

Appendix A

MAIDSTONE BOROUGH COUNCIL

PLANNING COMMITTEE

Agenda Date: 18 March 2010

REPORT OF THE ASSISTANT DIRECTOR OF DEVELOPMENT AND COMMUNITY STRATEGY

REFERENCE: TA /0195/09

Date: 09/12/09

APPLICANT: OCA UK Ltd, 4 The Courtyards, Wyncolls Road, Colchester, Essex, CO4 9PE

LOCATION: Land adjacent Wayside, Ashford road, Harrietsham, Maidstone, ME17 1BH

PROPOSAL: To fell one Beech tree and treat one stump subject to Tree Preservation Order No 2 of 1997, situated adjacent to 'Wayside'.

The applicant made an appeal (APP/TPO/U2235/1090) to the Secretary of State, under section 78 of the Town and Country Planning Act 1990 (as amended) on 22 February 2010 and the application will therefore be determined by the Planning Inspectorate. It is now necessary for the Council to consider how it will respond to the appeal.

CASE OFFICER: Guy Stephens

The recommendation for this case is being reported to Committee for decision because:

- It is contrary to views expressed by Harrietsham Parish Council on the original application.

POLICIES

South East Plan, 2006, Policy C4: Landscape & Countryside Management
Maidstone Borough Council, Landscape Character Assessment & Landscape Guidelines, 2000
Government Policy: ODPM, 'Tree Preservation Orders: A Guide to the Law and Good Practice'

PLANNING HISTORY

TA/0132/07 – Booth Field, Church Road, Harrietsham- An application for consent to remove and treat stump of one Beech tree- refused.

TA/0025/04 – Booth Field, Church Road, Harrietsham- An application to remove 2 lowest branches of 1 no Lime, trim lower branches of 1 no Lime to clear corner of pavilion and crown lift 5 no trees – approved/granted with conditions.

CONSULTATIONS:

Harrietsham Parish Council: recommend refusal of the planning application, due to the high amenity value of the tree.

Booth and Baldwin Charity, Harrietsham own the field where the tree is located. The trustees held a meeting and it was agreed that they could not comment on this matter as the owners of Wayside, whose property is affected by the tree root action, are themselves trustees. However, it was the unanimous view that the trustees would not object if permission was granted for the tree to be felled. The trustees also wish to seek assurances they will not be liable for any future costs should the property experience any future damage such as heave. They also wish to seek a replacement tree.

REPRESENTATIONS

Owners of Wayside: A letter was received which confirmed where the damage is occurring and requested that the Beech tree is removed.

CONSIDERATIONS

ISSUE FOR DECISION:

To seek members views on what their decision would have been had an appeal for non-determination not been submitted and what steps to take in response to the appeal as a result.

The application was made on 9th December 2009. The case was subject to a number of delays arising from a meeting request from the applicant, which had to be postponed on a number of occasions due to snow and the need to await representations from the parties involved. This subsequently resulted in the requirement for a report to Planning Committee. The Council's 8 week date for determination expired on 2 February 2010 and on 11 February Officers received from the applicant notification of their intention to appeal and potentially claim for costs. The report drafted for the earliest Committee meeting, 25 February 2010, was as a result withheld from the agenda to ensure that the recommendations and considerations were amended to take account of the appeal and cost implications. It is important that members make a decision at the earliest opportunity prior to the date for statement of case so that PINS can be notified as soon as possible how the Council propose to deal with the appeal.

SITE AND SURROUNDINGS

The tree in question is a mature Beech tree situated on the south western boundary on Booth Field and protected by TPO No 2 of 1997 along with the

seventeen mature trees on the playing field. Within this group there is a mixture of Sycamore, Plane, Horse Chestnut, Lime and Corsican Pine, all of which enhance the area and are prominent from many public viewpoints.

DESCRIPTION OF TREE AND PROPOSED WORKS.

The mature Beech tree is 23 metres in height, with a stem diameter of 980 mm and an average radial crown spread of 8 metres. It is natural in shape with multiple scaffold branches forking at 5 metres. Minor deadwood was noted throughout the crown, although this is a common feature for a tree of this age. The bud size and extension growth was noted as being healthy.

An investigation has been carried out to establish the cause of alleged damage to the adjacent property, 'Wayside'. The application to fell the tree included an engineering report which concluded that the damage is a result of subsidence caused by tree root action which can be attributed to the nearby Beech tree. The report provides technical evidence such as level monitoring, soil and root information to support this claim.

