours faithfully

Harrison Clark Rickerbys

HARRISON CLARK RICKERBYS LIMITED

Appendix A

Statement of events on 29th July 2016 reference land / vegetation management works on land adjoining the South-Westerly side of 73 Linthurst Newtown, Blackwell B60 1BS

Statement by: Mr Gavin Boyes, Senior Tree Officer, Bromsgrove & Redditch Councils

- We received an enquiry recorded on M3 reference number 201628462 on the 29th July 2016 from a concerned local resident of Linthurst Newtown reporting that a digger was working on land to the side of 73 Linthurst Newtown. The reporting resident was concerned that work may be being carried out to clear the land ready for development.
- Having checked the status of the land it was clear that there were no active TPO or conservation area restrictions on the site but it was under Green Belt designation.
- I therefore visited the site to investigate what work was being carried out, arriving at the site at approximately 11am on the 29th July 2016. I found a single workman on a small tracked 360 degree turn digger spreading type one grade road stone on a gateway entrance to the land immediately adjoining the South-Westerly side of the drive way serving 73 Linthurst Newtown. In addition to this work there was evidence of other work having taken place in light shrub and small tree clearance within the main body of the land immediately beyond the gated entrance to the field. This also appeared to be very recent and most likely undertaken that morning.
- On approaching the digger driver to gain information on the level and reason for the work he informed me that he was carrying out the work on behalf of the owner of 73 Linthurst Newtown who he advised was at home. I knocked on the door of this property with but no response came. The digger driver then phoned the resident on his mobile phone who then came out of the property to discuss the works.
- The owner was a Mr Fell who advised me he was only carrying out some work, partly to improve the entrance area to the field but mainly to improve the access to the driveway of 73 Linthurst Newtown as his wife particularly had found the entrance very tight to access and with low visibility when exiting the property. He indicated that the level of work intend was that which had been already carried out and was near to completion.
- This seemed a perfectly plausible explanation for this work and the level of work carried out had not had any detrimental influence on the major tree stock in area so the appeared no reason to pursue the matter further at that time.
- On return to the office I raised M3 enquiry number 201628462 to record my finding on site. Also as I was due to be on leave for the following two weeks I made my colleagues in the tree team aware of the enquiry and results of my site visit in case any additional issues may arise.

Your reference:

Our reference: RA03.ACC0014-0001.RA

Direct email: randrews@hclaw.com



16 November 2017

BY SPECIAL DELIVERY BY 1PM

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PLANNING TEAM

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Dear Sirs

LETTER BEFORE CLAIM – SECTION 288 CHALLENGE

TREE PRESERVATION ORDER (NO. 11) 2017

TREES ON LAND ADJACENT TO 73 LINTHURST NEWTOWN, BLACKWELL

We are instructed by Access Homes LLP in relation to Bromsgrove District Council's ("the Defendant") unlawful decision to rely on its report and update to its Planning Committee on the merits of Tree Preservation Order (No. 11) 2017 ("the TPO") in its Planning Committee Meeting on 6th November 2017.

The Defendant has failed to advise the Planning Committee in a way which is impartial, transparent, fair, or provides adequate (or any) reasoning for the recommendation made, and fails to accurately map and identify trees to be protected (and not protected). Further, the Defendant is promoter of the TPO and is also determiner of the TPO and therefore has an enhanced duty to act judiciously and without prejudice, which it has not.

Although the Defendant's Planning Committee resolved to defer the consideration of the merits of the TPO to a future Committee Meeting, we consider it to be firmly within the aims of the pre-action protocol to serve a formal letter before claim at this stage give the Defendant the opportunity to:

- a) understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents;
- b) make informed decisions as to whether and how to proceed;

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Cheltenham F. 01235 826000
Hereford T. 01432 366000
Thames Valley T. 01895 200000
Worcester T. 01905 744000
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- c) try to settle the dispute without proceedings or reduce the issues in dispute; and
- d) avoid unnecessary expense and keep down the costs of resolving the dispute.

This is a formal letter before claim in accordance with the pre-action protocol under the Civil Procedure Rules.

1. THE CLAIMANT

Access Homes LLP, The Exchange, Haslucks Green Road, Shirley, Solihull, West Midlands, B90 2EL.

