

Northern Planning Committee

Date of Meeting: 20th April 2022

Report Title: **Cheshire East Borough Council (High Legh – Land to the north of 2 North Drive) Tree Preservation Order 2021**

Senior Officer: David Malcolm- Head of Planning

1.0 Report Summary

1.1 To inform the committee about the background and issues surrounding the making of a Tree Preservation Order on 3rd December 2021 on land adjacent to 2 North Drive; to consider representations made to the Council with regard to the contents of the TPO and to determine whether to confirm or not to confirm the Order.

2.0 Recommendation

2.1 The Head of Planning (Regeneration) recommend that the Northern Area Planning Committee confirm the Tree Preservation Order on land at 2 North Drive with no modifications

3.0 Reason for Recommendation

3.1 The loss of the tree could have a significant impact upon the amenity and landscape character of the area. The confirmation of this Tree Preservation Order will ensure that the Council maintains adequate control over a tree of amenity value.

4.0 Background

4.1 Introduction

4.2 The Willow is located within a grass verge maintained by Cheshire East Highways at the junction of Pheasant Walk with North Drive. The tree is a prominent and valued feature in the locality and makes an important contribution to the landscape character of the area.

- 4.3 The circumstances are that a report was received from several members of the public that a plot of land (394 square metres) to the north of 2 North Drive was advertised for sale at public auction on 7th/8th December 2021. The area of amenity space contains a large early mature Willow and while no planning consent has been applied for; the sale package included a development viability survey which indicated the footprint of a property central to the small area of land.
- 4.3 Highways presently maintain the land, however the land is known to be registered to a third party. Section 263 (1) of the Highways Act 1980 provides that, subject to certain exceptions referred to in Subsection (2), every highway maintainable at public expense, together with the materials and scrapings of it, is vested in the authority who are for the time being the highway authority for the highway. Case Law has established trees planted pre and post adoption are vested in the authority, and that includes all parts of the tree, above ground and the soil the roots occupy. The subsoil beneath the area in question including services, highway apparatus, and tree roots are therefore believed to be vested with the Highway Authority (Hurst and Another v Hampshire CC [1997] EWCA Cid J0619-4).
- 4.4 The advertised sale of the land on which the tree stands constituted a perceived threat to the trees long term retention and prompted a number of local residents to contact the Council regarding their concerns that the tree was at risk, the value they placed on the tree, and the amenity it affords the area.
- 4.5 An amenity evaluation has determined that the tree contributes to the visual amenity and landscape character of the area and there was a risk of the tree being removed and therefore it was considered expedient to make an Order to protect the tree.
- 4.6 Under powers delegated to the Head of Planning (Regeneration), a Tree Preservation Order was made on 3rd December 2021.

Report Format

- 4.7 The information contained in this report is divided into three sections:
- 4.8 Section 5 provides a summary of the TPO service and consultation process
- 4.9 Section 6 provides a summary of the objections/representation made (see Appendix 3 & 4).
- 4.10 Section 7 provides the Councils appraisal and consideration of the objection.

5.0 Consultation

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- 5.1 On making the TPO a planning authority must publish and serve copies on owners and occupiers of land directly affected by it. There is a 28 day period to object or make representations in respect of the Order. If no objections are made the planning authority may confirm the Order itself if they are satisfied that it is expedient in the interests of amenity to do so. Where objects or representations have been made, then the planning authority must take them into consideration before deciding whether to confirm the Order.
- 5.2 The Order was served on the owner/occupiers of the land and their Agents on 3rd December 2021. Copies of the Order were also sent to residents that had requested the Order and Ward Members.

6.0 Objections/representations

6.1 The Council has received two objections to the Tree Preservation Order one from Joseph Search Ltd and one from ACS Consulting Ltd on behalf of their client.