LEGAL CONTEXT

In considering applications the (Local Planning Authority) LPA should:

- assess the amenity value of the tree or woodland and the likely impact of the proposal on the amenity of the area, and
- in the light of the amenity assessment, consider whether or not the proposal is justified, having regard to the reasons put forward in support of it.

It also considers whether any loss or damage is likely to arise if consent is refused or granted subject to conditions. In general terms, it follows that the higher the amenity value of the tree or woodland and the greater the impact of the application on the amenity of the area, the stronger the reasons needed before consent is granted.

The LPA's consent is not required for cutting down or carrying out work on trees so far as may be necessary to prevent or abate a nuisance. The term 'nuisance' is used in a legal sense, not its ordinary everyday sense.

For TPOs made before 2 August 1999, when refusing or granting consent subject to conditions, the LPA may issue an 'article 5 certificate'. It may only be issued if the LPA are satisfied:

- that their decision is in the interests of good forestry, or
- that the trees, groups of trees or woodlands to which the certificate relates have an 'outstanding' or 'special' amenity value.

In simple terms the effect of an article 5 certificate is to remove the LPA's liability under the TPO to pay compensation for loss or damage caused or incurred as a result of their decision.

LPAs are advised to use article 5 certificates with discretion and not simply as a means of avoiding the potential liability of compensation. The LPA should consider each case on its merits and must, when issuing a certificate, be satisfied that their decision is in the interests of good forestry, or that the trees, groups of trees or woodlands have an 'outstanding' or a 'special' amenity value.

CONTRIBUTION TO AMENITY

Although there are a number of other trees within the Booth Field the Beech tree is the most prominent and its removal would be detrimental to the character of the local area. All the trees in this area are situated in a parkland setting and have been able to grow in their natural form. The Council's amenity evaluation assessment gives an amenity value rating (AVR) of 20, which is clearly above the benchmark of 17, but it is not considered an 'outstanding' or 'special' tree and, therefore, an article 5 certificate could not be issued.

ASSESSMENT OF CASE

The evidence provided by OCA indicates that the damage which 'Wayside' is experiencing is attributed to soil desiccation causing a downward rotational movement of the rear left hand side corner of the property.

In cases where it is suspected that trees may be the primary cause of the damage there are three pieces of evidence which are essential, these are:

1. Evidence of soil desiccation
2. Proof of seasonal movement
3. Live roots have been found underneath the foundations.

In this case all three pieces of evidence have been submitted to support the claim that the cause of the damage can be attributed to the tree root action.

The Beech tree is of significant amenity value and its removal would have a detrimental effect on the character and amenity of the surrounding area. It would normally, therefore, be preferable to retain the tree by using alternative engineering solutions such as root barriers. However, any such solutions would mean that the roots would have to be partially severed, therefore, making the tree unstable.

A second option would be to reduce the crown, therefore reducing the amount of water it extracts from the soil. However recent studies have shown that to have any impact on soil moisture, severe crown reduction of 70%-90% would have to be carried out. This would result in the Beech tree being severely disfigured and, furthermore, the removal of such a large amount of living tissue would quite probably result in the decline of the tree.

It should be noted though that if consent is granted for the Beech to be felled it may result in heave, which can cause damage to structures. It occurs when clay starts to absorb more water than it was able to beforehand and therefore it expands. This could, in theory, occur if this Beech is removed. However, it is important to note that the engineers acting for the applicant, OCA, have ruled out the possibility of this happening. However, it is recommended that it be drawn to PINS attention that consideration should be given to attaching an informative note to any consent to the effect that the appellant should satisfy himself that there is not a possibility of heave and, if there is, take necessary steps to minimise the potential impact, such as phasing the work.

In this case if the cause of the damage is not removed then an alternative solution would have to be sought, for example, if the Beech tree is not removed the foundations of 'Wayside' would have to be underpinned.

A breakdown of the cost of structural works has been submitted by the appellant showing the difference between the tree being retained or removed.

If the tree is retained then the cost for carrying out major works to the property has been estimated between £56k- £71k. This includes underpinning and superstructure repairs, together with costs arising from disruption to the policy holder. However, if the tree is removed, the works will be kept to a minimum of between £12k -£15k for tree removal, reinforcement repairs and redecoration.