2. DEFENDANT'S REFERENCE DETAILS

Defendant's reference: Tree Preservation Order (11) 2017
Defendant's Legal Officer: Tracy Lovejoy

3. DETAILS OF THE CLAIMANT'S LEGAL ADVISERS

Harrison Clark Rickerbys Limited, 5 Deansway, Worcester, WR1 2JG.
Reference: RA03.ACC14-1

4. DETAILS OF THE MATTER BEING CHALLENGED

The decision taken by Bromsgrove District Council ("the Defendant") to report to its Planning Committee on the merits of Tree Preservation Order (No. 11) 2017 ("the TPO") in a way which is manifestly not impartial, transparent, nor fair, nor which provides adequate (or any) reasoning for the recommendation made, nor accurately identifies the trees to be protected (and not protected).

5. DETAILS OF ANY INTERESTED PARTIES

None.

6. THE ISSUES

The Defendant has published a report to its Planning Committee to consider the confirmation of the TPO without modification ("the Report"), however the Report has not been prepared to the standard required by law.

The Report contains a number of misleading statements, inaccuracies, omissions, irrelevant and misleading photographs, and fails to provide adequate (or any) reasons for the recommendation made, and fails to accurately map and identify trees to be protected (and not protected). Further, the Report clearly demonstrates that the applicable law has been misinterpreted and misapplied.

The Claimant considers the following flaws within the Report are sufficient to amount to arguable grounds of challenge under the following headings

- (1) Material error(s) of fact
- (2) Misinterpretation of relevant guidance and policy
- (3) Failure to provide adequate reasons

Having considered the update to the Report published by the Defendant on the afternoon of the 6th November 2017 ("the Update"), just hours before the Committee Meeting, the Claimant also considers the following grounds of claim are made out:

- (1) Further material errors of fact
- (2) Apparent bias.

Grounds relating to the Report:

(1) Material errors of fact

- a. **Tree Felling:** At paragraph 3.6, the Report states that trees had been felled on the site prior to the making of the provisional Tree Preservation Order in August 2016. This is misleading: it was primarily scrub and light tree clearance on the land and no major tree stock had been felled. This was confirmed by the Defendant's Tree Officer on a site visit on 29th July 2016 and recorded in a Statement appended to the Committee Report for the Committee Meeting in January 2017. This Statement confirmed that "***the level of work carried out had not had any detrimental influence on the major tree stock in the area***". It is understood that tree works had been carried out within the garden of 73 Linthurst Newtown, however this property is in separate ownership, and does not form part of the site covered by the TPO. The statement at paragraph 3.6 of the Report, together with the similar statement at paragraph 4.3, and the reference in paragraph 4.6 of the Report to the "***level of work that was being gradually undertaken***" is designed to mislead the Planning Committee in relation to the justification for the TPO and to justify the Tree Officer's perception of a 'threat' to any trees on the site as discussed below.
- b. **Identity of landowner:** At paragraph 3.6 the Report states that the owner of the site is a '***property development company who are understood to specialise in acquisition of land for then onward sale once outline planning permission has been granted***'. This statement is made without any evidential foundation and is extremely misleading. Although the Claimant is an investment company owning real estate, it primarily owns let residential properties. It has not applied for planning permission nor sold sites on for development. The Report also claims that the Claimant is '***under the management of the Fell Family***', which is a false statement – the Claimant is a partnership where 50% is owned by an unrelated party.
- c. **Speculation about landowner and its intentions:** Although the Planning Practice Guidance confirms that local planning authorities may consider development pressures and landowner's

intentions when considering whether it is expedient to make a tree preservation order, the statements in paragraph 4.3 of the Report that *"the nature of the companies owning the land are understood to specialise in acquisition of land for then onward sale once outline planning permission has been granted"* and that *"it was reasonable to assume the site would be largely cleared of tree stock to accommodate development on the site"* are without evidential basis. The Report also justifies the making of the TPO at paragraph 4.6 by reference to *"the known nature of the companies who own the land"*, and so this speculation has clearly played a large part in the Officer's decision-making process. The Report fails to mention the fact that the landowners have cooperated and engaged with the Defendant throughout, and were prepared to accept a tree preservation order over a number of trees on the site. These statements and omissions are designed to mislead the Planning Committee and to taint the Planning Committee's perception of landowner.

