

## **Confirmation of Tree Preservation Order**

### **LAND OPPOSITE THE OLD SWAN, MADELEY HEATH.**

#### **Tree Preservation Order No.192 (2017)**

Town & Country Planning Act 1990

Town & Country Planning (Tree Protection) (England) Regulations 2012

**The Order** protects an area of woodland situated to the south side of Crewe Road, Madeley Heath, opposite The Old Swan. The Order was made to safeguard the longer term visual amenity that the trees provide after information was received that trees could be unnecessarily felled, and a request was received as to the status of the woodland. It is considered that the loss of trees from the site would compromise the visual amenity that the woodland provides to the area.

The Order was made using delegated powers on 22 December 2017. Approval is sought for the Order to be confirmed as made.

**The 6 month period for this Order expires on 22 June 2018.**

#### **RECOMMENDATION**

That Tree Preservation Order No 192 (2017), land opposite the Old Swan, Madeley Heath, be confirmed and that the owners of the site be informed accordingly.

#### **Reasons for Recommendation**

Your officers are of the opinion that the longer-term visual amenity of the trees is best secured by the making of a Tree Preservation Order. Your officers are of the opinion that the trees are generally healthy at present and of sufficient amenity value to merit the making of a Tree Preservation Order. They are considered to be generally of appropriate species for the locality, visually important, and provide a high public amenity due to their form and visibility from public locations. The making of the Order will not prevent the owner from carrying out good management of the trees and it will give the Council the opportunity to control the works and prevent unnecessary cutting down, lopping, topping, uprooting, wilful damage or wilful destruction. The owner will be able to apply for permission to carry out maintenance work to the trees which is necessary to safely manage the woodland.

#### **Representations**

Letters and signatures of support representing six neighbouring properties have been received.

Objections have been received from two neighbouring properties.

The first objection is from a property that borders the woodland. The land of this property falls down towards the trees and branches from them need to be periodically pruned back to enable access for a ride-on mower. The objectors also consider that the owner has shown excellent stewardship managing, caring and maintaining the wood, and that they have a good relationship with him. Concern is also raised that the wood contains a large

number of over-mature poplars that are in danger of falling, especially when affected by flooding, which occurs periodically.

The making of the Order will not prevent carrying out good management of the trees and it will be possible to apply for permission to carry out maintenance work to the trees which is necessary. Pruning back for access and the removal of problematic trees would normally be acceptable.

The second objection, also from a neighbouring property raises many issues as follows:

- 1a Your covering letter to this Order states that it is a "Regulation 3" Notice. Regulation 3 of the Regulations to which you refer makes no reference to any notices. It prescribes the appropriate form of Order. This is most confusing. As to the requisite notice under Regulation 5, you will be aware that this must specify the date by which any objection or representation must be received by the authority making the Order. Your letter purports to specify a period, of 28 days, rather than a date, as is required, and insofar as it does purport to specify a date it is a date that has already passed (being 19 January 2017). Your Notice does not meet the requirements of the Regulations and is invalid.

The intention of the accompanying letter is to inform the recipient of the Tree Preservation Order under Regulation 5 and gives notice of the Tree Preservation Order which is in accordance with Regulation 3; which is the reason for the use of the word 'notice' in the heading. This is in accordance with the recommendations of The Act, and standard practice based on government guidance.

The typographical error on the letter with regard to the year was noted and the Order was served again to clarify the time available to comment, and a further period given to allow for further comment.

- 1b It appears that you have not taken any steps to ascertain the identity of the landowner of the relevant woodland. That person is not me, or anyone else upon whom you have served the Order thus far. As you will be aware, you are required to serve the Order upon all persons with an interest in the land and to give them adequate time to make representations. The landowner has told me that no correspondence has been received from you on this matter.

Your officers have taken all reasonable steps to identify the owner of the woodland. The Land Registry confirms that the land is not registered, as is the objectors house and the adjoining fields. It appears that the objector knows the identity of the landowner but has declined to confirm this.

- 1c Please send me a copy of the delegated report by which the Executive Director - Operational Services resolved to make this TPO. The reasons given in your letter and in the Order are wholly inadequate. They do not address many of the principles of decision making set out in your constitution at article 13 that you are required to consider, and in particular there is no consideration of the landowner's Article 8 or A1P1 rights or of the proportionality of making such a Draconian Order. The reasons given do not begin to explain why a Woodland Order is appropriate. They refer only to the existing trees.

