

From: David Gill – Head of Law and Governance / Monitoring Officer

To: All Members of Development Control Committee

BRIEFING NOTE – Tree Preservation Orders and Compensation

At the meeting of Policy Development and Finance Committee on 17 July a request was made for an update on the current position in respect of the payment of compensation under the provision of the Town and Country Planning Act 1990 (and associated regulations) where an application for works to a protected tree is refused and damage is subsequently caused.

Legislation

The Town and Country Planning (Tree Preservation) (England) Regulations 2012 introduced a single set of procedures for all trees covered by tree preservation orders. Consequently:

- Orders made before 6 April 2012 continue to protect the trees or woodlands they cover
- the legal provisions listed in Orders made before 6 April 2012 have been automatically cancelled and replaced by the provisions in the new regulations.
- Only the information necessary to identify these Orders and identify the trees or woodlands they protect is retained

NB: Many of the pre-2012 orders contained a restriction on the ability to claim damages or compensation which is now longer of any effect.

Taking decisions on applications for consent under a Tree Preservation Order.

- In considering an application, the local planning authority should assess the impact of the proposal on the amenity of the area and whether the proposal is justified, having regard to the reasons and additional information put forward in support of it. The authority must be clear about what work it will allow and any associated conditions. Appeals against an authority's decision to refuse consent can be made to the Secretary of State.
- In certain circumstances, compensation may be payable by the local planning authority for loss or damage which results from the authority refusing consent or granting consent with conditions. However, there are strict criteria and limitations on what compensation may be payable.

When considering an application the authority is advised to:

- assess the amenity value of the tree or woodland and the likely impact of the proposal on the amenity of the area;
- consider, in the light of this assessment, whether or not the proposal is justified, having regard to the reasons and additional information put forward in support of it;
- consider whether any loss or damage is likely to arise if consent is refused or granted subject to conditions;
- consider whether any requirements apply in regard to protected species;
- consider other material considerations, including development plan policies where relevant; and
- ensure that appropriate expertise informs its decision.

However, if the authority believes that some loss or damage is foreseeable, it should not grant consent automatically. It should take this factor into account alongside other key considerations, such as the amenity value of the tree and the justification for the proposed works, before reaching its final decision.

What can the local planning authority decide?

When determining applications for consent under an Order, the authority may:

- grant consent unconditionally;
- grant consent subject to such conditions as it thinks fit;
- refuse consent.

The authority must decide the application before it, so it should not issue a decision which substantively alters the work applied for. The authority could, however, grant consent for less work than that applied for.

What about granting consent subject to conditions?

A condition may:

- relate to the planting of replacement trees;
- require further approvals to be obtained from the person giving the consent;
- regulate the standard of the authorised work;
- allow repeated operations to be carried out (works may be carried out only once unless a condition specifies otherwise); and/or
- impose a time limit on the duration of consent other than the default 2 year period.

A condition should:

- relate to the authorised work;
- be fair and reasonable in the circumstances of each case;
- be imposed only where there is a definite need for it; and
- be worded precisely, so the applicant is left in no doubt about its interpretation and the authority is satisfied it can be enforced.

The authority is responsible for enforcing all conditions in a consent, so its decision notice should clearly state the reasons for its conditions. This is particularly important where repeated operations have been applied for. In such cases the authority should make the scope, timing and limit of the work clear.

What information should be provided by an authority if it refuses consent or imposes conditions?

When an authority decides to refuse consent or grant consent subject to conditions its decision notice should clearly state what the decision is and the reasons for that decision. These should specifically address each of the applicant's reasons for making the application. In addition, the authority should:

- give its reasons for each condition imposed;
- explain the applicant's right of appeal to the Secretary of State against the decision and give the contact details of the Planning Inspectorate; and

- explain the applicant's right to compensation for loss or damage as a result of the authority's decision, and how a claim should be made.

In what circumstances may a local planning authority be liable to pay compensation?

An authority is only liable to pay compensation in certain circumstances and there are strict criteria and limitations. Subject to provisions relating to forestry operations in protected woodland, an authority may be liable to pay compensation for loss or damage caused or incurred in consequence of it:

- refusing any consent under an Order;
- granting a consent subject to conditions; or
- refusing any consent, agreement or approval required under a condition

What are the limits for making claims for compensation?

No claim can be made for loss or damage incurred before an application for consent to undertake work on a protected tree was made.

Legislation sets out circumstances in which a claim cannot be made. Subject to provisions relating to forestry operations in protected woodland, a claim for compensation must be for not less than £500 and made to the authority either:

- within 12 months of the date of the authority's decision; or
- within 12 months of the date of the Secretary of State's decision (if an appeal has been made).

What limits the local authority's liability to pay compensation?

Legislation limits the authority's liability by setting out circumstances in which a claim cannot be made and circumstances in which compensation is not payable.

Subject to specific provisions relating to forestry operations in protected woodland, any claimant who can establish that they have suffered loss or damage as a result of an authority either refusing consent or imposing conditions in respect of protected trees is entitled to claim compensation. However the authority's liability is limited.

In such cases, compensation is not payable for any:

(1) loss or damage which was:

- reasonably foreseeable by that person; and
- attributable to that person's failure to take reasonable steps to avert the loss or damage or mitigate its extent;

(2) loss or damage which, having regard to the application and the documents and particulars accompanying it, was not reasonably foreseeable when consent was refused or was granted subject to conditions;

- loss of development value or other diminution in the value of land; and/or
- costs incurred in making an appeal to the Secretary of State against the refusal of any consent or the grant of consent subject to conditions.

Discussion

In so far as (1) above is concerned particular concern was generated by the case of *Burge & Anor v South Gloucestershire Council* a case in the Upper Tribunal (Lands Chamber) reported in August 2016.

The case concerned South Gloucestershire's refusal to allow the felling of an oak tree covered by a tree preservation order, despite its roots having been found to have damaged the foundations of a resident's conservatory.

South Gloucestershire argued that the conservatory had been so badly built that it would have failed anyway.

It also contended that the claimants' loss was not reasonably foreseeable when felling consent was withheld in 2010.

The tribunal said it was already known by then that the oak was causing significant damage to the conservatory's foundations and "we do not consider that the council comes anywhere near satisfying us that further loss or damage to the claimants was not reasonably foreseeable at that date".

South Gloucestershire argued that, were it to lose: "Anyone would be entitled to erect an inadequate building near a protected tree contrary to all industry guidance and when damage is caused by that tree and the local authority refuses to grant consent to fell the tree they are liable to pay damages in any and all events".

The reverse argument was put by the claimant (and accepted by the Tribunal) that where a claimant had instructed a reasonably competent builder to build a construction in accordance with the industry guidance of the time that was sufficient to discharge the duty to take reasonable steps to avert the loss or damage or mitigate its extent and therefore compensation should follow.

The case was appealed to the High Court in September 2017 where the court held that the Upper Tribunal had misdirected itself in law, although it did not say that the decision was in fact wrong and remitted the case back to the Tribunal to be re-determined.

As regards point (2) where it is reasonably foreseeable to an authority from the documentation and particulars submitted with an application that damage is likely to occur then an authority will not be protected from a compensation claim. Government guidance is that appropriate expertise (in the form of expert arboricultural and ecological advice, and/or technical evidence from a relevant engineer, building/drainage surveyor or other appropriate expert) should inform the final decision.

Dated: 13 August 2018