- d. Previous legal challenge: The description of the previous legal challenge in paragraph 3.8 of the Report fails to note that the previous Tree Preservation Order was quashed as it was unlawfully made, and the Council paid the Claimant's costs of bringing the challenge. It must be made clear to the Planning Committee that the Claimant's actions in bringing the previous legal challenge were correct and justified due to the Defendant's legal errors. The wording of paragraphs 3.6 to 3.8 of the Report suggest that the Claimant was unjustified in bringing the legal challenge, which serves to further mislead the Planning Committee.

Mistake of fact giving rise to unfairness is an established ground of challenge. The planning authority has a duty to ensure that its decisions are taken on the correct factual basis. The Report contains a number of misleading statements which amount to mistakes of fact if adopted by the Committee. These erroneous 'facts' form an important part of the factual matrix being taken into account by the Committee and used by the officer to justify the proposed TPO. Their inclusion within the Report gives rise to unfairness and so amounts to an error of law within the Report.

(2) Misinterpretation of relevant law and policy:

- a. Visibility from private gardens: The Report refers to views of the trees proposed to be protected from private gardens in a number of places, including paragraphs 4.4, 4.7, 4.10, 4.17, and a number of the photographs provided at Appendix 9 to the Report. The merits of the TPO must be considered on the basis of the public amenity, and any amenity provided to private properties cannot provide a lawful consideration for the confirmation of the TPO. The Report is misleading the Planning Committee and there is a significant risk of the Planning Committee taking unlawful considerations into account as a result.
- b. Tempo Assessment: All the trees are marked in the Tempo Assessment as having an 'expediency' score of 3, which is the equivalent of a 'foreseeable threat'. If the threat were marked accurately, the 'expediency' score should be reduced. Additionally, a degree of visibility is given to trees T5, T6, T7, T8, T9, T18, and T19, where these trees are not visible at all from public places. Similarly, if the visibility was marked accurately, the 'visibility' score would be reduced. Further, some trees are incorrectly marked for 'condition' and 'longevity' and should be reduced. If the trees were marked accurately, a number of them would fall below the threshold for suitability for inclusion in the TPO.

(3) Failure to provide adequate or any reasons for the extent of the TPO/ error of law in failing to apply the correct test:

The reasons given for the decision are inadequate to the extent that it cannot be determined whether the officer applies the correct test; it would appear that he does not.

The Report takes a confused approach to visibility and expediency. The Report accepts at 4.18 that "***not all the trees are visible from a public place***". The Report also reaches the conclusion at paragraphs 4.4 and 4.10 that the trees offer an "***acceptable level***" of visual amenity. These conclusions are then coupled with the officer's (flawed) conclusions as to the level of threat in order to justify the TPO. In doing so, the officer essentially applies the test of "if I can see a tree, and that tree might be removed, it should be protected". That is not the test. Visibility, whilst an essential component of amenity, is not the whole picture. A tree does not have amenity value simply because it can be seen. Otherwise, all visible trees would merit protection and the TPO regime would serve no purpose.

No substantive justification has been given by the Defendant for the extent of the protection in the TPO, other than the Tempo assessment discussed above. No justification or explanation has been given in response to the clear and reasoned objection made on behalf of the Claimant by Barton Hyett Associates (attached at Appendix 3 to the Report). It has been admitted at paragraph 4.18 of the Report that "***not all the trees are visible from a public place***", but the Report concludes that the trees merit protection by reason of their "***future potential as an amenity, rarity, cultural or historic value, contribution to and relationship with the landscape and benefit they provide to the character of the area***". Any justification on these grounds must be explained to the extent that the reasoning cannot be adequately determined from the public documents prepared for the Planning Committee, which reasoning has not been provided in the Report. As it stands, this conclusion is wholly disconnected to the remainder of the Report said to justify this conclusion and as such, is without proper reasoning.

It is further materially misleading to introduce the concept of 'rarity', 'cultural or historic value' and 'contribution to the landscape' within the conclusions of the Report without any evidence whatsoever to support an assertion that the trees are in any way rare, have cultural or historic value or make a contribution to the landscape (as distinct from visual amenity). The inclusion of this paragraph suggests to the Committee that some assessment has been made of these criteria, which does not appear to be the case, or in any event such assessment is not before the Committee.

