

# APPENDIX (3)

AH\_73LN | TPOob | PEB | 28.07.2017



## 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

## CONTENTS:

Page No:

1.	INTRODUCTION	1
2.	GUIDANCE	2
3.	GROUNDS FOR OBJECTION	4
4.	CONCLUSIONS	8

## 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:

<b>c) Relative public visibility &amp; suitability for TPO</b> <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 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.



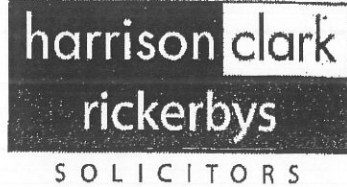
Paul Barton, *MSc, MArborA*

28th July 2017

Your reference:

Our reference: RA03.ACC0014-0001

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6<sup>th</sup> July 2017

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PLANNING TEAM

BY POST AND EMAIL: [t.lovejoy@bromsgroveandredditch.gov.uk](mailto:t.lovejoy@bromsgroveandredditch.gov.uk)

Dear Sirs,

**Bromsgrove District Council Tree Preservation Order (11) 2017 dated 4<sup>th</sup> 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 4<sup>th</sup> July 2017 ("the TPO").

We also write further to the quashing of Tree Preservation Order (13) 2016 on 20<sup>th</sup> 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 11H  
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  
Hamas 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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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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4<sup>th</sup> August 2017

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PLANNING TEAM

**DELIVERED BY HAND AND EMAIL: [r.sultana@bromsgroveandredditch.gov.uk](mailto:r.sultana@bromsgroveandredditch.gov.uk)**

Dear Sirs,

**OBJECTION to Bromsgrove District Council Tree Preservation Order (11) 2017 dated 4<sup>th</sup> 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 4<sup>th</sup> 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 20<sup>th</sup> 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 21<sup>st</sup> 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*



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2 November 2017

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**PLANNING TEAM**

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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.

0739

CHAMBERS



Lexcel



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 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, 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 6<sup>th</sup> 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.
- q
- (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@hcrlaw.com



6 November 2017

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**PLANNING TEAM**

**BY EMAIL**

[t.lovejoy@bromsgroveandredditch.gov.uk](mailto: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 2<sup>nd</sup> 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 10<sup>th</sup> 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 2<sup>nd</sup> 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 29<sup>th</sup> 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 29<sup>th</sup> 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 29<sup>th</sup> 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@hcrlaw.com



16 November 2017

**BY SPECIAL DELIVERY BY 1PM**

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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 6<sup>th</sup> 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;

- 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 6<sup>th</sup> 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 29<sup>th</sup> 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 6<sup>th</sup> November 2017 based on the Report as published, despite the above issues having been raised by the Claimant in a letter dated 2<sup>nd</sup> November 2017.

Following the site visit on the morning of the 6<sup>th</sup> 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 10<sup>th</sup> 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 10<sup>th</sup> 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 29<sup>th</sup> 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 2<sup>nd</sup> 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 6<sup>th</sup> 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**



the trees on site, however only the trees which merit protection, in accordance with the Government's planning policy tests, should be protected.

After extensive site visits over such a protracted period of time it is inexcusable that the Council is promoting a Tree Preservation Order where the Council's own Officers still cannot correctly identify and map the trees to be protected. This confirms the failure of the Council to correctly apply the correct planning policy tests, and of the apparent or actual bias of the Council's Officers with regard to their independent and appropriate and lawful promotion of the Tree Preservation Order.

Notwithstanding the assertions the Council have made in the revised Committee Report prepared for the December Planning Committee Meeting, the legal challenge of Tree Preservation Order (No. 12) 2016 earlier this year was successful because the Council's actions were unlawful.

Although Tree Preservation Order (No. 12) 2016 was quashed by consent, the Council's assertion that the Court had not considered the matter is incorrect. The legal challenge was considered by the Honourable Mr Justice Singh, who considered that the grounds were arguable and that the full legal challenge should be heard by the Court. Our client's costs in the action were paid by the Council.

We consider that the Council's actions in relation to Tree Preservation Order (No. 11) 2017 are also unlawful for the reasons raised in our Letter Before Claim.

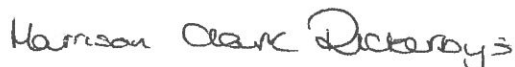
We had hoped that the Council's Officers would engage with our clients in relation to the trees to be protected, however it has become apparent that the Council continues to flout both the requirements of the Pre-Action Protocol and our client's requests to engage.

Due to the fact that the Council's Officer's assessments of the trees to be protected has been entirely undermined by their continued inability to correctly identify the trees on site, our client's arboricultural consultant has prepared a detailed assessment of the trees proposed by the Council to be included in Tree Preservation Order (No. 11) 2017 in the hope that this will assist Members understand the basis on which the trees can be lawfully included within a Tree Preservation Order.

A copy of this report is enclosed, together with a revised TPO schedule indicating the trees which our client's arboricultural consultant considers would merit TPO protection. The report contains extensively researched and detailed recommendations to the Committee as detailed in paragraph 7 on pages 29 and 30 of this report. It is open to the Committee to adopt the recommendations therein and confirm the TPO on this basis in substitution for the recommendations in the manifestly flawed report prepared by the Council's Officer.

These documents will be sent today to the Council's Planning Committee Members and Officers who are due to attend the site visit on Monday 4<sup>th</sup> December, together with a copy of this letter.

Yours faithfully



**HARRISON CLARK RICKERBYS LIMITED**

*Encl*



# LAND AROUND 73 LINTHURST NEWTOWN, BLACKWELL



## EVALUATION OF TREES' SUITABILITY FOR A TPO

Prepared for: Access Homes LLP

Prepared by: P Barton

24 November 2017



## **1. INSTRUCTION**

- 1.1. I have been instructed by Access Homes LLP, to evaluate trees growing on land adjacent to 73 Linthurst Newtown, Blackwell, for their suitability for protection by a Tree Preservation Order (TPO). This report is to be submitted to Bromsgrove District Council to provide information to the local planning committee tasked with deciding whether a provisional TPO should be confirmed.
- 1.2. The purpose of this report is simply to provide an expert opinion on the condition of trees at the site and to use a well-known methodology, adopted by the council, to assess the trees suitability for protection by a TPO.

## **2. BACKGROUND INFORMATION**

- 2.1. A provisional TPO (ref: TPO (13) 2016) was served at the site by Tree Officer Andrew Bucklitch on August 3rd 2016 in response to calls from local residents that were aware of some clearance work taking place at the site. The provisional Order consisted of a single Woodland designation that covered the entire site, therefore protecting all trees and saplings in perpetuity. Objections were submitted to the council regarding the appropriateness of the provisional Order and the council subsequently amended the scope of the Order to reduce the boundary of the 'woodland' and to protect a number of individual trees, two 'areas' and several 'groups' of trees. This amended Order was confirmed by the planning committee at a meeting held on 9th January 2017.
- 2.2. Following an application to the court under section 288 of the Town and Country Planning Act, a 'consent order' sealed by the High Court of Justice (Planning Court) that quashed the TPO.
- 2.3. A new provisional TPO (TPO (11) 2017) was served on the site on 4th July 2017 following visits to the site by Tree Officer Gavin Boyes. Objections to this new Order were submitted to the council, therefore triggering the requirement for the planning committee to once again consider the merits of the TPO and decide whether it should be confirmed. A planning committee site visit took place on 6th November 2017, which I attended. At the planning committee meeting held that evening, the committee deferred their discussions regarding the Order due to recent communications between the landowner's solicitor and the council's solicitors, and over concerns that the TPO plan was not accurate enough to adequately identify the trees during their site visit. It was therefore requested that BDC's tree officer re-visit the site to affix tags to trees to clearly identify which trees are intended for inclusion in the TPO.

## **3. PURPOSE AND APPLICATION OF TREE PRESERVATION ORDERS (TPO)**

- 3.1. A TPO is an order made by a local planning authority (LPA) to protect trees in the interests of amenity. An order prohibits the cutting down, 'topping', lopping, uprooting, wilful damage or destruction of trees without written consent from the LPA<sup>1</sup>.

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<sup>1</sup> National Planning Practice Guidance



3.2. 'Amenity' is not defined in law, so LPAs need to exercise judgment in deciding whether it is within their powers to make an Order. As such, LPAs are advised to develop ways of assessing the amenity value of trees in a structure and consistent way, taking in to account the following criteria<sup>2</sup>:

- *Visibility* - the extent to which the trees can be seen by the public.
- *Impact* - particular importance of trees due to their size, form, future potential, rarity, cultural or historic value, contribution to the landscape and contribution to the character or appearance of a conservation area.
- *Other factors* - LPAs may consider taking in to account other factors such as importance to nature conservation or response to climate change.

#### **4. TREE AMENITY VALUATION SYSTEM USED BY BROMSGROVE DISTRICT COUNCIL**

4.1. A search of the planning pages of Bromsgrove District Council's (BDC) website does not reveal any information on a formally adopted approach to a structure way of assessing tree's suitability for a TPO. However, the council's tree officer, Gavin Boyes, has in the process of providing evidence of decision making for TPO (11) 2017, submitted a completed assessment using the 'Tree Evaluation Method for Preservation Orders', known as 'TEMPO'.

4.2. The TEMPO system was devised by arboricultural consultant Julian Forbes-Laird in 2006 and, to my knowledge, is commonly used by local planning authorities (LPAs) across the country as an adopted methodology for assessing tree's suitability for protection using TPOs.

4.3. TEMPO consists of a three-part system:

- Part 1 - the Amenity Assessment
  - ▶ Tree condition
  - ▶ Retention span (life expectancy)
  - ▶ Relative public visibility
- Part 2 - the Expediency Assessment
  - ▶ Known or perceived threats to the tree(s)
- Part 3 - the decision guide
  - ▶ Based on the accumulated points awarded in the above assessments.

4.4. In order to provide the committee with a more detailed and transparent evaluation of the trees than that provided by Gavin Boyes, I have assessed the trees contained in the TPO (and some additional trees) using the TEMPO system, and present my findings and observations on the following pages. I acknowledge that elements of assessing amenity valuation can be subjective, but have tried as much as possible to explain my reasoning clearly in order to inform the committee as objectively as possible.

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<sup>2</sup>National Planning Practice Guidance





## 5. FINDINGS OF THE TEMPO ASSESSMENT

- 5.1. I visited the site on 21st November 2017, and assessed the 19 individual trees, 6 groups of trees and 1 woodland that are included in the current TPO. In addition, I also assessed some trees within groups as individuals in order to identify the better quality trees contained within them.
- 5.2. Each feature assessed is presented in turn below, with a photograph and my notes from the TEMPO assessment.
- 5.3. The details of the TEMPO methodology are provided in full at **Appendix 3**.
- 5.4. Each category of the tree-by-tree assessment is scored out of a maximum of 5 points. The thresholds for the total score for each trees are as follows:

TOTAL SCORE	DECISION GUIDE	EXPLANATION
Any 0	Do not apply TPO	Clear reason NOT to protect tree.
1-6	TPO indefensible	Failed to score enough points in sections 1a-c; such trees have little to offer their locality and should not be protected.
7-10	Does not merit TPO	May have scored adequately in section 1 but failed to score additional points necessary. E.g. a borderline amenity tree with low 'threat'.
11-14	Possibly merits TPO	Trees that have qualified under all section but not convincingly.
15+	Definitely merits TPO	Trees that have passed the amenity and expediency test and fully justify a TPO.

