



Appeal Decision

Hearing held on 23 August 2011

by G D Grindey MSc MRTPI Tech.Cert.Arb

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 31 August 2011

Appeal Ref: APP/TPO/X1735/1754

Land to rear of 24 - 25 Ramblers Way, Waterlooville, Hampshire, PO7 8RE.

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for consent to fell a tree protected by a Tree Preservation Order.
 - The appeal is made by OCA UK Ltd against Havant Borough Council.
 - The application Ref: APP/10/01023, is dated 16 December 2010.
 - The work proposed is fell 1 oak tree.
 - The relevant Tree Preservation Order (TPO) is Tree Preservation Order no. 1150 Westbrook Farm, Cowplain, (Area 2) which was confirmed on 20 May 1983.
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Decision

1. The appeal is dismissed.

The TPO and general background

2. Mr Nuttall, the owner of no. 25 Ramblers Way, attended the hearing. He brought to my attention the removal of an oak to the rear of Mr Nevitt's (his neighbour's) house no. 26, in the recent past. The circumstances of that case were examined during the hearing. It would appear that an application was made to fell that oak and Dr Biddle, for the Secretary of State, made a site inspection on 6 February 2007, in connection with an appeal.
3. Dr Biddle was advised, by the Council, that the tree to the rear of no. 26 was covered by TPO no. 1224. However, this proved to be incorrect; TPO no. 1224 (which I have not seen) is stated to cover trees to the west of Park Lane while the tree to the rear of no. 26 was on the east side. Dr Biddle was advised (incorrectly) that "there was no other Tree Preservation Order relevant to the trees along the east side of Park Lane"¹. That oak was felled.
4. This information is clearly incorrect as it was agreed at the hearing that TPO no. 1150, confirmed on 20 May, 1983, covers a substantial number of trees on the east side of Park Lane. More particularly, it was agreed on site that the current appeal tree, to the rear of no. 25 Ramblers Way, is located within the G3 group of that TPO. We established this by comparing the relative position of G3 and the open field to the east of Park Lane and the south of the built development and the remaining trees on the east side of Park Lane northwards towards Tempest Avenue. There is no doubt that the current appeal oak is protected by TPO no. 1150 of 1983.

¹ Dr Biddle's report ref. no GOSE/107/001/HAVA/48185, paragraph 9, handed to all at the hearing

5. I understand that the land forming the adopted Park Lane Bridleway² has been retained by David Wilson Homes the developer of the estate. They were advised of the proposed works to their tree and told of the hearing but did not participate. It goes without saying that none of the main interested parties own the appeal tree or could give permission for felling and/or any potential re-planting within the bridleway.

Main Issues

6. From my inspection of the site and surroundings and the representations made I consider that the decision in the appeal turns on 2 main issues. These are (i) the amenity value of the tree and the likely impact of felling and (ii) whether the felling is justified in the circumstances of this case.

Reasons

Appeal (i) the amenity value of the tree.

7. This might usefully be considered under the headings from *Tree Preservation Orders – A Guide to the Law and Good Practice – DETR March 2000*, paragraph 3.3. It is clear that a considerable number of large, mature oaks have been preserved in this area, with the houses being built around them later. The TPO, of which the appeal tree forms a part, covers one side of what was obviously a former hedgerow along a Bridleway which now runs through the residential estate and to the rear of Ramblers Way and other residential roads. The bridleway forms a linear feature and part of a network of interconnecting paths, permitting movement through the estate. The oak lies just outside the domestic boundary of no. 25 Ramblers Way to the south-west of the house.
8. The appellant Company did not offer much in the way of any analysis of the amenity value of the oak, only that it had the value awarded it by the TPO. I found at my site inspection that the oak has considerable visibility from a fair number of public viewpoints, particularly from the bridleway, Park Lane, and from dwellings in the various cul-de-sacs immediately adjacent. From these the appeal tree and its neighbours occupy a skyline position.
9. The appeal tree has had a crown reduction in the past and so is smaller than some of the others along the bridleway but it is visible from a significant number of public places, to residents, pedestrians and, particularly, those travelling along the well-used bridleway. Mr Nuttall stated at the hearing that this was not a 'rural bridleway' anymore but a 'commuter route'. Hence the tree has an amenity value to a fair number of passers-by. Because the tree occupies a skyline position from many of these viewpoints it contributes greatly to the attractive, mature appearance of this residential area and the bridleway. This is a moderately sized, mature tree and hence unusual in close proximity to suburban roads.
10. This tree contributes to the pleasantness and biodiversity interest of the locality and, as a typical, domed, deciduous tree, forms a good backdrop to the built development in foreground views. In my view the loss of this oak would harm the appearance of the area, even though there are many other trees present. While there are other protected trees visible this does not mean that its loss would not be significant. The very effective screening and softening role that all these oaks play, (including the appeal tree) along the rear of the built

