

**PLANNING
COMMITTEE**

4th December 2017

TREE PRESERVATION ORDER (No.11) 2017

Trees on land adjacent to 73 Linthurst Newtown, Blackwell

Relevant Portfolio Holders	P J Whittaker (Environmental Services and Leisure)
Portfolio Holder Consulted	No
Relevant Head of Service	Head of Environmental Services
Ward(s) Affected	Linthurst
Ward Councillor(s) Consulted	No
Non-Key Decision	

1. SUMMARY OF PROPOSALS

- 1.1 The Committee is asked to consider the confirmation of Tree Preservation Order (No.11) 2017 relating to trees and woodland on land adjacent to 73 Linthurst Newtown, Blackwell.

2. RECOMMENDATIONS

- 2.1 It is recommended that Tree Preservation Order (No.11) 2017 relating to trees and woodland on land adjacent to 73 Linthurst Newtown, Blackwell ('the Site') is confirmed with modifications as shown on the plan and schedule attached at Appendix 2.

3. KEY ISSUES

Financial Implications

- 3.1 There are provisions for compensation in specified circumstances, if further to confirmation of the order, consent to carry out works on trees is refused or granted subject to conditions. There are also provisions for a statutory challenge against the Order if the order is deemed to be made or confirmed unlawfully. The landowners have indicated, in their letters attached at Appendix 3, that there is a likelihood of statutory challenge.

Legal Implications

- 3.3 The Town and Country Planning (Tree Preservation) (England) Regulations 2012 cover this procedure. The power to make a TPO is found at section 198 of the Town and Country Planning Act 1990.

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Section 198 of the TCPA 1990 provides (emphasis added):

“(1) If it appears to a local planning authority that it is **expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area, they may for that purpose make an order** with respect to such trees, groups of trees or woodlands as may be specified in the order.

(2) An order under subsection (1) is in this Act referred to as a “tree preservation order”.

Regulation 7 of the Town and Country Planning (Tree Preservation) (England) Regulations 2012 provides (emphasis added):

“7.—(1) The authority **shall not confirm an order which they have made unless they have first considered objections and representations duly made in respect of it and not withdrawn.**

(2) An authority **may confirm an order with or without modifications.**

(3) Where an order is confirmed it shall be endorsed to that effect and the endorsement shall also indicate—

(a) that the order was confirmed with modifications or without modifications, as the case may be; and

(b) the date on which it was confirmed.

(4) Where an order is confirmed with modifications, the modifications shall be indicated in the order by distinctive type or other means.

(5) A modification under paragraph (2) may not add to the Schedule to the order (and the map) references to a tree to which the order did not previously apply.”

3.4 As set out in 3.3 above, the power to make a TPO is found in section 198 of the TCPA 1990. A TPO may be made where it appears that such an order is ‘expedient in the interests of amenity to make provision for the preservation of trees or woodlands’. The question is therefore: is it expedient in the interests of amenity to confirm this order? As also noted at 3.3 above it is possible for this committee to confirm this order without modification, confirm the order with modification or not to confirm the order.

The National Planning Practice Guidance (PPG) provides guidance on what ‘amenity’ and ‘expedient’ mean in practice and is attached at Appendix 7. Members are invited to consider this guidance carefully.

Service / Operational Implications

Background

- 3.4 TPO 11 of 2017 consists of a woodland area, 6 groups and 19 individual trees as shown in the schedule to the order (Appendices 1 and 2). A previous tree protection order (TPO 13 of 2016 – which I will refer to as the ‘2016 TPO’) was made on this site on 3rd August 2016 and confirmed by this committee on 9th January 2017. The 2016 TPO, which is attached at Appendix 10, covered a wider area and was made because of the risk of trees within the TPO being felled. The risks were assessed on the basis of reports from people in the area, actual felling of trees, site visits and a desktop assessment of the landowners.
- 3.5 The 2016 TPO was challenged in the High Court by the landowners, under section 288 TCPA 1990. The 2016 TPO was quashed by consent order, meaning officers, using their delegated powers, agreed that the TPO should be quashed before the courts had a chance to hear the matter. The order was quashed for the reasons stated in the consent order (see Appendix 11) and explained further below:
- (a) The extent of “Woodland” designation cover within BDC TPO (13) 2016 was found to be too extensive due to the tree volume in some sections of the site being lighter in density than first thought.
 - (b) Also although it is the Council’s usual practice for the Development Control Manager to lead the site visit (albeit with the tree officer present), on this occasion the tree officer, who was promoting the TPO was the sole officer in attendance at the site visit before the committee meeting on 9 January 2017. It was therefore accepted by the Council that the attendance of the site visit by the tree officer without the Development Control Manager, as is the usual practice of the Council, was sufficient in the circumstances of this case to give the impression of procedural unfairness.
- 3.6 Officers are still of the view that trees should be protected on the site and TPO 11 of 2017, the current order, was made on 4th of July 2017. Members are asked to confirm the order with modifications, having considered the officer’s assessment of the statutory test, PPG extract, the objections and the letters of support.