- 5.5. Please note that the tree reference numbers used in this report are based on the reference numbers used on the TPO served in July 2017, and not on the proposed amended TPO as prepared for the December 2017 planning committee meeting.



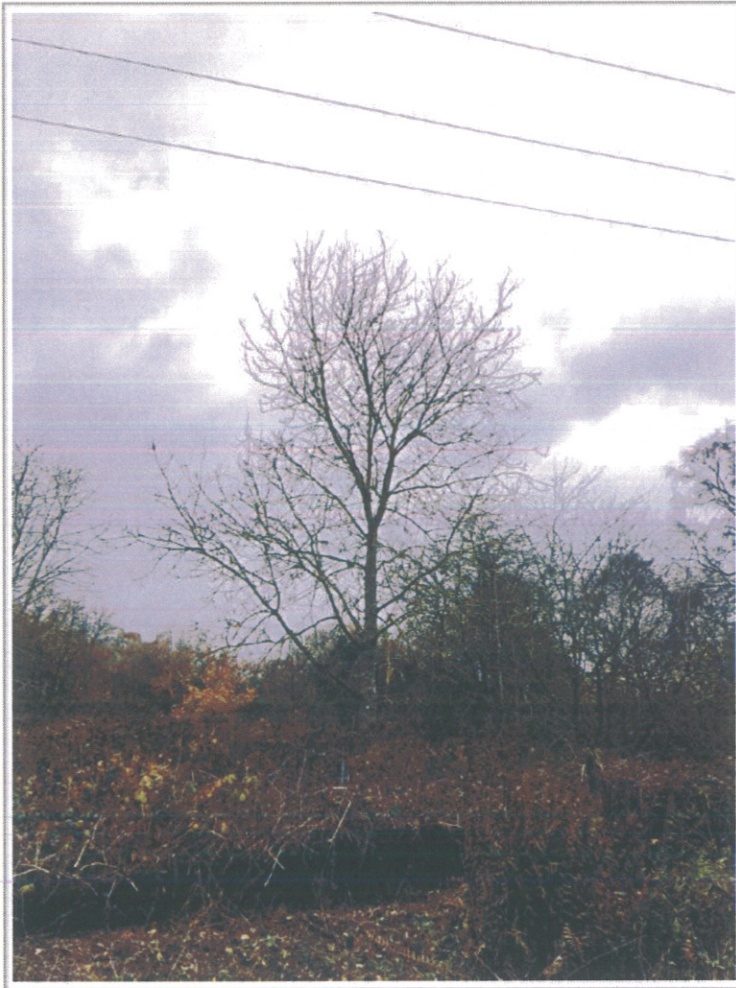
- T1 - ASH



<b>TPO ref</b>	<b>T1</b>
<b>Species</b>	Ash
<b>Condition</b>	5
<b>Longevity</b>	4
<b>Visibility</b>	3
<b>Sub-score</b>	12
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>15</b>
<b>Merits TPO?</b>	YES
<b>Notes</b>	Boundary tree of fair form and no significant defects. Limited visibility from road.



- T2 - ASH



<b>TPO ref</b>	<b>T2</b>
<b>Species</b>	Ash
<b>Condition</b>	5
<b>Longevity</b>	5
<b>Visibility</b>	2
<b>Sub-score</b>	12
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>15</b>
<b>Merits TPO?</b>	YES
<b>Notes</b>	Young tree of good form but currently limited visibility from public areas. Located approximately 5m back from fenceline - TPO plan requires amending for accuracy.

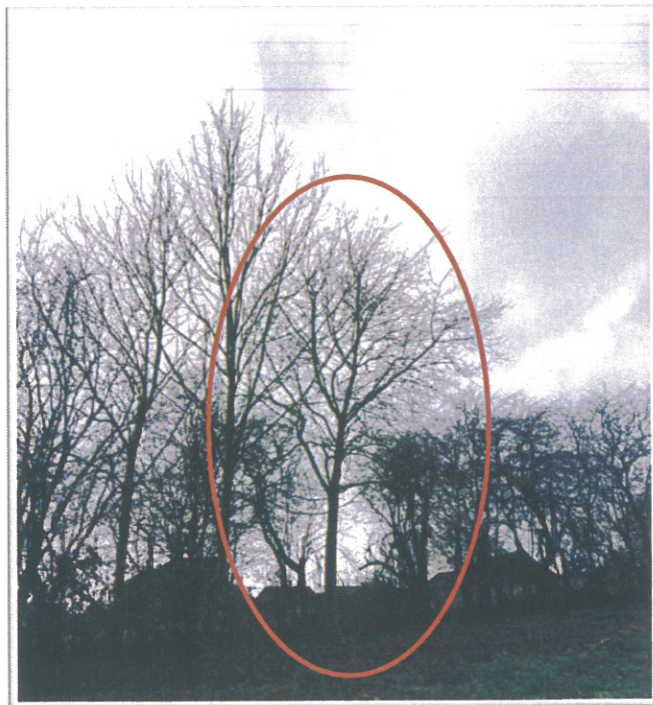


• T3 - ASH



TPO ref	T3
Species	Ash
Condition	5
Longevity	5
Visibility	2
Sub-score	12
Other factors	1
Expediency	2
<b>Total score</b>	<b>15</b>
Merits TPO?	YES
Notes	Tagged 30206 due to ambiguity of current TPO plan. There are 4 trees in close proximity in this area.

• T4 - ASH



TPO ref	T4
Species	Ash
Condition	5
Longevity	5
Visibility	2
Sub-score	12
Other factors	1
Expediency	2
<b>Total score</b>	<b>15</b>
Merits TPO?	YES
Notes	Tagged 30012 due to ambiguity of current TPO plan. There are 4 trees in close proximity in this area.



- T5 - ASH. There is not an Ash present on the site in the location indicated by the TPO plan, so no tree was assessed. There is a nearby Goat Willow of poor form.
- T6 - ENGLISH OAK



TPO ref	T6
Species	English Oak
Condition	5
Longevity	5
Visibility	1
Sub-score	11
Other factors	1
Expediency	2
<b>Total score</b>	<b>14</b>
Merits TPO?	POSSIBLY
Notes	Score presents TPO as possibly justifiable but there is currently no public visibility for this tree - i.e. it has no public amenity value.



• T7 - SILVER BIRCH



<b>TPO ref</b>	<b>T7</b>
<b>Species</b>	Silver birch
<b>Condition</b>	3
<b>Longevity</b>	2
<b>Visibility</b>	2
<b>Sub-score</b>	7
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>10</b>
<b>Merits TPO?</b>	NO
<b>Notes</b>	Bulges around stem union at 1.5m indicate weak fork structure. Top of crown just about glimpsed from one part of road.





• T8 - SILVER BIRCH



<b>TPO ref</b>	<b>T8</b>
<b>Species</b>	Silver birch
<b>Condition</b>	5
<b>Longevity</b>	2
<b>Visibility</b>	1
<b>Sub-score</b>	8
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>11</b>
<b>Merits TPO?</b>	POSSIBLY
<b>Notes</b>	Score indicates TPO possibly justifiable but tree not currently visible from any public vantage point.



- T9 - ASH



<b>TPO ref</b>	T9
<b>Species</b>	Ash
<b>Condition</b>	3
<b>Longevity</b>	4
<b>Visibility</b>	3
<b>Sub-score</b>	10
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	13
<b>Merits TPO?</b>	POSSIBLY
<b>Notes</b>	Boundary tree leaning in to site. Branch failure wounds at 5m.





- T10 - ASH



<b>TPO ref</b>	<b>T10</b>
<b>Species</b>	Ash
<b>Condition</b>	1
<b>Longevity</b>	1
<b>Visibility</b>	3
<b>Sub-score</b>	5*
<b>Other factors</b>	N/A
<b>Expediency</b>	N/A
<b>Total score</b>	N/A
<b>Merits TPO?</b>	NO
<b>Notes</b>	*Tree must score >7 to consider further assessment. Poor structural condition: previously topped at approximately 10m with 5m regrowth. Decay of topping points visible from ground level. Dense ivy on main stem. Low safe useful life expectancy.



- T11 - SYCAMORE



<b>TPO ref</b>	<b>T11</b>
<b>Species</b>	Sycamore
<b>Condition</b>	3
<b>Longevity</b>	4
<b>Visibility</b>	3
<b>Sub-score</b>	10
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>13</b>
<b>Merits TPO?</b>	POSSIBLY
<b>Notes</b>	Ivy to 8m obscures inspection. Limited visibility from road to south. Previously reduced.



- T12 - ASH



<b>TPO ref</b>	<b>T12</b>
<b>Species</b>	Ash
<b>Condition</b>	3
<b>Longevity</b>	2
<b>Visibility</b>	3
<b>Sub-score</b>	8
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>11</b>
<b>Merits TPO?</b>	POSSIBLY
<b>Notes</b>	Twin stemmed from base. Ivy covered Southern stem. Previously reduced.



- T13 - T14 - HOLLY



TPO ref	T13	T14
Species	Holly	Holly
Condition	3	3
Longevity	4	4
Visibility	4	4
Sub-score	11	11
Other factors	1	1
Expediency	2	2
<b>Total score</b>	<b>14</b>	<b>14</b>
Merits TPO?	POSSIBLY	POSSIBLY
Notes	Currently smothered on west side by cherry Laurel.	Currently smothered on west side by cherry Laurel. Two further, small holly stems to south.



- T15 - SYCAMORE



<b>TPO ref</b>	<b>T15</b>
<b>Species</b>	Sycamore
<b>Condition</b>	3
<b>Longevity</b>	4
<b>Visibility</b>	3
<b>Sub-score</b>	10
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>13</b>
<b>Merits TPO?</b>	POSSIBLY
<b>Notes</b>	Multi stemmed from base. Squirrel damage, some severe on east side.

- T16 - YEW



<b>TPO ref</b>	<b>T16</b>
<b>Species</b>	Yew
<b>Condition</b>	3
<b>Longevity</b>	5
<b>Visibility</b>	3
<b>Sub-score</b>	11
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>14</b>
<b>Merits TPO?</b>	POSSIBLY
<b>Notes</b>	Asymmetrical crown form due to adjacent trees to west.



• T17 - GOAT WILLOW



TPO ref	T17
Species	Goat willow
Condition	3
Longevity	2
Visibility	2
Sub-score	7
Other factors	1
Expediency	2
<b>Total score</b>	<b>10</b>
Merits TPO?	NO
Notes	Fair but unremarkable. Heavily pruned on north side for clearance from overhead power lines.



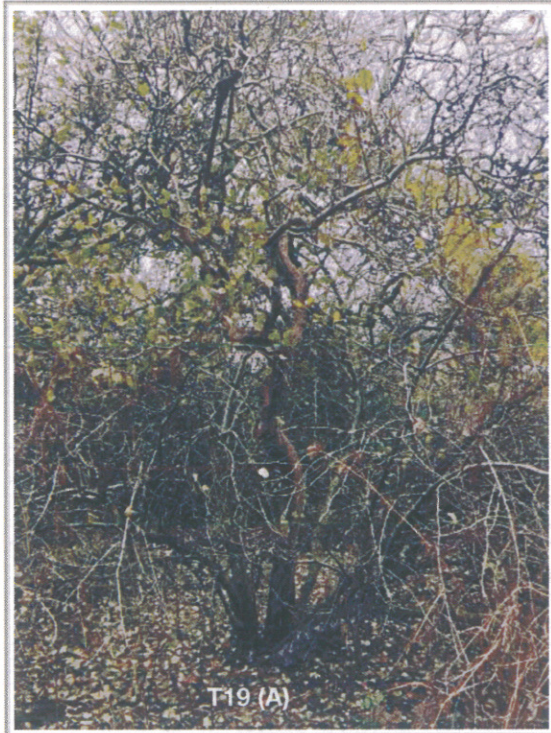
• T18 - ENGLISH OAK



<b>TPO ref</b>	<b>T18</b>
<b>Species</b>	English oak
<b>Condition</b>	3
<b>Longevity</b>	4
<b>Visibility</b>	1
<b>Sub-score</b>	8
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>11</b>
<b>Merits TPO?</b>	NO
<b>Notes</b>	Extensive squirrel damage to stem at 3m has resulted in dieback of central crown.