The reasons for making the Order are given in this report. The Tree Preservation Order Regulations stipulate four ways to specify a Tree Preservation Order. The making of a Woodland Order is the only form appropriate for these trees.

- 1d Please also send me a copy of the Head of Business Improvement, Central Services and Partnerships' decision that the Order is not a document required to be made under seal. I note that any documents not required to be made under seal but that are necessary to any "legal procedure", of which this is surely one, must be signed by certain specified officers in your authority. They do not include the Executive Director - Operational Services.

The Executive Director (Operational Services) has signed the Provisional Tree Preservation Order in accordance with the Council's Scheme of Delegation which can be viewed by the objector on the Council's website.

- 1e You will be aware that under the 2014 Regulations the written record of the Executive Director's decision to make the TPO must be produced as soon as reasonably practicable, must contain specified information, and must be made available on your website together with any background papers. To my knowledge none of these matters have occurred.

As required, a copy of the Provisional Tree Preservation Order has been, and remains, available for inspection by appointment during office hours at the Council's Knutton Lane Depot. The information for Confirming the Order is contained in this report which will be available on the Council's website.

Without prejudice to the above points, I object to the Order (in its entirety) for the following reasons.

- 1f The woodland has been in the same ownership for over 40 years and throughout that period has been properly and responsibly managed and maintained as a valuable amenity facility. There are no grounds whatsoever for believing that this will change. There is unlikely to be any positive value in the trees as a commercial forestry prospect. There are no prospects for developing the land. In short there is no reason to believe that there is any commercial imperative to fell the woodland, or that there is any prospect of any change to the existing management practices on the site. These are fundamental material considerations that you have wholly ignored.

Ownership of the land has not been confirmed. Information received indicates that trees could be inappropriately felled, and receipt of a tree status enquiry suggests that no work has been carried out on the trees for a significant time and could now be impending. This gives rise to concern for the trees future.

- 1g The reasoning in the Order that the loss or disfigurement of the woodland would have a detrimental effect on the visual amenity of the area appears to be based on a threat that does not exist. You are required to evaluate alternatives to, and the proportionality of, making any TPO and you have supplied no evidence that you have done so. You do not say why it is expedient to make the Order (or why, if it is expedient, that also warrants exercising your discretion to make it).

When the Order was first served the Statement of Reasons did not include the information received regarding possible inappropriate tree felling or the tree status enquiry request. This was included when the Order was served again.

- 1h You have identified that it is the well-being of the existing trees that needs protection, and yet you have made a Woodland Order. You have not explained the necessity for or the proportionality of this. If it is the existing trees you are seeking to protect then that would not merit the far more onerous imposition of a Woodland Order, which protects trees that do not yet even exist.

The Tree Preservation Order Regulations stipulate four ways to specify a Tree Preservation Order. The making of a Woodland Order is the only form appropriate for these trees.

- 1i The Parish Council have expressed concerns that some of the trees adjoining the highway are overgrown and are hanging across the highway. This has been confirmed by a specialist tree surgeon, and the removal of fewer than six of the trees adjoining the highway (all Category U) is recommended on this basis. The purpose of my 'tree status' enquiry was to establish the conditions necessary to obtaining a felling licence. There is no intention to destroy or disfigure the amenity value of the woodland. I am sending a copy of this letter to the Parish Council so that they are aware of my inability to conform to their wishes that remedial works are carried out.

Your officers are not of the view that the trees are currently under good management. There are several trees that are in need of attention and there appears to be no evidence that work has recently been carried out to maintain the woodland in good order. It is noted that the Parish Council has expressed concerns with regard to trees adjacent to the highway, however the making of the Order will not prevent the owner from carrying out appropriate work.

- 1j Additionally, you will have appreciated from your site inspection that a number of the poplar trees on the site are over-mature and all are of a non-native variety and will need to be felled in due course as part of proper responsible woodland management in order to allow new trees to flourish. As you will be aware, such proper woodland management may take place under felling licences granted by the Forestry Commission notwithstanding the existence of a TPO. Otherwise, confirmation of the TPO would be likely to carry a real risk of stifling such proper woodland management because of the disinclination to seek consent.