Amenity (First Statutory Test)

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- 3.7 The area of Blackwell contains a high volume of mixed species and varied age class trees that add greatly to the overall character of the area. The trees within this site contribute to that character of the area in that they are seen from a number of local properties, and public vantage points off Foxes Close, Linthurst Newtown and Public Foot Path / Right of Way to the north of the site. Being visible from these locations, they therefore contribute to the amenity of the area.
- 3.8 Apart from the visual amenity, the trees offer a high level of habitat and biodiversity value to the area as they include a woodland and small group of orchard trees and have great present and future potential amenity to residents and visitors (both present and future) of the site. The trees are also valuable in their own right as can be seen on the site visit and in the TEMPO Tree Evaluation attached at Appendix 13.
- 3.9 The PPG states that:

“The woodland category’s purpose is to safeguard a woodland as a whole. So it follows that, while some trees may lack individual merit, all trees within a woodland that merits protection are protected and made subject to the same provisions and exemptions. In addition, trees and saplings which grow naturally or are planted within the woodland area after the Order is made are also protected by the Order.” (Tree Protection Orders, paragraph 028)

Woodland is defined by the Forestry Commission and the UK Government in the UK Forestry Standard and national Forestry Statistics (2016) as the following:

‘land under stands of trees with a canopy cover of at least 20%, including integral open space. There is no minimum height for trees to form a woodland at maturity, so the definition includes woodland scrub’

The woodland area included within the order clearly has a density of trees that provide well above the 20% level of canopy cover required therefore the use of this designation is felt to be appropriate on this site. The woodland area chosen for the current TPO (11 of 2017) is relevant to the nature and density of valuable tree stock on the site.

Expediency (Second statutory test)

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3.10 Expediency relates, as shown in the PPG extract in Appendix 7, to the risk of trees being felled, pruned, or damaged in ways that would have a significant impact on the amenity of the area. Protection of trees on this site started in July/August 2016. As stated the 2016 TPO was instigated as a result of reports from residents in the area about cutting down of trees. Officers researched the landowners and the site, and concluded that a provisional tree preservation order was justified. Visits to the site following the provisional order showed that trees had been felled on site (see for example the photographs taken in August 2016 which appear to show freshly cut trees - Appendix 12) and members were asked to confirm the 2016 TPO, which they did.

3.11 The current order is a continuation of the process started in 2016 to protect the trees on this site and nothing has happened to change the officers' view of the risk of the loss of the trees. Officers are of the view confirmation of the order, subject to the modifications requested and, in light of the statutory test and national guidance, is justified.

Modifications

3.12 The modifications are made to avoid the risk of non-compliance with the consent order attached at Appendix 11. The consent order was made on the basis that the tree preservation order following the 2016 TPO would be no more restrictive than the plan and schedule attached to the order. Provisional TPO 11 (2017) is less in extent than the plan attached to the consent order but contains a group of trees (formerly labelled G2) which was not on the plan attached to the consent order. Officers were initially of the view that this addition did not breach the terms of the consent order but, to avoid the risk of breach of the consent, ask members to agree to the removal of trees at the confirmation stage.

3.13 Other modifications have also been made to clarify the plan and schedule.

4.0 Representations Received (Objections)

4.1 The following objections/representations have been received in respect of the Bromsgrove District Council TPO (11) 2017 see appendix (3).