- T19 (A & B) - APPLE(S)



TPO ref	T19 (A)	T19 (B)
Species	Apple	Apple
Condition	1	3
Longevity	1	2
Visibility	1	1
Sub-score	3	6
Other factors	n/a	n/a
Expediency	n/a	n/a
<b>Total score</b>	<b>3</b>	<b>6</b>
Merits TPO?	NO	NO
Notes	T19 as per TPO plan assessed. 90% dead.	Better condition Apple assessed 5m north of tree T19a. Low life expectancy and no public visibility.

Notes: The TPO plan appears to indicate that T19 (A) is the protected tree. However, there is a nearby Apple that it the plan may refer to so both trees have been assessed for completeness.





- G1 - LAWSON CYPRESS, SPRUCE, OAK, HORSE CHESTNUT



<b>TPO ref</b>	<b>G1</b>
<b>Species</b>	English oak Lawson Cypress x 4, Spruce x 2, English oak x 1, Horse chestnut x 2.
<b>Condition</b>	3
<b>Longevity</b>	2
<b>Visibility</b>	4
<b>Sub-score</b>	9
<b>Other factors</b>	4
<b>Expediency</b>	2
<b>Total score</b>	<b>15</b>
<b>Merits TPO?</b>	YES
<b>Notes</b>	The most prominent trees on the site due to roadside location. There are two more trees within the group than are specified in the TPO schedule - additional Lawson Cypress and Spruce. The group is dominated by the Oak in the middle which is the best quality tree in terms of its form and longevity.

• ADDITIONAL ASSESSMENT - 9 TREES WITHIN G1

Ref	Species	Condition	Longevity	Visibility	Sub-score 1	Other factors	Expediency	Total Score	TPO?	Notes
G1.1	Lawson Cypress	5	2	4	11	4	2	17	YES	Prominent tree at east end of G1. Recent permission gained to crown lift to 3m to improve visibility from driveway exit.
G1.2	Lawson Cypress	3	2	2	7	1	2	10	NO	Small tree of rather poor form behind the crown of adjacent Lawson.
G1.3	Spruce sp.	3	1	4	8	1	2	11	NO	Slender, suppressed tree between Lawson Cypress trees. Adds little to the group.
G1.4	Lawson Cypress	5	2	4	11	4	2	17	YES	No significant defects observed. Removal would benefit the form and appearance of the better quality adjacent Oak.
G1.5	English oak	5	4	4	13	5	2	20	YES	The dominant tree of G1, overhanging the entire road. Although mature, potential for long future contribution to the site.
G1.6	Horse chestnut	5	2	4	11	4	2	17	YES	Minor deadwood but no significant defects.
G1.7	Spruce sp.	1	1	3	5			5	NO	Slender suppressed form due to closely spaced adjacent trees. Small crown.
G1.8	Lawson Cypress	1	0	3	4			4	NO	Slender suppressed form with weak union between stems at 2.5m. Potential for split and failure on to road. Recommend removal.
G1.9	Horse chestnut	3	2	4	9	4	2	15	YES	No significant defects observed. Close to electricity terminal - likely to be cut back by utility company.



PHOTOS OF TREES WITHIN G1

G1.1



G1.2



G1.3



G1.4



G1.5



G1.6



G1.7



G1.8



G1.9



- G2 - ASH - Not assessed as G2 has been agreed to be removed from the TPO as it was made in contravention with the Court consent order which specified that any future TPO must not be any more restrictive than the TPO that was quashed.
- G3 - HORSE CHESTNUT, BEECH, BIRCH, SYCAMORE



<b>TPO ref</b>	<b>G3</b>
<b>Species</b>	Horse chestnut x 2, Beech x 3, Downy birch x 1, Sycamore x 7
<b>Condition</b>	5
<b>Longevity</b>	2
<b>Visibility</b>	3
<b>Sub-score</b>	10
<b>Other factors</b>	4
<b>Expediency</b>	2
<b>Total score</b>	<b>16</b>
<b>Merits TPO?</b>	YES
<b>Notes</b>	Large mature trees visible over House and from Foxes Close. Only 6 Sycamore included in TPO; clarification needed which tree is excluded.



• G4 - APPLE & PEAR



<b>TPO ref</b>	<b>G4</b>
<b>Species</b>	Pear x 1, Apple x 5
<b>Condition</b>	3
<b>Longevity</b>	1
<b>Visibility</b>	2
<b>Sub-score</b>	6
<b>Other factors</b>	n/a
<b>Expediency</b>	n/a
<b>Total score</b>	<b>6</b>
<b>Merits TPO?</b>	NO
<b>Notes</b>	Late-mature fruit trees planted in a row; only Southern tree visible from road. 5 Apple present but only 4 included in TPO schedule.



• G5 - SILVER BIRCH



<b>TPO ref</b>	<b>G5</b>
<b>Species</b>	Silver Birch x 3
<b>Condition</b>	5
<b>Longevity</b>	2
<b>Visibility</b>	2
<b>Sub-score</b>	9
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>12</b>
<b>Merits TPO?</b>	POSSIBLY
<b>Notes</b>	Closely spaced trees forming cohesive canopy. Just possible to glimpse top of crowns from one location on road.



- G6 - OAK, ASH HOLLY



<b>TPO ref</b>	<b>G6</b>
<b>Species</b>	Oak x 1, Ash x 1, Holly x 1
<b>Condition</b>	3
<b>Longevity</b>	4
<b>Visibility</b>	1
<b>Sub-score</b>	8
<b>Other factors</b>	1
<b>Expediency</b>	2
<b>Total score</b>	<b>12</b>
<b>Merits TPO?</b>	POSSIBLY
<b>Notes</b>	Borderline justifiable; not possible to view these trees from a public area. Small and unremarkable specimens.



• W1 - MIXED SPECIES WOODLAND



TPO ref	W1
Species	Silver birch, goat willow, English oak, Apple, pear, sycamore, elder, poplar, hawthorn.
Condition	3
Longevity	4
Visibility	2
Sub-score	9
Other factors	1
Expediency	2
<b>Total score</b>	<b>13</b>
Merits TPO?	POSSIBLY
Notes	Borderline justifiable; not possible to view these trees from a public area. Consists of predominantly small and unremarkable specimens and collapsed/dead trees.





• ADDITIONAL INDIVIDUAL TREES ASSESSED WITHIN W1

Ref	Species	Condition	Longevity	Visibility	Sub-score 1	Other factors	Expediency	Total Score	TPO?	Notes
W1.1	English oak	3	4	2	9	1	2	12	YES	Tagged 30091. Storm damage to crown has resulted in small, squat form. Located on north boundary of woodland area so just about visible from footpath to north. TPO defensible.
W1.2	Hybrid black poplar	3	2	2	7	1	2	10	NO	Tagged 30227. The most prominent of the larger woodland trees but still not of sufficient amenity value to warrant protection.
W1.3	Hybrid black poplar	3	2	2	7	1	2	10	NO	Tagged 30303. Leans to south. Amongst the most prominent of the larger woodland trees but still not of sufficient amenity value to warrant protection.
W1.4	English oak	5	5	1	11	1	2	14	NO	Similar to nearby T6; good form and long life expectancy but presently no public visibility.



## 6. PUBLIC VISIBILITY OF TREES WITHIN THE SITE

- 6.1. Documents submitted by the council for consideration in the November and December 2017 planning committee meetings (Appendix 9 of supporting documents) include a collection of photographs entitled 'Photographs of trees from local vantage points'. However, 5 of the photographs included were taken from the rear gardens of private properties, giving a false impression of the 'public' visibility of the trees. The National Planning Policy Guidance makes it clear that it is *public* visibility which is the primary element of tree's amenity value.
- 6.2. In order to address this important issue of *public* visibility, a selection of photographs is provided in **APPENDIX 2** with a plan showing the locations of each vantage point from a publicly accessible location.

## 7. CONCLUSIONS AND RECOMMENDATIONS TO THE COMMITTEE

- 7.1. The TEMPO assessment presented in this report has used an 'expediency' score of '2' for all trees; indicating that there is a *perceived* threat rather than a *foreseeable* threat. There have been no applications to remove any large or mature trees from the site other than those that are considered to pose an obstruction to visibility splays from the existing driveway from no.73. Neither has there been any pre-application discussions, or outline planning applications for development of the site. Whilst some vegetation has been cleared, this has all been small self-sown trees and ruderal vegetation. It therefore follows that there is no real and present threat of tree felling, but this has been *perceived* as a risk by local residents that have written in support of the TPO citing reasons that include not wanting to see the site developed for housing.
- 7.2. My assessment of the trees located at the site that are currently included in the provisional TPO has found that some trees are of adequate prominence, condition and longevity to warrant protection in an order, but that some are not.
- 7.3. As detailed in the tree-by-tree assessment above, are the following trees which I do not consider have enough merit to warrant protection:
- T5 (Ash) - no Ash tree located in this part of the site
  - T6 (Oak) - not visible from any local public vantage points
  - T7 (Silver Birch) - compromised structural condition and low public visibility at the rear of the site
  - T8 (Silver Birch) - not visible from any local public vantage points
  - T10 (Ash) - poor structural condition due to previous 'topping' which reduces the safe useful life expectancy of the tree.
  - T12 (Ash) - previously topped tree. Low public visibility.
  - T17 (Goat Willow) - poor form due to pruning by power line contractor. Low useful life expectancy.



- T18 (Oak) - small tree with extensive squirrel damage causing crown dieback.
- T19 (Apple) - unclear which tree the existing TPO seeks to protect, but both apples in the area have a short useful life expectancy and no public visibility.
- G4 (Pear and Apple) - late mature trees in decline with low future life expectancy.
- G6 (Holly, Ash, Oak) - small closely spaced trees of poor form and no public visibility.
- W1 (mixed species woodland) - predominantly small, poor formed trees with low public visibility. Larger trees within woodland assessed separately but even these fail to score adequately for suitability in the TPO.

7.4. I recommend that the committee confirms the TPO subject to modifications which remove the above trees from the order, thereby protecting only those trees which have been evidenced to have adequate amenity value to warrant protection.