² Shown as such on the definitive map

development, is obvious when a comparison is made with the rear of no. 26 where the oak was felled³. Park Lane, with its large, leafy oaks, brambles and remnant hedgerows, forms a welcome, semi-natural public route, where people may freely walk, through an otherwise densely built up urban area.

11. Significantly, this oak also forms a part of a corridor or network of natural habitat which, as *Planning Policy Guidance 9 – Biodiversity and Geological Conservation*⁴ states, can link sites of biodiversity importance and provide routes or stepping stones for the migration, dispersal and genetic exchange of species in the wider environment. Park Lane bridleway runs from the heart of an urban area south-eastwards over the motorway and into the more open land to the south-east; we should aim to maintain networks by avoiding fragmentation.
12. Taking account of all of these foregoing matters, the tree appears to me to meet the criteria for protection in *Tree Preservation Orders – A Guide to the Law and Good Practice – DETR March 2000*. It has a significant impact on the local environment and its enjoyment by the public. As such, my conclusion is that felling this oak would significantly diminish the character and appearance of the area.

Appeal (i) whether the reasons given for felling the oak are sufficient to justify the course of action proposed.

13. Mr Nuttal told me that he has owned the house since it was built; he moved there in 1985. Planning permission for the conservatory was granted in December 2003⁵. There was no Building Regulation application for this work; it is exempt.
14. All the damage is within the conservatory. I saw at my site inspection wide internal and external cracks between the conservatory and the original walls, where the conservatory butts up against the west elevation of the main house. The conservatory was tied in to the main walls apparently, but the movement broke the bricks and Mr Nuttall has repaired this so the conservatory is no longer tied to the original walls. There is a crack between the floor to the conservatory and the skirting, against the main house, and I was told that the external door needs periodic adjustment as the frame gets distorted. Externally, there is a crack at DPC level and the main body of the conservatory is over-sailing the foundations.
15. The foundations for the conservatory were found in Trial pit 1; they 'comprise a concrete foundations pad 800mm thick bearing at a depth of 1.1m'⁶. In answer to my question at the hearing Mr Boyes said that such foundations would probably not comply with NHBC documents, or best practice, and should be deeper, taking into account the soil type and the proximity of the tree.
16. It is not known what foundations the main portion of no. 25 has, but it does not appear to exhibit any signs of movement. In contrast, the conservatory has not been constructed taking into account either the soil conditions or the proximity of trees.

³ See my paragraphs 3 and 4 above

⁴ PPS 9 paragraph 12

⁵ Ref no. 03/64600/001, copy given to me at the hearing.