6.2 Objection 1

6.3 Joseph Search Ltd objects to the Order and its implementation for the reasons detailed below;

- 1. A discrepancy has been noted with the date of visit stated 29th November 2022 on the Landscape appraisal by E Hood. This TPO should not have been granted with such date, and a removal of the TPO with another inspection is necessary.*
- 2. This typographical error could not be held up in court, where a key clause contains an error such as this 2022 date, the consequences could be significant. As found in question in Wei Guang Real Estates Development Ltd. v. Netzwerk Productions Ltd., 2021 BCSC 215 ("Wei Guang"), where the summary trial judge, through contractual interpretation, found that an environmental indemnity clause was missing the key word "not".*

6.4 Objection 2

6.5 ACS Consulting Ltd objects to the Order and its implementation for the reasons detailed below;

The objection is made on 4 grounds which are summarised below.

- 1. That it is not expedient in the interest of amenity nor is there any amenity value; we do not believe it is expedient in the interest of amenity to protect the tree, nor is there any amenity value that justifies the placing of the tree in a Tree Preservation Order.*

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2. *Visibility; current guidance on TPOs notes that public visibility alone will not be sufficient to warrant an Order.*
3. *Individual, collective, and wider impact; We contend the tree does not contribute significantly to the local environment and its enjoyment by the public, is not special or rare and is no more noteworthy than any other tree within the estate. The tree has no cultural or historic value, its size and form are not remarkable, and it has poor canopy form making no special contribution to warrant protection.*
4. *Other factors; Central Government advises that trees already under management need not be the subject of an Order. In accordance with Government advice the tree does not require to be protected. The Council suggests there are no reasonably foreseeable actionable nuisances that may be associated or caused by the tree. We suggest this is wrong and that its likely to overgrow the boundary of the adjacent property becoming an actionable nuisance and that its location by a footpath will cause a nuisance that will require addressing.*

6.6 Objection 2 a)

6.7 ACS Consulting Ltd upholds its objection and submits further comments for consideration.

- *As advised in Government Guidance (Paragraph:037) Authorities should be mindful that they are responsible for making and confirming Orders and are in effect proposer and judge. They should therefore demonstrate that decisions have been made in an even handed and open manner and we contend this has not occurred.*
- *There is no risk; site owner could have removed the tree prior to the land being placed on open market. There has been no attempt to remove the tree, thus a TPO is not required and the wrong approach*
- *Tree is not right tree in right place and the use of TPO legislation in this instance is totally wrong and an abuse of the powers given to the Council*
- *Any alternative use of the land would need both a stopping up order from the Highways Authority and a planning application, both of which consider the merits of any application. A TPO is not the correct instrument in this instance*
- *The TPO is being used as a bar to any meaningful future use of a parcel land. A parcel of land that makes up part of the councils housing supply quota.*

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7.0 Appraisal and consideration of the objection

7.1 Objection 1 by Joseph Search Ltd

7.2 It is accepted that the year date on the landscape appraisal which is a supporting document is a typographical error and should read 2021 to reflect the date the site visit was carried out.

7.3 Legal advice was sought on the implications of the error within the supporting document. The Legal Department expressed the view that as the TPO document, plan and service documents all state the correct year and date of 2021, that a typographical error on a supporting document would not invalidate the Provisional TPO as served.

7.4 Objection 2 by ACS Consulting Ltd

7.5 Guidance – Tree Preservation Orders and trees in conservation areas states that *'Amenity' is not defined in law...but Orders can be used to protect selected trees if their removal would have a significant negative impact on the local environment and its enjoyment by the public'* (Paragraph 007)

'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' (Paragraph 010)

The Councils view is that the tree stands in a grass verge within the public domain and is clearly visible. The tree may not be fully mature but stands at a junction and is established and clearly visible landscape feature of significant amenity value. The advertised sale of the land on which the tree stands constituted a threat to the trees long term retention and prompted a number of local residents to contact the Council regarding their concerns that the tree was at risk, the value they placed on the tree, and the amenity it affords the area.

7.6 The tree is widely visible from several footpaths and roads as illustrated in the Councils Landscape Appraisal and as described within Section 4 of the Amenity Evaluation Checklist. The height and spread of the canopy of the tree presently occupies much of the verge and it is considered that its loss would have a detrimental impact on the existing landscape character and appearance of the area.