Grounds relating to the Update:

The Defendant allowed its Planning Committee to attend a site visit on 6th November 2017 based on the Report as published, despite the above issues having been raised by the Claimant in a letter dated 2nd November 2017.

Following the site visit on the morning of the 6th November 2017, the Defendant published the Update which was published just hours before the Committee Meeting.

Although the Update changed the Defendant's recommendation such that a modified version of the TPO was recommended for confirmation, which excluded the group of trees 'G2', the Update failed to address the above concerns with the Report, and also created the following additional legal errors:

(1) Further material errors of fact:

- a. Tree Felling: A number of photographs were appended to the Update, marked as taken on 10th August 2016. The photographs were published on the Defendant's website marked as "**Pictures of trees felled August 2016**" and the Update states that "**appended to this update are photographs taken at the time which show some tree felling**". These photographs, although may have been taken on 10th August 2016, relate to works carried out prior to the making of the provisional Tree Preservation Order in August 2016 which were carried out lawfully. As stated above, the Defendant's Tree Officer visited the site on 29th July 2016 and recorded his assessment of the works carried out in a Statement which was appended to the Committee Report for the Committee Meeting in January 2017. This Statement confirmed that "**the level of work carried out had not had any detrimental influence on the major tree stock in the area**". The mislabelling of the photographs on the Defendant's website and the statement in the Update, is designed to mislead the Planning Committee and public in relation to the justification for the TPO and to justify the Tree Officer's perception of a 'threat' to any trees on the site.

(2) Apparent Bias:

In spite of the clear concerns raised in our letter of 2nd November 2017 regarding the prejudice shown by Tree Officers, Andy Bucklitch and Gavin Boyes, and their ability to act independently as promoters of the TPO, the Defendant stated in the Update that "**Mr Boyes will explain the context of those photographs**" and "**Mr Boyes will also answer any further questions from members about the amenity test including the visibility of the trees, the TEMPO assessment, the future potential amenity of the trees, and rarity, cultural or historic value and contribution to the landscape and area**". Given the concerns raised about prejudice and the TPO being irrevocably tainted as a result, a verbal update on these important matters by one of the Officers about which concerns have been raised is sufficient to give rise to an appearance of bias.

A fair minded and informed observer would conclude that there was a real risk of apparent bias in these circumstances. The Claimant relies upon the matters set out within its letter of 2 November 2017 and the following:

- a. The Council has previously accepted that its procedure in allowing the promoting officer unfettered and unaccompanied access to the Committee was sufficient to give rise to procedural unfairness infecting the previous TPO. The same officer and same committee members are now involved in this TPO concerning the same land and substantially the same trees. The bias apparent (and accepted) within the previous decision has not been remedied and continues to infect this decision;
- b. Paragraph 4.3 of the Report and the (it is considered, deliberate) misstatement as to the operations of the Claimant. This inaccuracy appears to have been included as a pejorative reference to the Claimant's business aimed at colouring the Committee's views of the Claimant;

- c. The acknowledged failure to serve the new TPO on the Claimant. The Council had knowledge of the Claimant's involvement due to the previous proceedings and was well aware of its business address and address for service via its legal representatives. The Report makes no attempt to apologise or explain this error and in the circumstances, the failure to serve the TPO on the Claimant can be seen as nothing short of a further deliberate attempt to prejudice the Claimant's position; and
- d. Paragraph 4.6 contains a further erroneous and pejorative reference to the Claimants "known nature"

These matters, taken together with the issues raised in the Claimant's letter of 2 November are sufficient to give rise to an appearance of bias on the part of the two named officers. Their involvement in the promotion of the TPO infects the decision with an appearance of bias, amounting to a legal flaw in the decision.

We understand that the Planning Committee deferred consideration of this matter at the Committee Meeting on the evening of 6th November 2017 as:

1. The documents the Defendant provided to the Planning Committee were barely visible due to the poor quality of the copies provided;
2. The Planning Committee required more time to consider the documents provided at the Committee Meeting; and
3. The Planning Committee had been unable to identify some of the trees to be protected by the TPO during their site visit.

This, in itself, is evidence of the inadequate nature of the Report and the Update.