⁶ Cunningham Lindsey Engineering Synopsis, paragraph 4.2

17. There is agreement that the soil has the potential for volume changes to varying degrees and the root identification of 6 October 2009 reveals no surprises; given the proximity of the oak tree, such roots might be expected. On-going level monitoring demonstrates a trend of 'cyclical vertical foundation movements'.⁷ The Council does not dispute that the tree is the most likely cause of clay shrinkage subsidence here.
18. I think it highly likely that the manner in which the conservatory has been constructed is the main factor in the damage here; its foundations did not take into account the proximity of the tree or the soil conditions – both of which would have been obvious at the time of building and, indeed, Mr Nuttall stated at the hearing that he had brought both to the attention of the conservatory supplier. Had the foundations and construction been properly considered at the outset, there should have been no problems.
19. It was argued, for the appellants, that the 'deemed refusal fails to strike a reasonable balance between amenity and other factors ie the need to find an effective sustainable and cost effective remedy to the damage'⁸. However, the decision in this appeal is about finding the balance, it seems to me.
20. It has been suggested that underpinning/piling could provide a solution and that costs in the order of £20,000 - £30,000 might be incurred⁹ but there is no fully costed evidence put forward. The work, it is submitted, would be highly disruptive in terms of 'alternative accommodation/storage aspects' to the occupants. However, it did not seem to me that it would be impossible to seal off this small conservatory from the main house for the duration of works. I see no reason why the household would need to move from the house while works were being carried out.
21. There are too many unknowns here to make this a decisive issue anyway. Firstly, we discussed the possibility of heave at the hearing. If the tree is felled there is a possibility of recovery as the ground re-hydrates; neither party had done any calculations about this. Despite the appellants' assurances that heave is rare, it can occur. This means that repairs cannot be carried out immediately; Mr Boyes, for the appellants, stated that they would undertake repairs next spring, if the tree was felled immediately. There will still be some costs and disruption associated with repairs anyway to be set against a proper solution. Even with the conservatory in its present condition, there is little disruption, as Mr Nuttall confirmed to me that the hearing, the conservatory is in use and is '99%' watertight as he put it.
22. Next, Mr Nuttall stated that, despite the felling of the tree behind his neighbour's house at no. 26, that conservatory was re-built anyway, so felling did not provide a solution in that case. I have no evidence one way or the other about the soil re-hydrating in the general vicinity following felling there. Thirdly, it is more than likely that the foundations of the main house are different to those of the conservatory; there may be differential movement between the 2 anyway and additional costs and disruption at some point in the future; these elements should also weigh in the balance.

⁷ OCA UK Ltd appeal statement paragraph 3.8

⁸ OCA UK Ltd appeal statement paragraph 8.6

⁹ Cunningham Lindsey Engineering Synopsis, paragraph 8.4

23. It was argued for the appellants that, if the foundations were inadequate, 'then movement and damage would have been expected immediately'¹⁰ and that the damage has worsened as time has passed indicating 'root growth and activity from the tree' are the cause of the damage. But this seems to me rather simplistic. Clearly, if the foundations were inadequate *for the immediate load* of the conservatory then one might expect immediate failure but that is not the Council's submission. They do not dispute that the tree is the likely cause of the damage here, but argue that this could have been avoided by foundations which took account of soil conditions and the proximity of the tree. Mr Boyes, for the appellants, agreed that the foundations did not meet the NHBC Standards Chapter at the hearing. I agree. In these circumstances damage might not be immediate; there are many buildings, throughout the country, which did not exhibit movement, post construction, until a particularly dry summer, like that of 1975.
24. Pulling all these threads together, I am by no means convinced that felling the oak would end the matter. There is at least a possibility of heave occurring, or differential movement – house/conservatory - with all that implies in terms of future disruption. Whatever the outcome of this appeal, there are repair and re-decoration works necessary anyway. While underpinning works would be expensive, this is a small conservatory relative to the main house. This is purely an economic balance and cannot be decisive. Given this, I see no reason why the oak must be felled. Remedial works could be properly designed to take into account the presence of the nearby protected tree as, indeed, was done when the house was built and should have been done when the conservatory was added. This has, apparently, been done at no. 26 even though a tree was felled, since Mr Nuttall stated that they had rebuilt the extension at the rear.
25. The appellants submit that the Council has failed to 'observe the effect of recent case law in the area of tree related subsidence damage'¹¹. Several cases were quoted, but OCA UK Ltd failed to address the more recent case of *Perrin v Northampton Borough Council 2007* here. The judgement states "If, as is obviously the case, the underlying purpose of the legislation is to preserve trees which are the subject of TPOs, it would seem counterintuitive to that purpose when considering what is the minimum necessary that needs to be done in order to prevent or abate a nuisance caused by a tree that is subject of a TPO, to ignore altogether steps that may be taken other than to the tree itself and instead focus simply on the works to the tree". This judgement does not assist the appellant's case.
26. Returning to my original question of whether the reasons given for felling the oak tree are sufficient to justify the course of action proposed, this is a judgement or balancing exercise concerning the fate of a protected tree. In this case there is a once-and-for-all engineering solution; this is certainly one way of solving the problem. There should be no automatic felling of a tree simply because they are implicated in causing damage to a poorly constructed, minor addition to a property when there are other ways of tackling the problem. I accept that this may be more costly than the immediate works proposed but there are necessary repair works required, whatever the outcome of the appeal, to off-set against this. In any event the total cost would not compare to the greater public amenity value of the protected tree.