Potential Costs

Appeal Costs

With regard to appeal costs, generally each party meets their own but an application can be made against another party for wasted expense caused by unreasonable actions. There is no appeal fee in this case and little work will be accrued prior to the stage when actions in the appeal timetable have to be carried out. If members decided they would have granted consent then the Council would offer no evidence and notice will be given to that effect so that any work by the appellant should stop. If there were an application it is difficult to see what would be said to be unreasonable in the Council's actions and any costs should be low in any event. If members decide they would have refused consent the appeal would be defended and sufficient evidence to support that decision will need to be in place in time for the appeal deadlines to minimise the prospect of a successful costs application.

Compensation

In the case of compensation the position is more complex but in this case the TPO does make provision for compensation for loss/damage caused or incurred as a consequence of the refusal of any consent. One issue that could arise is that loss or damage may not be incurred as a consequence of refusal if no consent were required at all as in the case of a statutory exemption for nuisance under 198 (6), as outlined above. In these circumstances the Beech tree could potentially be regarded as a nuisance but, if that were not the case, then any compensation liability would arise from the date of the deemed refusal. Only damage caused by the tree roots

after the date of deemed refusal would be relevant except in so far as it could be evidenced that the refusal had necessitated more costly works than would have been needed if consent were given. The liability for compensation would only accrue if the Inspector goes on to refuse the appeal. In any event actions now taken by the Council should not affect the timescale for the appeal.

CONCLUSION:

The Beech tree in question has an important amenity value and, therefore, the impact of the proposed work would have an effect on the amenity of the area. This work is, however, considered to be the only viable option in regard to the evidence put forward by the applicant in support of the application. Therefore, it is recommended that Members resolve that if the Applicant had not appealed on the grounds of non determination, the Council would have granted consent subject to conditions and informatives accordingly and should, therefore, not offer evidence to the appeal.

It should be noted that whilst there are conditions and informatives that would have been sought if permission had been granted, if Members choose not to defend the appeal they will be referred to in a letter to PINS but will not be actively dealt with at a hearing. The decision on the appeal and any conditions or informatives is now a matter for the Inspector.

RECOMMENDATION:

- (1) THAT IF THE APPLICANT HAD NOT APPEALED ON THE GROUNDS OF NON DETERMINATION, THE COUNCIL WOULD HAVE GRANTED CONSENT SUBJECT TO THE FOLLOWING CONDITIONS AND INFORMATIVES:**

Conditions

C195 Completion of Felling

The tree works in respect of this consent shall be carried out in a manner to ensure that all brushwood and arisings are disposed of to leave the site in a safe and tidy condition;

Reason: In the interests of amenity and good arboricultural/forestry practice.

C196 Standard of Works (Trees)

All works hereby permitted shall be carried out in accordance with the provisions of BS 3998 (1989) "Recommendations for Tree Work" by a competent person only;

Reason: In the interests of amenity and good arboricultural practice.

C200 Replacement Planting (Nursery Standard)

One replacement Beech tree (*Fagus sylvatica*) of not less than Nursery Standard size (8-10cm girth, 2.75-3m height), conforming to the specifications of BS 3936 Part I "Nursery Stock", shall be planted during the tree planting season (October to February) following substantial completion of the felling hereby permitted, and be maintained thereafter to the satisfaction of the local planning authority.

Reason: In the interests of amenity and good arboricultural practice

C203 Replacement Planting (Specified Location)

The replacement tree(s) as specified shall be planted at the location(s) described below;

In a prominent position in Booth Field subject to the agreement of the Booth and Baldwin Charity.

Reason: In the interests of amenity and good arboricultural practice

C206 Replacement Planting (Maintenance)

Any replacement tree which dies or becomes seriously damaged or diseased within five years of being planted must be replaced with another of similar size or species within the course of the next planting season, unless the local planning authority give written consent to any variation;

Reason: In the interests of amenity and good arboricultural practice

Informatives

- It is recommended that the applicant and the landowner should satisfy themselves that there is not a possibility of heave and, if there is, take necessary steps to minimise the potential impact, for example through phasing the work.
- Owner Consent

This decision does not override the need for the applicant to obtain the consent of the tree owner before commencing the work granted consent.

- Provision for birds and bats

In taking the action specified in this Notice, special care should be taken not to disturb wild animals that are protected by the Wildlife and Countryside Act 1981, the Countryside and Rights of Way Act 2000 and the Conservation Regulations 1994. This includes birds and bats that nest or roost in trees.

(2) THAT THE COUNCIL OFFERS NO EVIDENCE TO THE HEARING ON THE ABOVE BASIS.

Background documents:

TA/0195/09: Land adjacent Wayside, Ashford Road, Harrietsham

406/115/12: TPO No 2 of 1997, Trees on Booth Field, Church Road, Harrietsham