



Appeal Decisions

Hearing held on 22 June 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: 26 July 2011

Appeal Ref: APP/TPO/X1735/1672

1 Deanswood Drive, Waterlooville, Havant, PO7 7RR.

- The appeals are made under section 78 of the Town and Country Planning Act 1990 against (i) a refusal to grant consent to fell a tree protected by a Tree Preservation Order and (ii) against an Article 5 Certificate.
 - The appeals are made by Marishal Thompson & Co against the decision of Havant Borough Council.
 - The application Ref: APP/10/00428, dated 19 July 2010, was refused by notice dated 4 January 2011.
 - The work proposed is remove T1 oak tree.
 - The relevant Tree Preservation Order (TPO) is No. 978: West End of Wallis Road, Waterlooville, which was confirmed on 13 April 1978.
-

Decision

1. The appeals are dismissed.

Main Issues

2. From my inspection of the site and surroundings and the representations made I consider that the decision in appeal (i) turns on 2 main issues. These are the amenity value of the tree and the likely impact of felling and whether the felling is justified in the circumstances of this case. Concerning appeal (ii) against the Article 5 Certificate, *Tree Preservation Orders – A Guide to the Law and Good Practice – DETR March 2000* (I will refer to this as *The Guide*) advises that it must be established whether the Certificate meets the terms of Article 5 and, if so, whether the tree merits such a Certificate.

Reasons

The amenity value of the tree and the likely impact of felling.

3. This might usefully be considered under the headings from *The Guide*, paragraph 3.3. A considerable number of large, mature oaks have been preserved in this area, with the houses being built around them later. The Council states that Park Wood and The Queen's Enclosure nearby are remnants from the Forest of Bere which used to extend across this area. The appeal tree is T4 on the TPO which covers a broadly rectangular area of land at the Western end of Wallis Road, from which Deanswood Drive branches.
4. I found at my site inspection that the oak has considerable visibility from a fair number of public viewpoints, particularly from Deanswood Drive where it is particularly visible as a tree within the front garden area, and from Wallis Road

where it occupies a skyline position. The appeal tree is visible from a significant number of public places, to residents, pedestrians, those travelling along the roads and those visiting/calling. Because the tree is so large it contributes greatly to the attractive, mature appearance of this residential area. This is a large, forest sized tree and hence unusual in close proximity to suburban roads.

5. The tree contributes to the pleasantness and biodiversity interest of the locality and, as typical, domed, deciduous tree, forms a good addition to the built development in foreground views. In my view the loss of the oak would harm the appearance of the area, even though there are many other trees present. While the appeal tree is one of a large number of protected trees visible this does not mean that its loss would not be significant.
6. Taking account of all of these foregoing matters, the tree appears to me to meet the criteria for protection in *The Guide*. It has significant impact on the local environment and its enjoyment by the public. As such, my conclusion is that felling the 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.

7. The property has the appearance of a modern detached house apparently built in 1981¹. It seems that sometime prior to the present occupiers' purchase in 2001, a UVPC conservatory was added to the southern elevation of the main house. There was no Building Regulation application for this work; all the damage is within this conservatory, which a long standing resident of Deanswood Drive remembered was constructed prior to 1992.
8. I saw at my site inspection that the tiled floor and step has moved away from the main building; the component parts of the conservatory show some distortion, and the main conservatory frame has also moved away from the walls of the main house. The crack between these is wide enough to insert my fingers; this crack reveals that there were only 3 fixings between the frame of the conservatory and the south elevation main wall to the house. As the Council's Building control Officer commented: the conservatory appeared to have been 'mainly stuck to the house with silicone'. I tend to agree.
9. The foundations for this conservatory were found to be to a depth of 0.7m (including the pad at the bottom). It was agreed at the hearing that these are inadequate, taking into account NHBC standards. It is not known what foundations the main portion of no. 1 has, but it does not appear to exhibit any signs of movement. I was told at the hearing, by a long-serving Councillor, who coincidentally lives in the same Road, that great care was taken at the time of construction of the estate, both to preserve the oaks and to take their presence into account in the building works. In contrast, the conservatory has not been constructed taking into account either the soil conditions or the proximity of this oak.
10. There is agreement that the soil has the potential for volume changes to varying degrees and the root identification of 8 June 2010 indicates oak roots were present in the exploratory pits.

¹ Crawford Technical Report of 23 September 2009

11. I think it highly likely that the manner in which the conservatory has been constructed is the main factor in the damage here; the 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. Had the foundations and general construction been properly considered at the outset, there should have been no problems. Likewise, the conservatory was not tied in to the main structure; differential movement seems to me highly likely and, indeed, the main cracks are at the junction of the original house/later conservatory.
12. It was argued, for the appellants, that the cost of underpinning would 'be in the order of £38,000'²; the Council considered this a high figure. It seems to me a high figure, given the simplicity of the structure and its small size, but I have not seen any written and detailed costs anyway as no quotations for the works have been obtained. It was argued that underpinning would cause 'great disruption'³ to the occupiers but I think this is an exaggeration. The conservatory is a small, single storey addition to the main house. It seems to me it would be reasonably easy to temporarily close and seal the intervening doorway between the house and the conservatory and simply demolish the structure and re-build.
13. We discussed the possibility of heave at the hearing. If the tree is felled there is a possibility of between 0 – 2cm recovery as the ground re-hydrates. This means that repairs cannot be carried out immediately; Mr Wilkins, for the appellants, stated that they would not wish to undertake repairs for 12 – 18 months to accommodate soil re-hydration; the disruption and uncertainty for the householder may continue. Secondly, we know 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.
14. Pulling 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, with all that implies in terms of delay to repair works and future disruption. Whatever the outcome of this appeal, there are repair and re-decoration works necessary anyway – if not total re-building (which seems to me a reasonable possibility since the structure is around 20 years old and poorly constructed in the first place). If underpinning works are the preferred option for the insurers then this is a small floor area 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.
15. The appellants submit that the Council has not 'acknowledged or referred to'⁴ the 'reasons' for making the application and list the Arboricultural Report; Engineering Report; the Root Analysis; the Soil Report; and the Level Monitoring. But these 5 items are not 'reasons' as referred to in paragraph 6.61 (as amended) of *The Guide*. There is a single 'reason' put forward for the application in this case and that is the clay shrinkage subsidence exacerbated by vegetation. The 5 listed items are not 'reasons' (in paragraph 6.61 terms) they are the *evidence* required by paragraph 6.40C (as amended) to support the case made in the application. Clearly, the Council has considered the *reason* put forward and