4.2 Objections and representations on behalf of Access Homes Limited, the owners of the site, during this process:

(a) Letter from Harrison Clark Rickerbys Solicitors dated 6th July 2017.

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- (b) Letter from Harrison Clark Rickerbys Solicitors dated 4th August 2017.
 - (c) Letter from Harrison Clark Rickerbys Solicitors dated 2nd November 2017 containing a draft letter before action.
 - (d) Letter from Harrison Clark Rickerbys Solicitors dated 6th November 2017.
 - (e) Letter before action from Harrison Clark Rickerbys Solicitors dated 16th November 2017.
 - (f) Report objection from Barton Hyett Associates dated 28th July 2017.
- 4.3 An e-mail objection dated 4th August 2017 has been received from Mr Fell, the occupier of 73 Linhurst. See appendix (4)
- 4.4 The letters from Harrison Clark Rickerbys address a number of legal points which will be summarised, along with the officers' responses below. My comments in relation to the substantive tree-related points raised in the objection from Barton Hyett Associates and Mr M Fell are as follows:
- (a) The large proportion of trees within the site are visible from a number of public vantage points around the site including Linhurst Road, Foxes Close and Public Foot Path to the North of the site (see the map attached at Appendix 6 highlighting the location of the public footpath to the North of 73 Linhurst Newtown, Appendix 9 photographs of site and Appendix (8) showing the locations from which the photographs were taken). They are also visible from a number of local properties and gardens. Therefore, I feel that the trees do offer an acceptable level of public visual amenity value and it is appropriate and in the interest of the amenity of the area to make the order.
 - (b) Due to the level of visibility both from public vantage points and local properties, I feel that the loss of any currently protected trees within the site would undoubtedly have a detrimental influence on the outlook from these vantage points and the overall character of the area and therefore the enjoyment of passers-by and local residents would be affected. As well as the visual amenity benefits the tree stock within the site especially the woodland area also offers a high level of habitat value to the area. If any major volume of tree stock within the site was lost or it would undoubtedly have a major impact on the amount of wild life that benefit offered by the overall tree cover and could drive the wild life from within the site and possibly wider area of adjoining land. The PPG indicates that these other factors are relevant to an assessment of

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amenity but they are not alone sufficient to warrant making an order. The PPG also highlights under the heading “Individual, Collective and Wider Impact” that an assessment of the particular importance of an individual tree, group of trees or of woodlands by reference to their characteristics is advised. One criteria under this heading is ‘future potential as an amenity’. I consider that the trees would have great future potential as an amenity to the residents, visitors or users of any future development on this site.

- (c) The large majority of trees within the site are visible from a number of public vantage points around the site including Linthurst Road, Badger Way and Public Foot Path to the North of the site (see photographs and plan and Appendices 6,8 and 9). They are also visible from a number of local properties and gardens. Therefore the trees do offer an acceptable level of visual amenity value and it is appropriate to make the order in the interest of amenity.
- (d) It is accepted that the visibility of some trees and certainly trees within the woodland block is limited. Unsurprisingly, some trees within the woodland block obscure other trees within the woodland block. The PPG states:

“The extent to which 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 be visible from a public place such as a road or footpath, or accessible by the public”.

It is clear that the guidance does not require that every single tree must be visible from a public place. The PPG goes on to highlight within the next paragraph titled **Individual, Collective and Wider Impact**

“Public visibility alone will not be sufficient to warrant an Order”.

- (e) The authority is advised to also assess the particular importance of an individual tree, of groups of trees or 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. Therefore, I feel that even though some trees are not

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visible from a public place or individually visible there is justification for their inclusion within the order in view of their size and form, present value and future potential as an amenity and contribution to the landscape and the character of the area.

- (f) The TEMPO assessment chart showing how the trees were graded in terms of condition, longevity, visibility, expediency and other factors are attached in appendix 13. The TEMPO assessment was sent to Access Homes Limited on 22 August 2017 further to an information request.