Paul Barton  
MSc, MArborA.  
Director

APPENDIX 1: TPO PLAN

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CLARE FLANAGAN  
4th JULY 2017



**Bromsgrove District Council**  
www.bromsgrove.gov.uk

Project:	Bromsgrove District Council Tree Preservation Order (11) 2017	Drawn:	G.B.
Drawing:	Land Adjoining 73 Linthurst Newtown Blackwell	Scale:	1/1250 @ A4
Drawing No:	P0000/0	Date:	28 / 05 / 2017

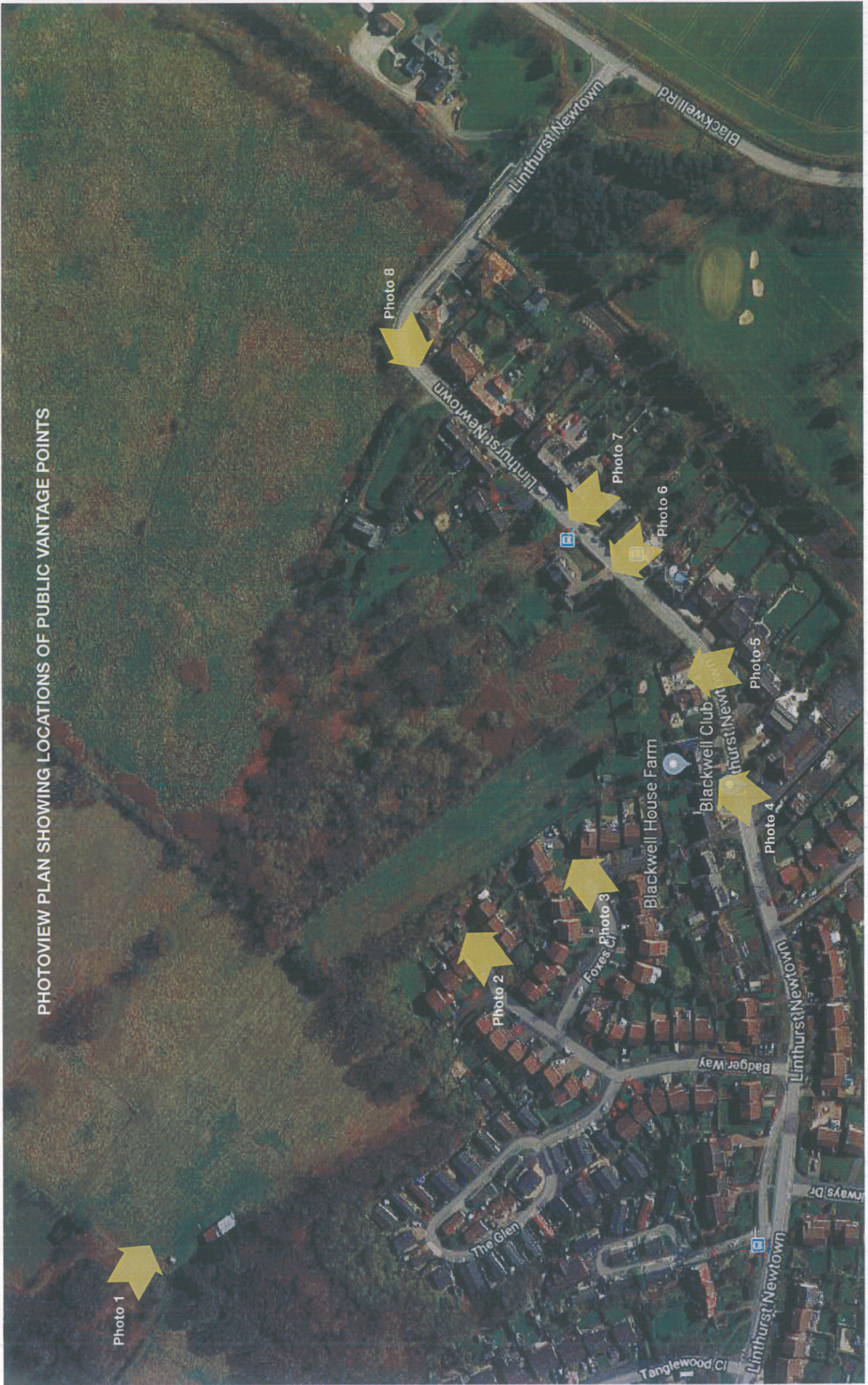
Engineering and Design Services  
Town Hall  
Water Stranz Square  
Redditch  
Worcs B98 8AH

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Ordnance Survey 100024252

APPENDIX 2: PUBLIC VISIBILITY OF TREES COVERED  
BY THE TPO

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PHOTOVIEW PLAN SHOWING LOCATIONS OF PUBLIC VANTAGE POINTS



## APPENDIX 3: TEMPO GUIDANCE NOTES

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**TREE EVALUATION METHOD FOR PRESERVATION ORDERS**

**TEMPO**

**Guidance Note for Users**

**Julian Forbes-Laird**

BA(Hons), MICFor, M.Arbor.A, Dip.Arb.(RFS)

**Registered Consultant of the Arboricultural Association**

**Director & Principal Consultant, Forbes-Laird Arboricultural Consultancy Ltd**

**July 2006**

## **Introduction**

### **Background**

The impetus to take a fresh look at existing TPO suitability evaluation methods grew out of the preparation for a local authority of a detailed Method Statement for reviewing Tree Preservation Orders (TPOs) in 2002. The client wanted the Method Statement to include a reliable means of assessing trees for TPO suitability, and asked for a bespoke system.

Having looked closely at what was already available, JFL decided that there was considerable room for improvement, as each of the better-known existing methods has disadvantages.

Accordingly, TEMPO was developed by JFL (whilst working as a Senior Consultant at CBA Trees) as a direct response to the apparent continuing uncertainty about what attributes a tree should have in order to merit statutory protection by TPO.

### **Overview**

TEMPO is designed as a field guide to decision-making, and is presented on a single side of A4 as an easily completed pro forma. As such, it stands as a record that a systematic assessment has been undertaken.

TEMPO considers all of the relevant factors in the TPO decision-making chain. In this connection, it is helpful to revisit the wording of central government advice<sup>1</sup>:

‘Although a tree may merit protection on amenity grounds it may not be expedient to make it the subject of a TPO’

From this, it becomes apparent that most existing methods are inadequate, seeking as they do solely to consider the tree rather than any known threats to its retention. TEMPO corrects this omission by including an expediency assessment within the framework of the method.

Excluding the first section, which is simply the survey record and is thus self-explanatory, TEMPO is a three-part system:

- Part 1 is the Amenity Assessment
- Part 2 is the Expediency Assessment
- Part 3 is the Decision Guide

These parts are set out and function as follows:

## Part 1: Amenity Assessment

This part of TEMPO is broken down into four sections, each of which are related to suitability for TPO:

- a) Condition
- b) Retention span
- c) Relative public visibility
- d) Other factors

The first three sections form an initial assessment, with trees that 'pass' this going on to the fourth section. Looking at the sections in more detail:

### **a) Condition**

This is expressed by five terms, which are defined as follows:

GOOD	Trees that are generally free of defects, showing good health and likely to reach normal longevity and size for species, or they may have already done so
FAIR	Trees which have defects that are likely to adversely affect their prospects; their health is satisfactory, though intervention is likely to be required. It is not expected that such trees will reach their full age and size potential or, if they have already done so, their condition is likely to decline. However, they can be retained for the time being without disproportionate expenditure of resources or foreseeable risk of collapse
POOR	Trees in obvious decline, or with significant structural defects requiring major intervention to allow their retention, though with the outcome of this uncertain. Health and/or structural integrity are significantly impaired, and are likely to deteriorate. Life expectancy is curtailed and retention is difficult
DEAD	Tree with no indication of life
DYING/ DANGEROUS	Trees showing very little signs of life or remaining vitality, or with severe, irremediable structural defects, including advanced decay and insecure roothold. Death or catastrophic structural failure likely in the immediate future, retention therefore impossible as something worthy of protection

The scores are weighted towards trees in good condition. It is accepted that trees in fair and poor condition should also get credit, though for the latter this is limited to only one point. Dead, dying or dangerous trees should not be placed under a TPO, hence the zero score for these categories, due to exemptions within the primary legislation.

A note on the pro forma emphasizes that 'dangerous' should only be selected in relation to the tree's existing context: a future danger arising, for example, as a result of development, would not apply. Thus, a tree can be in a state of collapse but not be dangerous due to the absence of targets at risk.

Where a group of trees is being assessed under this section, it is important to score the condition of those principle trees without which the group would lose its aerodynamic or visual cohesion. If the group cannot be 'split' in this way, then its average condition should be considered.

Each of the condition categories is related to TPO suitability.

## b) Retention span

The reason that this is included as a separate category to 'condition' is chiefly to mitigate the difficulty of justifying TPO protection for veteran trees. For example, it is necessary to award a low score for trees in 'poor condition', though many veteran trees that could be so described might have several decades' potential retention span.

This factor has been divided into ranges, which are designed to reflect two considerations:

- It has long been established good practice that trees incapable of retention for more than ten years are not worthy of a TPO (hence the zero score for this category); this also ties in with the R category criteria set out in Table 1 of BS5837:2005
- The further ahead one looks into the future, the more difficult it becomes to predict tree condition: hence the width of the bands increases over time

Scores are weighted towards the two higher longevities (40-100 and 100+), which follow the two higher ranges given by Helliwell<sup>2</sup>.

The Arboricultural Association (AA) publishes a guide<sup>3</sup> to the life expectancy of common trees, which includes the following data:

300 years or more	Yew
200-300	Common [pedunculate] oak, sweet chestnut, London plane, sycamore, limes
150-200	Cedar of Lebanon, Scots pine, hornbeam, beech, tulip tree, Norway maple
100-150	Common ash, Norway spruce, walnut, red oak, horse chestnut, field maple, monkey puzzle, mulberry, pear
70-100	Rowan, whitebeam, apple, wild cherry, Catalpa, Robinia, tree of heaven
50-70	Most poplars, willows, cherries, alders and birches

The above should be considered neither prescriptive nor exclusive, and it is certainly not comprehensive. However, it should assist with determining the overall lifespan of most trees, in light of their current age, health and context as found on inspection.

It is important to note that this assessment should be made based on the assumption that the tree or trees concerned will be maintained in accordance with good practice, and will not, for example, be subjected to construction damage or inappropriate pruning. This is because if the subject tree is 'successful' under TEMPO, it will shortly enjoy TPO protection (assuming that it doesn't already).

If a group of trees is being assessed, then the mean retention span of the feature as a whole should be evaluated. It would not be acceptable, for example, to score a group of mature birches based on the presence of a single young pedunculate oak.

A note on the pro forma identifies for inclusion in the less than ten years band trees which are assessed being an existing or near future nuisance, including those clearly outgrowing their context, or which are having an adverse effect on adjacent trees of better quality.

The nuisance element is introduced to cover situations where, for example, a Section 211 Notice has been received by the LPA for removal of a tree causing subsidence damage. In relation to outgrowing context, some common sense is needed here: if the trees are being considered for TPO protection prior to development, and if it is apparent that demolition of existing structures will be a component of this process, then a tree should not be marked down simply because it is standing hard up against one of the existing structures.

As with condition, the chosen category is related to a summary of TPO suitability.

### **c) Relative public visibility**

The first thing to note in this section is the prompt, which reminds the surveyor to consider the 'realistic potential for future visibility with changed land use'. This is designed to address the commonplace circumstance where trees that are currently difficult to see are located on sites for future development, with this likely to result in enhanced visibility. The common situation of backland development is one such example.

The categories each contain two considerations: size of tree and degree of visibility. I have not attempted to be too prescriptive here, as TEMPO is supposed to function as a guide and not as a substitute for the surveyor's judgement. However, I have found that reference to the square metre crown size guide within the Helliwell System<sup>4</sup> can be helpful in reaching a decision.

Reference is made to 'young' trees: this is intended to refer to juvenile trees with a stem diameter less than 75mm at 1.5m above ground level. The reasoning behind this is twofold: this size threshold mirrors that given for trees in Conservation Areas, and trees up to (and indeed beyond) this size may readily be replaced by new planting.

In general, it is important to note that, when choosing the appropriate category, the assessment in each case should be based on the minimum criterion.