The making of the Order will not prevent the owner from carrying out appropriate woodland management.

- 1k In summary, the absence of adequate reasons for making the Order means that it is unlawful. The accompanying Notice is invalid. The Order is an unwarranted and completely disproportionate response to my 'tree status' enquiry. There is no present intention to carry out works to any trees except to those presenting a risk to highway users. The imposition of a TPO is an unwarranted interference with the continued proper and responsible management of the woodland as has been done for decades. At no point until I made a 'tree status' enquiry have you considered this woodland to be worthy of protection.

My 'tree status' enquiry was made in the furtherance of my responsible approach to soundly managing the woodland, and it is unconscionable that you have responded to it in this way. My 'tree status' enquiry is not evidence of any risk to the trees that Government policy expects to exist before it becomes expedient for you to make a TPO (I refer you to paragraph: 0L0 Reference ID: 36-010-20140306 of the Planning Practice Guidance).

The third party information received combined with receipt of the tree status enquiry and unconfirmed ownership provides sufficient doubt and gives rise to concern for the trees future. The subsequent tree assessment confirms that the woodland is worthy of a TPO. The making of the Order will not prevent the owner from carrying out appropriate woodland management.

- 11 If this way of responding to such responsible enquiries becomes public knowledge then I hardly see how this is going to further your obligations to consider the protection of trees in the exercise of your planning functions. People will simply act first, and ask afterwards.

The initial concern for the trees arose from information received from a third party and the tree status enquiry was in addition to this.

A second letter was subsequently received from the same objector raising issues as follows:

- 2a There were a number of points raised in my letter of 8 January that I am afraid have not been satisfactorily addressed. The first issue is that it appears, from what you are now telling me, that there has been no actual decision to make the TPO. It seems that the Executive Director has merely applied his signature to the TPO itself. However, deciding to make an Order and actually making an Order are not the same thing. I did draw your attention to the 2014 Openness etc. Regulations. Those Regulations require a record of any delegated decision, where people's rights are affected, as they obviously are in this case, to be made available on the Council's website. They also require anyone making a delegated decision of the nature described in the Regulations to consider any alternative options and to record their consideration of these.

Your officers have carried out a TPO assessment and the provisional Order has been made in accordance with the TCPA Regulations to enable a decision to be made by the Planning Committee.

- 2b The Regulations also require that background papers are made available. You say in your letter that you have taken account of some "information received in confidence" which you have not "explicitly" included in your reasons for making the TPO. However, where a decision is being made with regard to exempt information, the public are entitled to know that that is the case, and the reason for the claimed exemption. Whilst I readily accept that the source of your claimed information may wish to withhold his or her identity and that there may be good public policy reasons for allowing that, I do not understand why there would be any good reason to withhold the information itself. Which paragraph of Schedule 12A to the 1972 Act applies to it? I am particularly disconcerted by your statement that you "will ensure these facts are made clear". What facts, and made clear to whom? If you are making facts clear to the Committee who will decide whether or not to confirm the TPO then how do you suggest it gives me or the landowner (or any adjoining neighbours) a fair hearing if you do not also disclose those facts to the public with an opportunity to comment? Surely objectors to a TPO are entitled to know and respond to the case against them. This approach flies in the face of the transparency to be expected of a local authority carrying out its statutory functions.

The reasons for making the TPO are included in the Statement of Reasons. Objections have been recorded in this report which will be available on the Council's website.

- 2c As to your "reasonable steps" to ascertain the identity of the landowner, I do not consider that you have made adequate enquiries merely by undertaking a Land Registry search and then making assumptions as to ownership upon learning that the land is unregistered. I would refer you to the relevant provisions of Part XV of the 1990 Act, and am surprised your legal advisors appear not already to have done so. If, as I

believe, reasonable enquiries have not been made to ascertain the identity of the landowner then that must cast further doubt over the validity of the process.

Your officers have carried out all means reasonably available, which are supported by the council's legal advisor, to identify the owner, who is believed to be known to the objector. The objector has declined to confirm this. In accordance with the Regulations a notice has been posted adjacent to the site giving details of the TPO.