4.5 Email received from Mr Matt Fell dated 4th August 2017 as shown Appendix 4. My comments in relation to the points raised within the letter are as follows:

- (a) I feel that the group designation of G1 within the order is appropriate as although if evaluated individually arguably some trees might not be of sufficient quality to warrant TPO protection. Together they form a valuable cohesive group that is highly prominent to users of Linthurst Newtown and residents opposite the site therefore offering a high degree of visual amenity value to the area.
- (b) T15 is an appropriate distance from the property and although there is some minor root plate damage to the local paved area there is no indication that it might damage the property. There is some squirrel damage within the crown but there are no obviously over weighted branches this could be managed by a suitable level of pruning.
- (c) T16 & T17 are partially visible from vantage points on the Linthurst Road and are highly visible from the gardens and properties to the South Eastern side of 73 Linthurst Newtown offering a high degree of screening and visual amenity value to residents. T17 Willow has received some crown management pruning to ensure a safe crown distance is maintained from the local power lines. However, the tree is of a good age and there is a substantial amount of crown remaining on what is a perfectly viable tree.
- (d) I accept that not all of the trees identified within the new order are visible from a public place but they merit consideration in view of their future potential as an amenity, contribution to and relationship with the landscape and benefit they provide to the character of the area.

4.6 Officers' (legal and environmental) responses to the legal objections in Harrison Clark Rickerbys Solicitors are as follows:

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- (a) Service: the service on the wrong company was an error and does not appear to have prejudiced the landowners in any way since they have submitted several objections during this process. The landowner was sent the current order immediately the officers became aware of the error.
- (b) Whether the order is more restrictive than the plan attached to the Consent Order dated 20th June 2017 (Appendix 11): This point is dealt with in paragraph 3.12 of this report and the requested modifications.
- (c) Legal fees: The legal fees have now been paid and this issue is not relevant to committee's considerations.
- (d) Lack of reasons for the current order: This complaint has been superceded as the officer has sent the landowner a copy of the TEMPO report and through the November report, the landowner is well aware of the Council's reasoning for the provisional order. The Council has invited comments from the landowner even outside the 28 day statutory period.
- (e) Selection of consultees: Officers consider this point to be without merit and note that it is not pursued in subsequent correspondence. The complaint appears to be aimed at the fact that the Council notified neighbouring occupiers of the TPO. As demonstrated by the extract below, this is entirely in accordance with the regulations and guidance.

"5.— Procedure after making an order

(1) As soon as practicable after making an order, and before confirming it, the authority which made it shall—

(a) serve on the persons interested in the land affected by the order—

(i) a copy of the order; and

(ii) a notice containing the particulars specified in paragraph (2);

(b) make a copy of the order available for public inspection, in accordance with paragraph (3); and

(c) in the case of an order made following service of a notice under section 211(3) (preservation of trees in conservation areas), serve on the person who served that notice the information specified in sub-paragraph (a).

(2) The particulars mentioned in paragraph (1)(a)(ii) are—

(a) the reasons for making the order;

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(b) a statement that objections or other representations with respect to any trees, groups of trees or woodlands specified in the order may be made to the authority in accordance with regulation 6;

(c) the date, being at least 28 days after the date of the notice, by which any objection or representation must be received by the authority; and

(d) a copy of regulation 6.

(3) A copy of the order shall be made available for inspection, free of charge, at all reasonable hours, at the offices of the authority by whom the order was made; and where an order is made on behalf of an authority, it shall be made available for inspection also at the offices of the authority on whose behalf it was made.

From the PPG:

Who must the local authority inform?

The 'persons interested in the land affected by the Order' are every owner and occupier of the land on which the protected trees stand and every other person the authority knows is entitled to carry out certain works to any of those trees or in relation to the affected land.

The authority may decide to notify other people, groups, authorities and organisations (such as parish councils and the Forestry Commission). It can also consider displaying site notices.

Paragraph: 032 Reference ID: 36-032-20140306

Revision date: 06 03 2014

- (f) Various freedom of information requests and complaints: These have been dealt with and continue to be dealt with by the Freedom of Information team. The plan requested in the letter of 2nd November 2017 and other letters is considered relevant to the committee's considerations and is attached at Appendix 8.