Whilst the scores are obviously weighted towards greater visibility, we take the view that it is reasonable to give some credit to trees that are not visible (and/or whose visibility is not expected to change: it is accepted that, in exceptional circumstances, such trees may justify TPO protection<sup>5</sup>).

Where groups of trees are being assessed, the size category chosen should be one category higher than the size of the individual trees or the degree of visibility, whichever is the lesser. Thus a group of medium trees would rate four points (rather than three for individuals) if clearly visible, or three points (rather than two) if visible only with difficulty.

Once again, the categories relate to a summary of TPO suitability.

### **Sub-total 1**

At this point, there is a pause within the decision-making process: as the prompt under 'other factors' states, trees only qualify for consideration within that section providing that they have accrued at least seven points. Additionally, they must not have collected any zero scores.

The total of seven has been arrived at by combining various possible outcomes from sections a-c.

The scores from the first three sections should be added together, before proceeding to section d, or to part 3 as appropriate (i.e. depending on the accrued score). Under the latter scenario, there are two possible outcomes:

- 'Any 0' equating to 'do not apply TPO'
- '1-6' equating to 'TPO indefensible'

#### **d) Other factors**

Assuming that the tree or group qualifies for consideration under this section, further points are available for four sets of criteria, however only one score should be applied per tree (or group):

- 'Principle components of arboricultural features, or veteran trees' – The latter is hopefully self-explanatory (if not, refer to Read 2000<sup>6</sup>). The former is designed to refer to trees within parklands, avenues, collections, and formal screens, and may equally apply to individuals and groups
- 'Members of groups of trees that are important for their cohesion' – This should also be self-explanatory, though it is stressed that 'cohesion' may equally refer either to visual or to aerodynamic contribution. Included within this definition are informal screens. In all relevant cases, trees may be assessed either as individuals or as groups
- 'Trees with significant historical or commemorative importance' – The term 'significant' has been added to weed out trivia, but we would stress that significance may apply to even one person's perspective. For example, the author knows of one tree placed under a TPO for little other reason than it was planted to commemorate the life of the tree planter's dead child. Thus whilst it is likely that this category will be used infrequently, its inclusion is nevertheless important. Once again, individual or group assessment may apply
- 'Trees of particularly good form, especially if rare or unusual' – 'Good form' is designed to identify trees that are fine examples of their kind and should not be used unless this description can be justified. However, trees which do not merit this description should not, by implication, be assumed to have poor form (see below). The wording of the second part of this has been kept deliberately vague: 'rare or unusual' may apply equally to the form of the tree or to its species. This recognises that certain trees may merit protection precisely because they have 'poor' form, where this gives the tree an interesting and perhaps unique character. Clearly, rare species merit additional points, hence the inclusion of this criterion. As with the other categories in this section, either individual or group assessment may apply. With groups, however, it should be the case either that the group has a good overall form, or that the principle individuals are good examples of their species

Where none of the above apply, the tree still scores one point, in order to avoid a zero score disqualification (under part 3).

## **Sub-total 2**

This completes the amenity assessment and, once again, there is a pause in the method: the scores should be added up to determine whether or not the tree (or group) has sufficient amenity to merit the expediency assessment.

The threshold for this is nine points, arrived at via a minimum qualification calculated simply from the seven-point threshold under sections a-c, plus at least two extra points under section d. Thus trees that only just scrape through to qualify for the 'other factor' score, need to genuinely improve in this section in order to rate an expediency assessment. This recognises two important functions of TPOs:

- TPOs can serve as a useful control on overall tree losses by securing and protecting replacement planting
- Where trees of minimal (though, it must be stressed, adequate) amenity are under threat, typically on development sites, it may be appropriate to protect them allowing the widest range of options for negotiated tree retention

## **Part 2: Expediency assessment**

This section is designed to award points based on three levels of identified threat to the trees concerned. Examples and notes for each category are:

- 'Immediate threat to tree' – for example, Tree Officer receives Conservation Area notification to fell
- 'Foreseeable threat to tree' – for example, planning department receives application for outline planning consent on the site where the tree stands
- 'Perceived threat to tree' – for example, survey identifies tree standing on a potential infill plot

However, central government advice<sup>7</sup> is clear that, even where there is no expedient reason to make a TPO, this is still an option. Accordingly, and in order to avoid a disqualifying zero score, 'precautionary only' still scores one point. This latter category might apply, rarely for example, to a garden tree under good management.

Clearly, other reasons apply that might prevent/usually obviate the need for the making of a TPO. However, it is not felt necessary to incorporate such considerations into the method, as it is chiefly intended for field use: these other considerations are most suitably addressed as part of a desk study.

As a final note on this point, it should be stressed that the method is not prescriptive except in relation to zero scores: TEMPO merely recommends a course of action. Thus a tree scoring, say, 15, and so 'definitely meriting' a TPO, might not be included for protection for reasons unconnected with its attributes.

### **Part 3: Decision Guide**

This section is based on the accumulated scores derived in Parts 1 & 2, and identifies four outcomes, as follows:

- **Any 0 Do not apply TPO**  
Where a tree has attracted a zero score, there is a clearly identifiable reason not to protect it, and indeed to seek to do so is simply bad practice
- **1-6 TPO indefensible**  
This covers trees that have failed to score enough points in sections 1a-c to qualify for an 'other factors' score under 1d. Such trees have little to offer their locality and should not be protected
- **7-10 Does not merit TPO**  
This covers trees which *have* qualified for a 1d score, though they may not have qualified for Part 2. However, even if they have made it to Part 2, they have failed to pick up significant additional points. This would apply, for example, to a borderline tree in amenity terms that also lacked the protection imperative of a clear threat to its retention
- **11-14 Possibly merits TPO**  
This applies to trees that have qualified under all sections, but have failed to do so convincingly. For these trees, the issue of applying a TPO is likely to devolve to other considerations, such as public pressure, resources and 'gut feeling'
- **15+ Definitely merits TPO**  
Trees scoring 15 or more are those that have passed both the amenity and expediency assessments, where the application of a TPO is fully justified based on the field assessment exercise

### **Notation boxes**

Throughout the method, notation space is provided to record relevant observations under each section. For local authorities using TEMPO, it may even be helpful to include a copy of the TEMPO assessment in with the TPO decision letter to relevant parties, as this will serve to underline the transparency of the decision-making process.



## Conclusion

TEMPO is a quick and easy means of systematically assessing tree or group suitability for statutory protection. It may be used either for new TPOs or for TPO re-survey, especially where Area TPOs are being reviewed.

From the consultants' perspective, it is also an effective way of testing the suitability of newly applied TPOs, to see whether they have been misapplied, or it can be used to support a request to make a TPO in respect of trees at risk, for example from adjacent development.

TEMPO does not seek to attach any monetary significance to the derived score: the author recommends the use of the Helliwell System where this is the objective.

CBA Trees owns the copyright for TEMPO, however the method is freely available, including via internet download through the Arboricultural Information Exchange [www.aie.org.uk](http://www.aie.org.uk)

TEMPO has undergone a number of minor revisions since its inception, many of which are due to helpful comments received from users. Any feedback on the method is gratefully received by the author.

**JFL**

Contact: [jfl.flac@btinternet.com](mailto:jfl.flac@btinternet.com)

## *References*

- 1 'Tree Preservation Orders: A Guide to the Law and Good Practice', DETR 2000
- 2 'Amenity Valuation of Trees and Woodlands', DR Helliwell, Arboricultural Association 2003 [the Helliwell System]
- 3 'Tree Management', Leaflet No. 4, Arboricultural Association 1991
- 4 Helliwell op. cit.
- 5 DETR 2000 op. cit. at para. 3.3 (1)
- 6 'Veteran Trees: A Guide to Good Management', Helen Read, English Nature 2000
- 7 DETR 2000 op. cit. at para. 3.5

APPENDIX 4: TEMPO ASSESSMENT PROVIDED BY BDC  
TREE OFFICER

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# T.E.M.P.O Tree Evaluation Sheet

Evaluation by: Garvin Bayes Date: 27th June 2017 Sheet No. 1 of 2

Address/Site Details: 173 Luthurst Newtown (land adjoining)

Tree Ref	Species	DBH (mm)	Amenity Assessment				Sub	d - other factors	Expediency	Score	TPO Y/N?	Notes
			a - Condition	b - Longevity	c - Visibility							
Trees must have accrued 7+ points ( & no zeros) to qualify												
G1	Mixed Species		3	4	5	12	4	3	19	Y		
T1	Ash		3	5	3	11	1	3	15	Y		
G2	3x Ash		3	5	2	10	1	3	14	Y		
T2	Ash		3	5	2	10	1	3	14	Y		
T3	Ash		3	5	2	10	1	3	14	Y		
T4	Ash		3	5	2	10	1	3	14	Y		
T5	Ash		3	5	2	10	1	3	14	Y		
T6	Oak		3	5	3	11	1	3	15	Y		
T7	Silver Birch		3	4	2	9	1	3	13	Y		
T8	Silver Birch		3	4	2	9	1	3	13	Y		
T9	Ash		3	4	2	9	1	3	13	Y		
T10	Ash		3	4	3	10	1	3	14	Y		
T11	Sycamore		3	4	3	10	1	3	14	Y		
T12	Ash		3	4	3	10	1	3	14	Y		

**Part 1: Amenity assessment**

- a) Condition
  - 5) Good (highly suitable)
  - 3) Fair (suitable)
  - 1) Poor (unlikely)
  - 0) Dead
- b) Longevity
  - 5) 100+
  - 4) 40 - 100
  - 2) 20 - 40 (suitable)
  - 1) 10 - 20 (just suitable)
  - 0) <10 (unsuitable)
- c) Relative public visibility
  - 5) Very large trees, or large trees that are prominent features (V lge=200sqm++)
  - 4) Large trees, or medium trees clearly visible to the public (lge=100-200sqm)
  - 3) Medium trees, or larger trees with limited view only (Suitable, med=25-100sqm)
  - 2) Small trees, or larger ones visible only with difficulty (unlikely, small = 6-25sqm)
  - 1) Young/v. small or not publicly visible regardless of size (prob unsuitable, <5sqm)
- d) Other factors
  - 5) Principal components of arboreal features, or veteran trees
  - 4) Members of groups of trees that are important for their cohesion
  - 3) Trees with significant historical or commemorative importance
  - 2) Trees of particularly good form, especially if rare or unusual
  - 1) Trees with none of the above additional redeeming features

**Part 2: Expediency assessment**

- 5) Known threat to tree
- 3) Foreseeable threat to tree
- 2) Perceived threat to tree
- 1) Precautionary only
- 0) Known as an actionable nuisance

**Part 3: Decision guide**

- Any 0 Do not apply TPO
- 1 - 6 TPO indefensible
- 7 - 11 Does not merit TPO
- 12 - 15 Possibly merits TPO
- 16+ Definitely merits TPO

# T.E.M.P.O Tree Evaluation Sheet

Evaluation by: Garvin Bayes Date: 27th June 2017 Sheet No. 2 of 2

Address/Site Details: 73 Lirthurst Newtown (land adjoining)