¹⁰ Cunningham Lindsey letter of 6 June 2011

¹¹ Letter from Ms M MacQueen headed secondary comments of 7 June 2011

27. Indeed, to my mind such a loss runs counter to the thrust of the TPO system of making 'provision for the preservation of trees' as Section 198 of the Act says. The key matter to weigh against this loss of amenity would be the scale of the repairs/works necessary to return this minor conservatory to a reasonable standard once more. The felling would be disproportionate and the tree would not be 'preserved' in the ordinary meaning of the word of keeping safe from harm or injury; to take care of, to guard.
28. It should not be forgotten, also, that the appeal tree is only 1 of a long row of protected trees, most of which are precisely similarly located in relation to the adjacent housing. All are a highly characteristic feature in Park Lane; they are particularly prominent; they are what makes the bridleway distinctive. If permission for felling is granted in this single case, it must be of the greatest importance to ask oneself what the consequences to the locality will be – what are the side effects which will flow if such a permission is granted? It is common sense that, if one consent to fell is granted it has to be predicable that other applications will follow and be difficult to resist. The fear of other applications, difficult to resist in these circumstances, is not a mere fear or generalised concern. It is founded on other, similarly positioned trees in relation to dwellings, along Park Lane. Over time, their loss or diminution, as substantially sized trees, would result in a reduction in the amenity of the area.
29. My conclusion is that while the tree is the most likely cause of the structural damage to a minor part of no. 25, there are reasonable and preferable alternatives to felling. The reasons given for the works proposed are not sufficient to justify the course of action proposed.
30. I have taken account of all other matters raised but find nothing that causes me to change my decision in this appeal. I conclude that the appeal should be dismissed.

Gyllian D Grindey

Inspector

APPEARANCES

FOR THE APPELLANT:

Ms M MacQueen BSc CBiol MSB MICFor MAE	Of OCA UK Ltd
Mr M Boyes BSc(Hons) CEng MICE RMaps ACILA	Of Cunningham Lindsey Subsidence Scanning Centre
Mr R Nuttall	Owner occupier, 25 Ramblers Way

FOR THE LOCAL PLANNING AUTHORITY:

Mr S Cantwell BSc MSc MRTPI AIEMA	Chief Planning Officer Havant Borough Council (HBC)
Mr J Gargett MSc ND Arb Tech ArborA	Arboricultural Officer HBC
Mr D Reed BSc Tech RICS	Building Control Officer HBC

DOCUMENTS

- 1 Letter of notification fo hearing & circulation list
- 2 Copy of Planning permission ref. no 03/64600/001
- 3 Copy of Dr Biddle's report to Secretary of State ref. no
GOSE/107/001/HAVA/48185
- 4 Corrections to HBC's appeal statement