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- (g) Material errors of fact (tree felling): The level of threat to the trees is summarised in paragraphs 3.4, 3.10 and 3.11 of this report. Also, the threshold for deciding whether there are risks to the trees is contained in the PPG at appendix 7 of the report of the report. Although some of the detail in the last report has been streamlined especially excessive detail about the 2016 TPO, which has now been quashed, officers consider that there is sufficient threat for the current TPO to be confirmed.
- (h) Material errors of fact (Identity of landowner and speculations about its intentions): This has largely been removed from the report as stated the threat to the trees is summarised in paragraphs 3.4, 3.10 and 3.11 of the report to be considered along with the guidance in the PPG.
- (i) Material errors of fact (previous legal challenge): This has been accurately reported in the report (see paragraph 3.12). Members are reminded that the 2016 TPO has been quashed by consent and that they are being asked to consider a new order.
- (j) Visibility from private gardens, TEMPO assessments and Guidance: The first two of these points are substantive tree-related points rather than legal or procedural points. The amenity test, including the TEMPO assessment, have been dealt with in paragraphs 3.7 to 4.5 of this report. The definition of woodland is contained in the Forestry Commission's Forestry Statistics (2017) is contained in Appendix (14) of this report and does not differ from the guidance contained in paragraph 3.6 of this report or from last month's report.
- (k) Photographs taken on 10th August 2016 attached to November 2017 update (and appendix 13 of this report): This point appears in Harrison Clark Rickerbys letter of 16th November 2017 and is, in the officers' view, without merit. I visited the site, in relation to the 2016 TPO, and concluded that there was no risk. The part of the site I visited was immediately area immediately around the driveway entrances to 73 Linthurst Newtown and gated entrance to the adjoining field, where work was reportedly being under taken to improve the access to 73 Linthurst Newtown. My colleague, Andrew Bucklitch visited the site on 10th August, following further complaints and after the making of the 2016 order and saw and photographed evidence of tree cutting. There is no 'mislabelling' of the photographs.

Officers consider that allegations of bias, deliberate frustration of the process and failure to advise the committee properly are untrue and unsubstantiated.

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Amendments have been made to officer's report for the purpose of streamlining the information given to members and condensing it, as much as possible, to information relevant to the decision to confirm the TPO and information required by legislation.

5.0 Representations Received (Support)

- 5.1 We have received 21 correspondence of support for the order from local residents as summarised in Appendix 5.
- 5.2 There is clearly a very strong local concern regarding the potential threat of mismanagement or loss of trees on the site as evidenced by the letters of support we have received for both the previous and revised new order.

6.0 conclusions and recommendations

- 6.1 Having given full consideration to all the points raised in terms of objection and extensively surveyed and evaluated the tree stock and its relevance in this setting I feel that it is worthy of TPO protection. I therefore recommend that the order as shown in Appendix 1 is confirmed with modification set out in Appendix 2.

7. Customer / Equalities and Diversity Implications

- 7.1 The customers have been provided with the relevant notification and the responses received are attached in the appendices. The customers will receive notification by post of the decision of the committee.
- 7.2 Equalities and Diversity implications- None

8. RISK MANAGEMENT

- 8.1 There are no significant risks associated with the details included in this report.

9. APPENDICES

Appendix 1– Copy of Provisional Order

Appendix 2 - Copy of Proposed Modified order and schedule

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- Appendix 3 – Copy of Objections to BDC TPO (11) 2017 from Harrison Clark Rickerbys Solicitors and Barton Hyett Arboricultural Consultants
- Appendix 4 – Copy of Objection from Mr Fell Dated 4th August 2017
- Appendix 5 – Summary of positive representations
- Appendix 6 – Plan showing location of Public Footpath
- Appendix 7 – Copy of National Planning Policy Guidance: extract on Tree Preservation Order
- Appendix 8 - Plan of vantage points from which photographs were taken
- Appendix 9 – Photographs of trees from local vantage points
- Appendix 10 – Copy of TPO 13 (2016)
- Appendix 11– Copy of consent order dated 20 June 2017
- Appendix 12 – Photographs of trees which had been cut on site taken on 10 August 2016
- Appendix 13 – TEMPO Assessment
- Appendix 14 – Forestry Commission Statistics Information.

10. BACKGROUND PAPERS

Copy of representations summarised in Appendix 5 – please contact Gavin Boyes or see representations in this link - <http://svmodern.gov.bromsgrove.gov.uk:9072/documents/s34582/Appendix%206%20-%20Messages%20of%20Support.pdf>

11. KEY

TPO - Tree Preservation Order

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