Tree Ref	Species	DBH (mm)	Amenity Assessment			Sub	d - other factors	Expediency	Score	TPO Y/N?	Notes
			a - Condition	b - Longevity	c - Visibility						
Trees must have accrued 7+ points ( & no zeros) to qualify											
T13	Holly		3	5/4	3	10	1	3	14	Y	
T14	Holly		3	4	2	9	1	3	13	Y	
T15	Spamole		3	4	3	10	1	3	14	Y	
T16	Yew		3	5	2	10	1	3	14	Y	
T17	Willow		3	4	2	9	1	3	13	Y	
T18	Oak		3	5	2	10	1	3	14	Y	
T19	Apple		3	4	2	9	1	3	13	Y	
T											
G3	Mixed Species Group		5/3	4	4	11	1	3	15	Y	
G4	4x Apple 1x Pear		3	4	2	9	1	3	13	Y	
G5	3x Silver Birch		3	4	3	10	1	3	14	Y	
G6	1x Oak 1x Pear 1x Ash		3	4	2	9	1	3	13	Y	
W1	Mixed Species		3	4	2	9	1	3	13	Y	

- Part 1: Amenity assessment**
- a) Condition
    - 5) Good (highly suitable)
    - 4) Fair (suitable)
    - 3) Fair (unlikely)
    - 2) Poor (unlikely)
    - 1) Poor (unlikely)
    - 0) Unsafe
    - 0) Dead
  - b) Longevity
    - 5) 100+
    - 4) 40 - 100
    - 3) 20 - 40 (suitable)
    - 2) 10 - 20 (just suitable)
    - 1) <10 (unsuitable)
  - c) Relative public visibility
    - 5) Very large trees, or large trees that are prominent features (V lge=200sqm+)
    - 4) Large trees, or medium trees clearly visible to the public (lge=100-200sqm)
    - 3) Medium trees, or larger trees with limited view only (suitable, med=25-100sqm)
    - 2) Small trees, or larger ones visible only with difficulty (unlikely, small = 5-25sqm)
    - 1) Young/v. small or not publicly visible regardless of size (prob unsuitable, <5sqm)
  - d) Other factors
    - 5) Principal components of arboricultural features, or veteran trees
    - 4) Members of groups of trees that are important for their coherence
    - 3) Trees with significant historical or commemorative importance
    - 2) Trees of particularly good form, especially if rare or unusual
    - 1) Trees with none of the above additional redeeming features
- Part 2: Expediency assessment**
- 5) Known threat to tree
  - 3) Foreseeable threat to tree
  - 2) Perceived threat to tree
  - 1) Precautionary only
  - 0) Known as an actionable nuisance
- Part 3: Decision guide**
- Any 0 Do not apply TPO
  - 1 - 6 TPO indefensible
  - 7 - 11 Does not merit TPO
  - 12 - 15 Possibly merits TPO
  - 16+ Definitely merits TPO

**First Schedule**

**Trees specified Individually**

(encircled in black on the map)

<u>No. on Map</u>	<u>Description</u>	<u>NGR</u>	<u>Situation</u>
T1	Ash	399729 - 272428	Near left boundary
T2	Ash	399703-272484	Centre left side of site
T3	Ash	399661-272519	Near left boundary
T4	Ash	399658-272523	Near left boundary
<del>T5</del>	<del>Ash</del>	<del>399649-272540</del>	<del>Near left boundary</del>
<del>T6</del>	<del>Oak</del>	<del>399698-272582</del>	<del>Near right boundary</del>
<del>T7</del>	<del>Silver Birch</del>	<del>399704-272544</del>	<del>Centre site</del>
<del>T8</del>	<del>Silver Birch</del>	<del>399714-272551</del>	<del>Centre site</del>
T9	Ash	399737-272563	Right boundary of site
<del>T10</del>	<del>Ash</del>	<del>399757-272533</del>	<del>Right boundary of site</del>
T11	Sycamore	399761-272527	Right boundary of site
<del>T12</del>	<del>Ash</del>	<del>399764-272521</del>	<del>Right boundary of site</del>
T13	Holly	399790-272479	Right boundary of site
T14	Holly	399792-272476	Right boundary of site
T15	Sycamore	399765-272484	Right side of property
T16	Yew	399759-272493	Right side of property
<del>T17</del>	<del>Willow</del>	<del>399750-272501</del>	<del>Rear of property</del>
<del>T18</del>	<del>Oak</del>	<del>399664-272558</del>	<del>Centre of plot rear of Property</del>
<del>T19</del>	<del>Apple</del>	<del>399726-272560</del>	<del>Right side of site</del>

### Groups of trees

(within a dotted black line on the map)

<u>No. on Map</u>	<u>Description</u>	<u>NGR</u>	<u>Situation</u>
G1	2 x Horse Chestnut, 1 x Oak, 3 x Lawsons Cypress 1 x Spruce	399743-272428	Front boundary with Linthurst Newtown road
G2	3 x Ash	399703-272467	Near left boundary
G3	2 x Horse Chestnut 3 x Beech 1 x Birch, 6 x Sycamore	399729-272512	Centre of site
<del>G4</del>	<del>1 x Pear, 4 x Apple</del>	<del>399746-272529</del>	<del>Right side of site</del>
G5	3 x Silver Birch	399697-272574	Near right boundary
<del>G6</del>	<del>1x Oak, 1x Holly 4x Ash</del>	<del>399686-272549</del>	<del>Centre of site</del>

### Trees specified by reference to an area

(within a broken black line on the map)

<u>No. on Map</u>	<u>Description</u>	<u>NGR</u>	<u>Situation</u>
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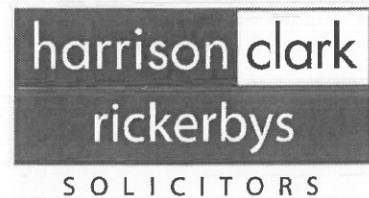
NONE

### Woodlands

(within a continuous black line on the map)

<u>No. on Map</u>	<u>Description</u>	<u>NGR</u>	<u>Situation</u>
<del>W1</del>	<del>Mixed native Species woodland</del>	<del>399639-272584</del>	<del>North-eastern end of site</del>

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



4 December 2017

**BY SPECIAL DELIVERY BY 1PM**

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**PLANNING TEAM**

**BY POST AND EMAIL**

[t.lovejoy@bromsgroveandredditch.gov.uk](mailto:t.lovejoy@bromsgroveandredditch.gov.uk)

Dear Sirs

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

We write further to your email of 1<sup>st</sup> December timed at 15.48, your letter of 1<sup>st</sup> December 2017 sent by email at 22.27, and your email this morning timed at 11.47.

We consider your latest email complaining of the "lack of response" to the above correspondence, is entirely inappropriate, given considerably less than one working day has passed since receipt of the correspondence, and also given the Council's failure to respond to our Letter Before Claim of 16<sup>th</sup> November 2017 within the 14 day timescale required by the Pre-Action Protocol within the Civil Procedure Rules.

We note in your email this morning at 11.47 that you say that "the tree officer cannot see why there was difficulty identifying the trees in the November 2017 site visit and does not, for the avoidance of doubt, accept your allegation that the plan and schedule are ambiguous". We would remind you that the clearer identification of trees and tagging of trees to be protected was requested by the Council's own Committee Members at the Committee Meeting on 6<sup>th</sup> November. This is not, therefore, an allegation, but is a matter of fact.

At your request, we now set out our concerns in relation to the identification of the trees proposed to be protected by the Tree Preservation Order. Given the proximity to the planning committee meeting this evening we do not intend to repeat all the numerous legal grounds and requests for information put forward in our letters dated 6 July 2017, 4 August 2017, 2 November 2017, 6 November 2017 and Letter Before Action dated 16<sup>th</sup> November 2017.

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The late timing of this letter in advance of the Committee Meeting this evening, is the result of the Council's previous failure to respond to the points raised in our previous correspondence, and the Council's request for further detail sent on Friday 1<sup>st</sup> December.

1. November Committee Report: Your letter of 1<sup>st</sup> December states that many of the erroneous statements made in the November Committee Report have not been repeated in the December Committee Report. This is not sufficient to correct the legal errors – the previous legal errors, misleading statements and apparent bias set out in the November Committee Report are in the public domain, and have been presented to Committee Members. The errors need to be expressly addressed and the corrections explained, otherwise the decision of Members remains irrevocably tainted.
2. Failure to respond to points raised: We note you have now given some partial answers to some of the queries we have raised, however this gives rise to further to questions, and our repeated requests for information and full disclosure of documents still remain unanswered.

We note you put forward reasons for failing to comply with S.288 protocols after the expiration of the mandatory 14 day period, though no such reasons were given during this period. We also note you consider dealing with lawful requests to be a waste of time and money, however our client has every right for protection from the unlawful actions of the Council and to be provided with information and documents. You claim BDC is acting in a fair and transparent way complying with the law but then in complete contradiction wilfully deny the provision of information and documents. There is now a clear record of delaying in answering, refusing to disclose information and failing to cooperate.

3. Failure to identify and map trees: There is a continued failure to correctly map and identify the trees proposed to be protected by the Tree Preservation Order. A new Schedule to the Tree Preservation Order has been published on the Council's website, which we presume was uploaded on Friday 1<sup>st</sup> December, however we note that a copy was not sent to us. This new Schedule contains changes to tree species, as well as a number of changes to National Grid References from the Consent Order. Further explanation of the errors are set out below, however we have noted inconsistencies which we consider are in breach of the Consent Order and so confirmation of the Tree Preservation Order would amount to contempt of Court.

### **Inconsistencies and errors with tree identification and mapping**

As you are aware, it is a requirement that any Tree Preservation Order clearly identifies the trees to be protected. It is also noted in the Planning Practice Guidance, paragraph 36-022-20140306 that Council's officers should also record "trees which are not to be included in the Order".

If there is any error or doubt whatsoever regarding the identity and location of a tree proposed for TPO, then a TPO should not be confirmed until that error or doubt has been resolved. Alternatively any such tree or trees should be removed from the proposed TPO.

The latest tree officer schedule and map, Appendix (2) Revised (though dated the same as the previous Appendix (2)), reveals a number of changes from the schedule and map attached to the Consent Order, the 2017 TPO schedule, and the 2017 TPO schedule as revised.



It would have been prudent for the tree officer to draw attention to each and every change, and give precise and detailed explanation for making ongoing changes so these changes could be checked and verified as they arose. Having not done so this not only adds further confusion and ambiguity to precisely which trees (or not) are being promoted for TPO and also puts the Council in breach of the Consent Order and thus in contempt of Court.

There may be valid reasons why some minor changes have occurred, such as errors in previous tree officer surveys, but equally there may not. Further, some changes are substitutions and in those cases must be considered additions to those in the Consent Order, which has very serious consequences.

Whatever the reasoning it is now absurd at this late stage to try and resolve this critical issue without removing all ambiguously identified or changed/added trees as to do otherwise would clearly be unlawful.

Discrepancies between the Consent Order and Revised Appendix 2 to the December Report:

- T1 (previously T11 in Consent Order) has a changed National Grid Reference (NGR) – why?
- T2 (previously T14 in Consent Order) has a changed NGR – why?
- T10 (previously T22 in Consent Order) has a changed NGR – why?
- T11 (previously T21 in Consent Order) has been changed from a Maple to a Sycamore with a changed NGR why? Accordingly, this should be removed from TPO.
- T12 (previously T20 in Consent Order) has a changed NGR – why?
- T13 and T14 (previously T24 and T25 in Consent Order) T14 has a changed NGR and furthermore as noted in BH report there are four holly trees NOT two in this area. It must be that with a change in NGR for T14 a different holly tree to that in the Consent Order has been proposed. This is a **breach of the Consent Order and therefore the Council is in contempt of Court.**
- T17 (previously T17 in Consent Order) has a changed NGR – why?
- T19 (previously in A3 in Consent Order) - a different apple tree has been tagged to that shown by the NGR in the Consent Order but the NGR has not been changed.