7.7 The tree is a large, early mature Weeping Willow expresses good vigour and vitality and has become an established and attractive feature of the residential area. The tree is sited a reasonable distance from the closest

- property and its growth habit is considered characteristic of the species and not of a 'poor form' as suggested. Weeping willow is a species which would tolerate pruning operations to maintain it as a street tree to achieve appropriate clearances from roads and footpaths and is subsequently considered to be a long-term amenity feature.
- 7.8 The factors that have been considered are visual amenity and risk to the tree as a consequence of the advertised sale of a piece of land that the Local Authority currently maintain as a Highway verge.
- 7.9 The view that the tree can be managed and maintained in this setting is valid as options to maintain the tree in accordance with *BS3998:2010 Tree work - Recommendations* clearly exist to maintain its relationship with the adjacent property, roads, and footpaths. The requirement to provide recommendations for future management as suggested is not considered necessary or relevant in determining whether the tree is worthy of formal protection, nor is this a recommendation of Government Guidance. Damage to adjacent footpaths was not evident at the time of the assessment and while this could be a factor that may require consideration in the future, anticipating root severance as and when this occurs, does not provide adequate justification on its own to dismiss protection of the tree at the present time.
- 7.10 Objection 2 a) by ACS Consulting Ltd
- 7.11 The referenced paragraph 037 relates to the process of Confirming an Order. The Provisional Order has been signed by the Council's Principal Arboricultural & Forestry Officer who has delegated powers under the Council's current Local Scheme of Delegation. The submitted objections have been considered and responded to in writing by the Arboricultural Officer. The circumstances relating to the making of the Order and submitted objections are now being presented to and decided upon by the Northern Planning Committee in accordance with the requirements of Government Guidance and the Council's Local Scheme of Delegation.
- 7.12 The land/highway-maintained verge was advertised for sale on the open market as a development plot. While the tree was not removed prior to the auction, the expressed intention to sell an area of open space for development clearly suggests a threat to the long-term future of the tree.
- 7.13 The matter of suitability in terms of right tree in right place is subjective. The tree has amenity value and has been demonstrated to be enjoyed by the public at large. Protection of the tree was proven to be expedient given the advertised auction and the service of the TPO is therefore considered justified and in accordance with Government Guidance.
- 7.14 Alternative use of the land would require the submission of a planning application and a stopping up Order which would consider the merits of

any application although neither of these instruments would prevent the removal of the tree in advance of any submission.

- 7.15 Confirmation has been received from Strategic Planning that the land is currently allocated as amenity open space and that policies RT1 and RT2 of the adopted Macclesfield Local Plan are applicable. The land does not form part of Cheshire East Councils 5-year housing supply

8.0. Implications of Recommendation

8.1 Legal Implications

- 8.1.1 The validity of a TPO may be challenged in the High Court on the grounds that the TPO is not within the powers of the Act or that the requirements of the Act or Regulations have not been complied with in respect of the TPO. When a TPO is in place, the Council's consent is necessary for felling and other works, unless the works fall within certain exemptions e.g. to remove a risk of serious harm. It is an offence to cut down, top, lop, uproot, willfully damage or willfully destroy any tree to which the Order relates except with the written consent of the authority.

8.2 Finance Implications

- 8.2.1 No direct implication

8.3 Policy Implications

- 8.3.1 Cheshire East Local Plan – SE5 - Trees, hedgerows and woodland

8.4 Equality Implications

- 8.4.1 No direct implication

8.5 Human Resource Implications

- 8.5.1 No direct implication

8.6 Risk Management Implications

- 8.6.1 No direct implication

8.7 Rural Communities Implications

- 8.7.1 No direct implication

8.8 Implication for Children & Young People/Care for Children

- 8.8.1 No direct implication

8.9 Climate Change -

8.91 The retention of mature trees where possible is in accordance with the Councils Climate Change Agenda

8.10 Public Health Implications

8.10.1 No direct implication

8.11 Ward Members Affected

8.11.1 High Legh

9.0 Access to Information

9.1 The following document is appended to this report

Appendix 1 – Provisional TPO document
Appendix 2 – Amenity Evaluation Checklist
Appendix 3 – Objection 1
Appendix 4 – Objection 2

10.0 Contact Information

10.1 Any questions relating to this report should be directed to the following officer.

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