For the reasons set out above the Report and the Update are legally flawed. The errors made go to the heart of the matter which the Planning Committee will be considering, and so any decision made on the basis of the Report and Update will be unlawful.

The effect of the Report and Update is to significantly mislead the Planning Committee about material matters and the law relating to the TPO. The way the Report and Update have been drafted, together with the photographs taken from neighbouring properties, raises questions about the impartiality of the author, and gives the appearance of bias.

The Court may properly exercise a higher degree of scrutiny of the Defendant's conduct in relation to tree preservation orders and apply an enhanced duty to deal with objectors fairly and openly on the basis that the Defendant is both promoting the TPO and determining objections made against it, in accordance with the case of Wilkson Properties v Royal Borough of Kensington and Chelsea [2011].

There is a duty for the Defendant to give reasons for the recommendation given in the Report where the reasoning cannot be adequately determined from the public documents prepared for the Planning Committee, as was established by the case of Oakley v South Cambridgeshire District Council [2017].

If the Report and Update were presented in a lawful way, it is highly likely that the Planning Committee would come to different decision.

7. ACTION THE DEFENDANT IS EXPECTED TO TAKE

Given the clear prejudice shown by Tree Officers, Andy Bucklitch and Gavin Boyes, whose independence as promoters of the TPO is irrevocably tainted, any further report to the Defendant's Planning Committee in relation to the TPO should be supported by a report authored by an alternative Tree Officer or alternatively an independent and appropriately qualified expert.

The revised report must address the issues raised in this letter, so as to ensure that the Committee are advised in a lawful way.

In the event that the Defendant proceeds to Planning Committee without the issues raised in this letter being addressed, the Defendant is expected to either revoke the TPO or sign a consent order agreeing to the quashing of the TPO made.

8. DETAILS OF ANY DOCUMENTS THAT ARE CONSIDERED RELEVANT AND NECESSARY

The Claimant asks the Defendant to provide within fourteen days of the date of this letter (and before any further consideration of this matter by Planning Committee):

- a. All written reports and site notes regarding the TPO and / or Bromsgrove District Council Tree Preservation Order (No. 12) 2016 – Tree/s on land at side and rear of 73 Linthurst Newton, Blackwell dated 12th January 2017, and the provisional Tree Preservation Order relating to the same site served in August 2016, relating to the visits made to site by tree officers Gavin Boyes and Andy Bucklitch or other officers involved. In particular, documentation relating to the assessment of the trees at the site as suitable for a tree preservation order (sometimes referred to as an amenity value assessment). The above request is for the disclosure of all written reports and site notes which are not annexed to the Report, the Update, or the Committee Report dated 9th January 2017.
- b. Any letters and emails sent to and received from the above officers and notes of any meetings or telephone conversation by or with the above officers in relation to the TPO and / or Bromsgrove District Council Tree Preservation Order (No. 12) 2016 – Tree/s on land at side and rear of 73 Linthurst Newton, Blackwell dated 12th January 2017, and the provisional Tree Preservation Order relating to the same site served in August 2016, and in particular communications to and / or from planning officers, local councillors (District and Parish), their clerks or staff, and residents. The above request is for the disclosure of all written reports and site notes which are not annexed to the Report, the Update, or the Committee Report dated 9th January 2017.
- c. Confirmation of who took each of the photographs appended to the Report at Appendix 9, and the date that the photographs were taken. Additionally confirmation of how access to the properties of local residents was arranged to take such photographs.

- d. Any additional photographs taken by or provided to officers in support of the TPO which have not been disclosed to date. Confirmation of who took each of the photographs, and the date that the photographs were taken. Additionally confirmation of how access to the properties of local residents was arranged to take such photographs, if applicable.

The Defendant is reminded of its strict duty of candour in this respect. In particular, the duty of candour applies as soon as a public body is aware that someone is likely to test a decision or action affecting them; it applies even at the pre-action stage.

9. THE ADDRESS FOR REPLY AND SERVICE OF COURT DOCUMENTS

Harrison Clark Rickerbys Limited, 5 Deansway, Worcester, WR1 2JG. Correspondence to be sent for the attention of Mrs R. Andrews, quoting reference: RA03.ACC14-1

Yours faithfully

Harrison Clark Rickerbys

HARRISON CLARK RICKERBYS LIMITED