Discrepancies between the Schedule to Tree Preservation Order (No. 11) 2017 and Revised Appendix 2 to the December Report:

- T5 was originally recorded as an Ash tree in the Schedule to Tree Preservation Order (No. 11) 2017, but now refers to a Willow tree.

The Barton Hyett report also identifies further errors and/or ambiguity and lack of clarity as follows:

- G1 (previously A1 in Consent Order) - there are two more trees with the group than are specified in the TPO schedule. The tree officer has NOT identified which two trees are not protected and therefore there is ambiguity over which trees in the group are protected.

Accordingly this group cannot be confirmed for want of clarity and should be removed from the TPO or trees properly identified.

- G2 (was G3 and previously in A3 in Consent Order) – there are 7 sycamores in group but only 6 proposed for TPO. The tree officer has NOT identified which sycamore tree is not protected and therefore there is ambiguity over which trees in the group are protected. Accordingly this group cannot be confirmed for want of clarity and should be removed from the TPO or trees properly identified.
- G3 (was G4 and previously in A3 in Consent Order) – BH notes there are 5 apple trees present but only 4 in the proposed TPO. The tree officer has NOT identified which apple tree is not protected and therefore there is ambiguity over which trees in the group are protected. Accordingly this group cannot be confirmed for want of clarity and should be removed from the TPO or trees properly identified.

A single digit change to a National Grid Reference equates to a significant mapping change. It is unclear whether the changes made are due to mapping errors, typing errors, or are referring to different trees. If, at this stage, it is impossible to ascertain which trees are proposed for TPO (or not), the planning committee cannot lawfully confirm any such order.

We strongly advise that until such time as there is no doubt whatsoever about the identifying and mapping of the proposed TPO trees and the tree officer given a full explanation that we can verify, and the planning committee has been properly apprised of the pertinent law and the facts, that any tree, group of trees or woodland is NOT confirmed for TPO. To do otherwise in these circumstances would clearly be unlawful.

#### **Other matters:**

1. The latest tree officer report still includes photographs from private gardens and heavily relies upon private amenity which cannot in anyway be construed as 'significant public amenity'. These, and any reference to private gardens and private amenity should be removed from the report not being lawful considerations.
2. You have advised that permission was sought for the taking of photographs on private land however you did not confirm that permission had been expressly granted. Are there any instances where homeowners were not in residence and consent was not obtained?
3. Appendix 5 of the December Committee Report provides a summary of representations in support of the TPO. It is noted that 1/3 of these are anonymous and therefore it is entirely incorrect to state they are all from local residents as this is unknown.
4. The above summary of support comments completely fails to mention that over half the comments refer to housing, planning or development grounds. Such grounds are expressly prohibited as grounds for considering making a TPO. This is an extraordinary omission from a supposed objective report.
5. The names and addresses of those support comments that were not anonymous have been redacted, however that is not the case with objection comments. Both objection and support comments identity are in the public domain and are not subject to the data Protection Act. The Council's different treatment of the representations, again, seems to demonstrate apparent or actual bias.

There are a number of other matters which we have not raised at this time, but reserve the right to raise further matters in due course.

Our client will be seeking full re-imbusement of costs incurred in the matter as a result of the repeated delays, changes, and errors occasioned by the conduct of the Council.

Yours faithfully

*Harrison Clark Rickerbys*

**HARRISON CLARK RICKERBYS LIMITED**

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



7 December 2017

**BY SPECIAL DELIVERY BY 1PM**  
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**PLANNING TEAM**

**BY POST AND EMAIL**  
[t.lovejoy@bromsgroveandredditch.gov.uk](mailto:t.lovejoy@bromsgroveandredditch.gov.uk)

Dear Sirs

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

Thank you for your email of 6<sup>th</sup> December. As you will appreciate, the content of the email raises a number of concerns regarding the way Bromsgrove District Council is approaching the making of Tree Preservation Order (No. 11) 2017 ("the TPO").

We wish to make a limited number of comments in advance of the meeting between the Council's Tree Officer and our client's Arboricultural Consultant on site on Friday 8<sup>th</sup> December. We will be making further representations following the site meeting.

**1. Identification of Trees proposed to be protected by the TPO**

The current ambiguity in relation to which trees are proposed to be protected by the TPO has been noted by the Council's Committee Members, as well as our clients, and our clients' Arboricultural Consultant.

The assertion in your email of 6<sup>th</sup> December that the Council "does not accept there is any ambiguity", is therefore baffling.

As you have identified in your email of the 6<sup>th</sup> December, Regulation 3(3) of the Town and Country Planning (Tree Preservation) (England) Regulations 2012 requires that **"The map contained in, or annexed to, an order shall be prepared to a scale sufficient to give a clear indication of the position of the trees, groups of trees or woodlands to which the order relates"** (emphasis added).

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The Planning Practice Guidance (“PPG”) states at paragraph 36-022-20140306 that it is **“important”** for the Council **“to gather enough information to be able to accurately map”** the trees, and that **“trees which are not to be included in the Order”** should also be recorded.

The Council’s Members must be clear as to which trees are to be protected in order for them to be able to assess the merits of the TPO lawfully.

Paragraph 36-025-20140306 of the PPG also reminds authorities that **“successful prosecutions for contravening Orders will be difficult where Orders do not show clearly which trees are meant to be protected”**.

It is, therefore, in all parties’ interests for the trees intended to be protected to be correctly identified in the TPO.

We trust that, as a result of the meeting on site, the correct trees will be tagged, the updated Committee Report will identify the trees proposed to be protected clearly, and the TPO Map and Schedule will correctly reflect the trees proposed to be protected.

## **2. Assessment of Trees proposed to be protected by the TPO**

As you are aware, the legal power for the Council to make the TPO pursuant to Section 198 of the Town and Country Planning Act 1990 (“TCPA”) is based on it being **“expedient in the interests of amenity”** to make the TPO.

Although there is no legal test of amenity, the PPG provides guidance on the assessment of amenity.

Paragraph 36-007-20140306 of the PPG, which is entitled **“What does ‘amenity’ mean in practice?”**, makes clear 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”** (emphasis added).

That paragraph goes on to say that **“Before authorities make or confirm an Order they should be able to show that protection would bring a reasonable degree of public benefit”** (emphasis added).

Paragraph 36-008-20140306 of the PPG sets out the two key components of amenity for the purposes of Section 198 of the TCPA as (A) visibility, and (B) individual, collective and wider impact, with ‘other factors’ such as nature conservation or climate change being a third potential consideration. The Council has states in its letter of 1<sup>st</sup> December 2017 that it is promoting the TPO on the basis of **“the character of the trees and visual amenity”** and is not pursuing the protection of the trees on the basis of **“the rarity and cultural or historic value”**.

### **(A) Visibility**

The concept of amenity being based on public benefit, is then repeated in the PPG guidance in the context of the assessment of visibility.

In your email of 6<sup>th</sup> December 2017 you quote part of the above paragraph of the PPG, being **“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**" (emphasis added).

As such, the inclusion of any trees which are not visible from a public place within the TPO would be 'abnormal', and contrary to guidance, so would need to be justified clearly and objectively.

It is noted that the TEMPO method of assessment, adopted by the Council to assess the merits of the trees for inclusion in the TPO, grades trees on the basis of "**Relative public visibility**" (emphasis added), with any trees which are "**not publically visible**" being given a score of 1 out of 5 in this category.

The TEMPO assessment undertaken by Gavin Boyes, rates all trees proposed to be protected with a score of 2 or higher, which is inconsistent with the statement made at paragraph 4.5(e) in the Committee Report prepared for the December Committee Meeting that "**I accept that not all the trees identified within the new order are visible from a public place**".

As you are aware, the Barton Hyett report dated 24<sup>th</sup> November 2017 considers a number of the trees proposed to be protected by the TPO to have no public visibility whatsoever.

Paragraph 36-008-20140306 of the PPG states that authorities should assess "**the amenity value of trees in a structured and consistent way**". The TEMPO methodology is such a structure, but only if it is applied correctly and consistently.

There is no concept of "personal" amenity value in the PPG, and so consideration of views from private gardens as part of the amenity test is a clear departure from the guidance, for which a clear rationale must be given and justified in accordance with the case of Carpets of Worth v Wyre Forest DC (1991) 62 P. & C.R. 334.

The inclusion of photographs taken from private properties within the Committee Report as evidence of amenity value is therefore misleading as to the amenity value of the trees to be protected. The statement in the December Committee Report at paragraph 3.7 that trees visible from private properties "**contribute to the amenity of the area**" is also misleading, as any private amenity does not form part of the proper assessment of the merits of the TPO in accordance with the PPG.

Given the key importance of visibility in the PPG, misleading the Committee in relation to this critical issue is a material error: it cannot be said that the same decision would be made if the Committee had been properly directed, which therefore makes the decision susceptible to legal challenge.

#### (B) Individual, collective and wider impact

The "**size and form**" of trees is also an important part of assessing the amenity value of trees, in accordance with paragraph 36-008-20140306.

The TEMPO methodology assigns a value of 1 to any specimens in "**poor**" condition, and a value of 3 to any "**fair**" specimens.

Gavin Boyes' TEMPO assessment assigns a value of 3 to all trees proposed to be protected. The Barton Hyett report, by contrast, assigns a value of 5 ("**good**") to a number of trees, 3 to many, and 1 to some. This suggests the latter report has adopted a more structured and thorough consideration of

the condition of the tree, rather than a blanket assessment. If the Council genuinely considers that all the trees are of "*fair*" condition, this should be documented with reasons.

### **3. Expediency of making the TPO**

Expediency is another key factor for the making of the TPO, for which guidance being provided in PPG paragraph 36-010-20140306.

That paragraph states "***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***" (emphasis added).

The amenity value as discussed above, is therefore also a key component of the assessment of expediency. A flawed approach in relation to the assessment of amenity value, also infects the assessment of expediency.

The proper question for the Committee to be explained in the Committee Report is whether each element of the modified TPO satisfies the test that it is expedient in the interests of amenity to confirm the TPO in relation to that element.

Any trees for which there is no public amenity, it would be irrational for the Committee to conclude that the expediency test is met, and the use of a TPO in these circumstances would constitute an improper use of the Council's powers.

### **4. The Council's role as a public body**

As you are aware, the Council, as a public body, has a duty to act fairly and transparently.

The PPG notes at paragraph 36-037-20140306 that "***Authorities should bear in mind that, since they are responsible for making and confirming Orders, they are in effect both proposer and judge. They should therefore consider how best to demonstrate that they have made their decisions at this stage in an even-handed and open manner***".

Case law also recognises that Court may properly exercise a higher degree of scrutiny of Councils' conduct and apply an enhanced duty to deal with objectors fairly and openly in TPO matters on the basis that the Council is both promoting the TPO and determining objections made against it: Wilkson Properties v Royal Borough of Kensington and Chelsea [2011] J.P.L. 1083.

The statements in your letter of 6<sup>th</sup> December 2017 that "***There is no duty to give a detailed explanation for trees***" should be reconsidered, particularly in light of the Supreme Court's decision yesterday in the case of Dover District Council, China Gateway International Ltd v CPRE Kent [2017] UKSC 79, which emphasises the duty of local authorities to give reasons for a decision in accordance with the common law principle of fairness, open justice and transparency.

In addition to carrying out the assessment of the trees in accordance with the requirements of the law, policy, and guidance, the Committee Report must also correct errors in the previous Committee Report clearly and expressly, so that the decision of the Committee is not tainted by uncorrected errors in previous reports.