- 2d Your observations (if they are your own observations) in regard to the management of the woodland are noted but not accepted. In any case your observations appear to have led you to conclude that the copse consists of trees in need of attention. A TPO does not promote good management in this way. It merely prohibits unauthorised topping, lopping or felling. You ought to be aware, if you are not already, that the area is regularly subjected to inundation as a result of poor maintenance of the culvert beneath the M6 to the west by the Highways Agency (now Highways England) and is the subject of extensive correspondence with them over many years in our efforts to preserve the copse.

This flooding is a persistent and recurrent problem and the periods of inundation, sometimes coupled with high winds, have caused multiple losses of trees, mainly poplars; some healthy, some diseased, but generally those in the later stages of life. We have experienced floods of in excess of 3m deep lasting for weeks on end. These circumstances are not in the landowner's (or my) control and I trust that Highways England's attention has been drawn to the existence of the TPO.

The making of the TPO will not hinder good management and appropriate maintenance being carried out. The Highways Agency have been informed of the TPO.

- 2e In summary I am disappointed by your response to the serious issues I raised in my letter of 8 January concerning the validity of the Order and the accompanying Notice. I do not intend to repeat any of that here, but I had anticipated that the Council might find it rather more edifying to withdraw the Order before taking a view about whether to start again. Instead, by revealing that you have had regard to information that you do not intend to allow me to see or to respond to, you are compounding your errors.

I appreciate that your own position is expressed after having taken legal advice. Unfortunately I consider that the Council's misapprehension as to its legal obligations in this case amounts to maladministration, and I would ask that your Corporate Complaints officer is asked to look into it and to communicate to me the outcome of his or her deliberations. Meanwhile I consider that it would be incautious of the Council to proceed to consider the question of confirmation of the TPO without allowing me some time to consider that outcome, as well as the material that you intend to draw to the attention of the Committee.

Your officers have carried out the procedures in line with the Town and Country Planning Regulations. An assessment has been carried out, a Provisional Order made and representations reported to the Planning Committee for a decision to be made. The objector's complaint was referred to the Council's corporate complaints procedure and has been dealt with to conclusion separately via this route.

A third letter was subsequently received from the same objector raising the following issue:

- 3a The only point I would add to my previous correspondence with you, and to my daughter's correspondence with your Complaints Department, is that you have still not

effected proper service on the landowner of the woodland. I have seen your notice attached to the pole opposite the woodland, on the pavement by the Old Swan. However there is nothing affixed; conspicuously or otherwise, to any object on the land itself. The requirements of section 329 TCPA 1990 (or of section 233 of the LGA 1972, for that matter) are therefore still not met and you are unable to confirm the order.

The notice was posted opposite the site as it was considered that the absence of a roadside footpath on the site side on such a busy road would make access to view it dangerous. A plan was included on the notice showing the location and boundary of the site.

A letter from this objector has also been received by the Councils Customer Relations with reference to a Stage 2 complaint, and has been responded to separately under this process.

### **Issues**

The woodland is situated to the south side of Crewe Road, Madeley Heath, opposite The Old Swan. It is clearly visible from Crewe Road (Swan Bank) and is a significant feature. It provides an important contribution to the area.

In November 2017 information was received in confidence by your officers that trees could be unnecessarily felled within the woodland. Subsequently on 7 December an enquiry was made to the Council as to the status of the trees. These two things combined gave rise to sufficient concern that trees could be inappropriately felled,

Your officers inspected the woodland and carried out a TPO assessment. It is considered to be in reasonable health and visually significant, and an important feature of the Swan Bank road corridor. It is an amenity to the locality, with the prospect of continuing to provide this for many years.

It is considered that inappropriate felling of trees would be likely to have a detrimental effect on the visual amenity, not only of the site but also to the locality. The Order was made and served on 22<sup>nd</sup> December 2017 in order to protect the long term well-being of the trees.

Letters of objection to the TPO raised issues relating to the Statement of Reasons and the date by which objections should be received. In order to clarify these, the Order was served again on 27th April 2018 making these points clear and allowing time for further comments.

The concerns of the neighbours have been considered and it is the view of your officers that the risk is sufficient to justify making a TPO. The making of the Order will not prevent the owner from carrying out good management of the trees and it will give the Council the opportunity to control the works and prevent unnecessary cutting down, lopping, topping, uprooting, wilful damage or wilful destruction.

### **Date report prepared**

6 June 2018