² Appeal statement, paragraph 4.9

³ Appellants' appeal statement paragraph 6.3

⁴ Appellants' appeal statement, paragraph 3.5

states, on their decision notice, that there are other remedies, besides the work proposed, as indeed there are.

16. The appellants submit that underpinning would be 'the least sustainable long term option as it will result in the use of concrete'⁵. However, the simplistic calculation put forward⁶ does not take into account the beneficial effect of this tree efficiently absorbing and storing carbon dioxide over its life, cleaning the air of pollutants, moderating the climate, enriching biodiversity and enhancing the quality of life for those living near it. I give this point limited weight.
17. Returning to my original question of whether the reasons given for felling the oak are sufficient to justify the course of action proposed, this is a judgement or balancing exercise concerning the fate of this 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 it is implicated in causing damage to a poorly constructed, small conservatory nearing the end of its life 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/re-building 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.
18. 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 addition 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.
19. The case of *Perrin v Northampton Borough Council* is relevant 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.
20. My conclusion is that while the tree is the most likely cause of the structural damage to the conservatory at no. 1, there are reasonable and preferable alternatives to felling it. The reasons given for the works proposed are not sufficient to justify the course of action proposed. I conclude that appeal (i) should be dismissed.

Appeal (ii) the Article 5 Certificate

21. *The Guide* states that, before issuing a "special" or "outstanding" certificate the LPA should consider carefully the amenity value of the tree and whether that value amounts to something that could reasonably be described as "special" or "outstanding" using the ordinary meanings. The example that is then used⁷ refers to the term 'outstanding' being used in relation to dominant features of

⁵ Appeal statement, paragraph 6.4

⁶ 1 tonne of concrete = 1 tonne of CO₂ released into the atmosphere

⁷ Paragraph 6.69 of *Tree Preservation Orders – A Guide to the Law and Good Practice – DETR March 2000*

the landscape. *The Guide* goes on to state that, in an appeal, it should be considered whether there are special factors that distinguish the trees from other protected trees rather than trees generally.

22. I consider that this is the case. This is a large, forest sized oak adjacent to a suburban road and set amidst a housing estate; such juxtapositions are unusual and special. The tree lies in a front garden where its presence can be easily appreciated from public viewpoints. It performs a notable softening function of the skyline and adds interest, maturity and scale to the street scene. The tree is mature and, as the parties suggest, may have been part of the original Forest of Bere. All these features distinguish it from other protected trees.
23. The appellants submit that the TEMPO system is a recognised way of objectively and systematically assessing the amenity of trees and that trees known to be causing a 'statutory nuisance'⁸ are not considered suitable for inclusion within a TPO. However, no evidence was submitted to the hearing that demonstrates that the tree has been judged to be a 'statutory nuisance'. Indeed the term is generally used if there is an unacceptable interference with the personal amenity of neighbours or the community, which does not appear to apply here. As far as I am aware, in the TEMPO system, this phrase is merely a note on the pro-forma which suggests not including trees which are assessed as being a nuisance, for example, by clearly outgrowing their context or which are having an adverse effect on adjacent trees of better quality (neither of which apply here). I know of no custom or practice to use the concept in the way in which the appellants argue.
24. The appellants also question the Council's reference to policy L6 of the Havant Borough District Wide Local Plan in their decision and why it has been struck through on the Council's web-site. However this does not get me further forward since *The Guide* states at paragraph 6.46 that there is no general duty on local planning authorities to take their TPO decisions in accordance with the development plan.
25. The appellants also refer to the Government's intention to revoke the Article 5 Certificate provisions. While I have taken this matter into account in determining this case, I give it limited weight at this stage of the process of change and am required to determine the case before me. I can find no reason for the Article 5 Certificate to be quashed.
26. For the reasons given above I conclude that appeal (ii) should be dismissed.

Gyllian D Grindey

Inspector

⁸ Appellants statement, paragraph 5.4

APPEARANCES

FOR THE APPELLANT:

Mr P Wilkins BA(hons) M Arbor Assn AA Tech Cert	Marishal Thompson & Co
Mr T Walker-Smith BA(Hons) MSc MRICS Cert C11	Loss Adjustor

FOR THE LOCAL PLANNING AUTHORITY:

Mr S Cantwell BSc MSc MRTPI	Team Leader Development Management Havant Borough Council (HBC)
Mr D Harris ND Arb MArborAssn	Arboricultural Officer HBC
Mr J Gargett MSc	Arboricultural Officer HBC
Mr D Thomas BSc(Hons) MBEng	Building Control Officer HBC
Mr D Tanner BSc	Building Control Officer HBC

INTERESTED PERSONS:

Ms F Jannaway	Tree Warden
Cllr P Buckley	Cllr HBC
Ms V Phillips	Tree Warden

DOCUMENTS

- 1 Letter of notification of hearing & circulation list
- 2 Letter from Ms F Jannaway handed in at the hearing