The purpose of this correspondence is to assist the Council in carrying out an impartial, objective, and transparent assessment of the trees on site, and to report to its Planning Committee in a way which would allow the Committee to make a decision on the confirmation of the TPO lawfully.

Further representations will be made in relation to the other points raised in your email of the 6<sup>th</sup> December 2017 shortly.

Yours faithfully

A handwritten signature in black ink that reads "Harrison Clark Rickerbys". The signature is written in a cursive, slightly slanted style.

**HARRISON CLARK RICKERBYS LIMITED**



Your reference:

Our reference: RA03.ACC0014-0001.RA

Direct email: randrews@hcrlaw.com



11 December 2017

**BY SPECIAL DELIVERY BY 1PM**

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**PLANNING TEAM**

**BY POST AND EMAIL**

[t.lovejoy@bromsgroveandredditch.gov.uk](mailto:t.lovejoy@bromsgroveandredditch.gov.uk)

Dear Sirs

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

We write further to our letter of 7<sup>th</sup> December, which we trust will be placed before Committee Members alongside this letter, and our letter of 4<sup>th</sup> December.

We understand that the site meeting which took place on the 8<sup>th</sup> December between your tree officers and our client's Arboricultural Consultant was productive, and trust that the Committee Report and recommendation to Committee in relation to the modification of Tree Preservation Order (No. 11) 2017 ("the TPO") will reflect the matters discussed.

As indicated in our letter of 7<sup>th</sup> December, we wish to make some further comments to assist the Council in ensuring the way the TPO is presented to Committee is lawful, and thus reducing the risk of the decision being susceptible to legal challenge.

Whilst we have made every effort to respond within the arbitrary and unreasonable deadline set by the Council of noon on Monday 11<sup>th</sup> December following the site visit at 11am on Friday 8<sup>th</sup> December, we reserve the right to make further representations.

**1. Inclusion of trees which were not identified in the TPO as made on 4<sup>th</sup> July 2017**

As you are aware, in accordance with Regulation 7(5) of the Town and Country Planning (Tree Preservation) (England) Regulations 2012, any modifications the Council wishes to make to the TPO

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Hereford T: 01432 349670 F: 01432 349660 Thorpe House 29 Broad Street Hereford HR4 9AR  
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as made on 4<sup>th</sup> July 2017 "**may not add to the Schedule to the order (and the map) references to a tree to which the order did not previously apply**".

As we have raised in previous correspondence, the modified version of the TPO put forward to Committee at Appendix 2 of the December Committee Report includes a Willow tree at T5.

This tree was not included in the TPO, and so may not lawfully be added to the modified TPO.

## **2. Breach of the Consent Order**

You are also aware that any breach of the Consent Order approved by the High Court of Justice on 20<sup>th</sup> June 2017 would amount to contempt of Court.

This means that the Council may not include within the TPO any trees which were not identified within the Schedule and Map attached to the Consent Order.

As you are aware from our letter dated 4<sup>th</sup> December 2017, there are a number of trees identified in the TPO which have different National Grid References to the trees identified in the Consent Order. It is, therefore, not clear whether the two documents identify the same trees.

If new trees have been included within the TPO, then this would amount to contempt of Court.

You will appreciate that the change in National Grid Reference is particularly crucial in relation to trees where there are several trees of the same species in an area, where some of the trees are proposed to be protected, and some are not.

This is the situation in relation to T14 identified in the TPO, where the change in National Grid Reference from the Consent Order has resulted in a different holly tree being proposed for protection.

As such the inclusion of T14 within the TPO is a breach of the Consent Order, and so T14 must be removed from the TPO.

## **3. Correction of legal errors within previous Committee Reports**

We note the statement in your letter of the 1<sup>st</sup> December 2017 that the November Committee Report is "**no longer in front of members**", however this is not the case.

The Council's Committee has received and reviewed the November Committee Report, the December Committee Report, as well as various updates, both verbally and in writing. All of these documents and representations form part of the Council's report to Committee, and so any flaws in any of the documents or verbal statements taint the decision of the Committee, leaving it susceptible to legal challenge.

The Council has an opportunity to correct the errors made, by providing a full explanation to the Committee in which it identifies, explains, and corrects the errors made in the previous Reports and updates expressly. It is simply not sufficient to 'not repeat' the errors in the latest Committee Report – the previous errors must be addressed and corrected clearly and comprehensively.

Failure to correct these errors is a material error which would leave the decision of the Committee open to legal challenge on the basis that it cannot be said that the same decision would be made if the Committee had been properly directed.

#### **4. Apparent or actual bias of Officers**

As we set out in our letter of 7<sup>th</sup> December 2017, the Council, as a public body, has a duty to act transparently and fairly. There is a higher degree of scrutiny to be applied to Council's actions in relation to TPO matters, as the Council is acting as both proposer and Judge.

We have previously raised concerns about the impartiality of the Council's tree officers on the basis of the erroneous and misleading statements made in the November Committee Report regarding the landowners, and other misleading comments within both Committee Reports, including the misinterpretation and misapplication of planning policy and guidance, and the inclusion of misleading documents, such as the photographs taken from neighbouring properties.

To date, these errors, as identified in detail in our previous correspondence, remain uncorrected.

In addition to the points raised in previous correspondence, we also note that in your email of 6<sup>th</sup> December 2017 you state in the context of the photographs taken from neighbouring properties that ***"the tree officer obtained permission from all but one property where the owner was out"***.

Whilst we appreciate that the Council's Officers have powers of entry pursuant to Section 214B of the Town and Country Planning Act 1990 (as amended), this power may only be used in connection with the functions conferred on the authority under Chapter 1: Trees, of Part VIII of the Town and Country Planning Act 1990 (as amended).

As such, and given that personal amenity value is not recognised in the Planning Practice Guidance, it is questionable that the Council's Officer had the legal power to enter this property without consent. This conduct would, therefore, constitute trespass.

We have set out previously in our letters of the 2<sup>nd</sup> November and 16<sup>th</sup> November 2017 the actions of the Council's Officers which gives rise to an appearance of bias.

Both seeking and obtaining permission from neighbouring properties to take photographs of the trees proposed to be protected by the TPO from viewpoints entirely irrelevant to the assessment of the trees, and the potential trespass in order to obtain further photographs, provides further cause for concern about the impartiality and apparent (or actual) bias in the promotion of the TPO.

#### **5. Failure to disclose documents and failure to respond to Letter Before Claim**

We note your confirmation in your email of 28<sup>th</sup> November that the Council has provided copies of all documents requested in our letter of 16<sup>th</sup> November 2017.

We nevertheless repeat this request, which includes all documents produced or received since 28<sup>th</sup> November, and remind the Council of its duty of candour.

You will recall that we requested a list of all addresses which were served with notice of the TPO. A list of addresses served must have been retained by the Council, and so there is no reason why this

has not been disclosed. This is not privileged nor confidential information, and should not have been withheld. Please now provide this by return.

We also note that the Council's response to our Letter Before Claim, dated 1<sup>st</sup> December 2017, does not follow the form prescribed by Annex B of the Pre-Action Protocol in the Civil Procedure Rules.

The purpose of this correspondence, and, indeed, our previous correspondence is to assist the Council in carrying out an impartial, objective, and transparent assessment of the trees on site, and to report to its Planning Committee in a way which would allow the Committee to make a decision on the confirmation of the TPO lawfully.

Committee Members should be aware that the landowners have not sought to challenge the TPO in its entirety, as it is accepted that there are a number of trees on the site which merit protection. In fact, the Barton Hyett assessment grades some trees as being of much higher value than the Council's own assessment.

The trees to be protected by the TPO must, however, be identified and the extent of the TPO determined in accordance with the law and planning practice guidance. The TPO as made on 4<sup>th</sup> July 2017 simply does not meet the required standard.

The Committee have the power to modify the TPO in accordance with the thorough assessment of the trees on site, carried out by Barton Hyett, which has been acknowledged verbally by the Council's tree officer to be "fair".

**The Committee must make its own assessment in view of the information before it. Any decision based on the flawed Committee Report will be open to legal challenge.**

To this end we enclose a modified version of the Schedule attached to the TPO as made on 4<sup>th</sup> July 2017, which we invite the Council and its Committee Members to consider together with the other information before them.

We trust that this letter is of assistance, and the Council will modify the report to Members for the Committee Meeting on the 20<sup>th</sup> December 2017 accordingly, enabling all parties to avoid a further legal challenge in relation to this matter.

We reserved the right to make further representations once we have reviewed the amended report to Committee.

Yours faithfully

*Harrison Clark Rickerbys*

**HARRISON CLARK RICKERBYS LIMITED**

**First Schedule**

**Trees specified Individually**

(encircled in black on the map)

<u>No. on Map</u>	<u>Description</u>	<u>NGR</u>	<u>Situation</u>
T1	Ash	399729 - 272428	Near left boundary
T2	Ash	399703-272484	Centre left side of site
T3	Ash	399661-272519	Near left boundary
T4	Ash	399658-272523	Near left boundary
<del>* T5</del>	<del>Ash</del>	<del>399640-272540</del>	<del>Near left boundary</del>
<del>T6</del>	<del>Oak</del>	<del>399608- 272582</del>	<del>Near right boundary</del>
<del>T7</del>	<del>Silver Birch</del>	<del>399704-272544</del>	<del>Centre site</del>
<del>T8</del>	<del>Silver Birch</del>	<del>399714-272551</del>	<del>Centre site</del>
T9	Ash	399737-272563	Right boundary of site
<del>T10</del>	<del>Ash</del>	<del>399757-272533</del>	<del>Right boundary of site</del>
T11	Sycamore	399761-272527	Right boundary of site
<del>T12</del>	<del>Ash</del>	<del>399764-272521</del>	<del>Right boundary of site</del>
T13	Holly	399790-272479	Right boundary of site
<del>* T14</del>	<del>Holly</del>	<del>399792-272476</del>	<del>Right boundary of site</del>
T15	Sycamore	399765-272484	Right side of property
T16	Yew	399759-272493	Right side of property
<del>T17</del>	<del>Willow</del>	<del>399750-272501</del>	<del>Rear of property</del>
<del>T18</del>	<del>Oak</del>	<del>399684-272558</del>	<del>Centre of plot rear of Property</del>
<del>T19</del>	<del>Apple</del>	<del>399728-272560</del>	<del>Right side of site</del>

\* In breach of Regulation 7(5) of the Town and Country Planning (Tree Preservation) (England) Regulations 2012.

\*\* In breach of the Consent Order.

as explained in covering letter dated 11 December 2017.

### Groups of trees

(within a dotted black line on the map)

<u>No. on Map</u>	<u>Description</u>	<u>NGR</u>	<u>Situation</u>
G1	2 x Horse Chestnut, 1 x Oak, 3 x Lawsons Cypress 1 x Spruce	399743-272428	Front boundary with Linthurst Newtown road
G2	3 x Ash	399703-272467	Near left boundary
G3	2 x Horse Chestnut 3 x Beech 1 x Birch, 6 x Sycamore	399729-272512	Centre of site
G4	1 x Pear, 4 x Apple	399746-272529	Right side of site
G5	3 x Silver Birch	399697-272574	Near right boundary
G6	1x Oak, 1x Holly 1x Ash	399686-272549	Centre of site

### Trees specified by reference to an area

(within a broken black line on the map)

<u>No. on Map</u>	<u>Description</u>	<u>NGR</u>	<u>Situation</u>
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NONE

### Woodlands

(within a continuous black line on the map)

<u>No. on Map</u>	<u>Description</u>	<u>NGR</u>	<u>Situation</u>
W1	Mixed native Species woodland	399639-272584	North-eastern end of site