

**Chichester District Council**

**Planning Committee**

**18 April 2018**

**Report in relation to a claim concerning a tree adjacent to 22 Salthill Road, Fishbourne, West Sussex**

**Part 2 – Not For Publication**

The press and the public are likely to be excluded from any discussion at which this report is considered on the grounds that it is likely that there would be a disclosure to the public of 'exempt information' of the description specified in Paragraph 5 (Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings) of Part I of Schedule 12A to the Local Government Act 1972.

**1. Contact**

**Report Author:**

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**2. Recommendation**

- 2.1. That the Planning Committee authorise the amendment of Tree Preservation Order FB/79/00053/TPO to remove reference to the Oak Tree.**

**3. Background**

- 3.1. The 1 no. Oak tree (T1) is situated within a small verge area between the eastern side of Salthill Road and the west boundary of Peppercorns, 22 Salthill Road. This property is a detached bungalow (with a small extension built in circa 1988), with a garden to the west and south of the property. The Oak tree is one of two trees subject to FB/79/00053/TPO (the other being an Ash tree (T2) located in the frontage of The Croft, 20 Salthill Road, confirmed 25 January 1980. It is a mature specimen of its kind and is in adequately sound and healthy condition. The trunk is 12 metres from the south-west corner of the bungalow at 22 Salthill Road and 15 metres from the nearest point of an extension to the property built in circa 1988. The tree has been pruned in the past, can be seen from various public vantage points and is a prominent and significant feature within the street scene and makes an important environmental contribution to the visual amenities within the locality.
- 3.2. On 30 October 2015 an application was made by OCA Ltd to fell the Oak Tree, on behalf of the insurance company who had been engaged by the owners of 22 Salthill Road. It was claimed that the Oak Tree was causing differential movement between the main house and the 1988 extension, leading to cracking in the mortar between the brickwork. Roots consistent with the Oak Tree were found in trial holes dug close to the building 22 Salthill Road. The claim was supported by a report which documented this movement over an 18 month period. The Council commissioned a structural surveyor to review the evidence

and visit the site in order to form their own conclusions. The appointed surveyor concluded that the differential movement between the two parts of the property were likely caused in part by seasonal take up of water from the Oak Tree and other surrounding vegetation. However the supporting material submitted with the application was silent on the likely impact of other vegetation that surrounded the tree, and therefore the apportionment of liability that could be linked to the Oak Tree was unclear.

- 3.3. On 17 June 2016 the application to fell the tree was reported to the Planning Committee. At that time the applicant had stated that the estimated repair costs should the tree have to remain would be up to £34,000. The independent advice of the structural engineer appointed by the Council was provided to the Committee confirming that the tree was likely to be having an impact on the swell and drainage of the surrounding soils but that it was not clear that it would be the only contributing factor. The assessment also concluded that any structural issues affecting the remainder of the building (22 Salthill Road) were unlikely to be as a direct result of the Oak tree. The Committee supported the recommendation to refuse the application for the felling of the Oak Tree.

#### **4. Outcomes to be achieved**

- 4.1. Pursuant to the terms of the Tree Preservation Order and Section 203 of the Town and Country Planning Act 1990, any person who has suffered loss or damage in consequence of a refusal of consent under a Tree Preservation Order is entitled to recover from the Council compensation in respect of such loss or damage that may have followed as a result. A Council is not liable for any damages that may have occurred prior to the issuing of the decision to refuse consent (in this case 17 June 2016).
- 4.2. The Council was notified of the claim on 22 February 2017 and it has so far not accepted any liability to pay compensation. The Council has not been made aware of any works having been carried out to prevent further differential movement to the property at this time.
- 4.3. As no work has been undertaken thus far to secure the property from further damage the full amount of the claim has yet to be quantified. However solicitors acting on behalf of the loss adjusters have indicated, in a letter dated 15 January 2018, that at the present time the claim is estimated to be £50,636 plus VAT and fees (engineering, adjusting, arborist and legal fees that have yet to be quantified, likely to be in the region of £20,000). If the claim were to be contested and referred to the Upper Tribunal (Lands Chamber) for a successful hearing, then interest may also be added to the claim from the date of the Council's refusal to fell the tree.
- 4.4. The letter of 15 January 2018 also invites the Council to consider allowing the removal of the TPO tree; thereby limiting the potential claim against the council to those professional and legal fees incurred by the loss adjuster since the refusal to allow the felling of the tree in 2016 (estimated to be £4,750 plus VAT).
- 4.5. It is now necessary for the Council to consider and determine its position in respect of the claim to enable resolution of this matter.

#### **5. Proposals**

- 5.1. Considering the significant cost to the Council likely to arise as a result of continued retention of the TPO tree, it is now proposed following careful consideration of all the material planning considerations, which include potential compensation liability, to amend Tree Preservation Order FB/79/00053/TPO, to remove reference to the Oak Tree at 22 Salthill Road, thereby allowing the felling of the oak tree.
- 5.2 To seek to minimise the outstanding financial liability on the Council arising from professional fees incurred by the loss adjusters since the refusal of the application to fell the tree in June 2016, but recognising the claim set out in the letter of 15 January 2018 of £4,750 plus VAT as the maximum residual potential liability as a result of the removal of the TPO at this stage.

## 6. Alternatives that have been considered

- 6.1. **Alternative remedies to the subsidence at 22 Salthill Road:** In some cases of tree root driven subsidence a root barrier may be constructed to prevent the tree from encroaching further toward the built form. However in this case the cause of the subsidence is likely due to seasonal expansion and shrinkage of the clay soil due to differing levels of moisture within the ground and water take-up from the oak tree at different times of the year. A root barrier in this case would be ineffective.
- 6.2. **Leaving the Tree Preservation Order in effect:** The oak tree would remain protected for as long as it was healthy and alive and would continue to contribute to the amenity of the area for a considerable period of time. The loss adjuster (acting on behalf of the owner's insurance) would be entitled to claim compensation for existing (since the refusal of the application to fell the tree in June 2016) and future detriment to the building at 22 Salthill Road, attributable to the existence of the oak tree. Counsel has advised that the likely cost of any liability would be c. £70,000, although the cost to the Council would likely be higher if contested or if it were to be heard at an Upper Tribunal.

## 7. Resource and legal implications

- 7.1. No further evidence has been submitted either to establish the proportion of liability that may be attributed to the oak tree vs smaller but more numerous elements of other vegetation to the east, however further detailed information has been received as to the nature of the required repairs and mitigation of further movement. Officers have sought Counsel's advice on this matter and Counsel has advised that since the Council's independent expert (structural engineer) accepts that the Oak is the main contributing factor, the Council would be likely to be found liable in relation to a claim for the full costs of the repairs to the adjacent dwelling in relation to damage that occurred post refusal of the application to fell the tree and works to prevent foreseeable damage that would occur if the tree remains. Whilst the claimant has estimated that in total the costs claimed against the Council would likely exceed £100,000, the Council's appointed barrister believes that a more realistic total potential liability of circa £70,000 should be anticipated and used by the Council in evaluating the next steps available to it.
- 7.2. The likely financial liability that retention of the tree exposes the Council to is significantly greater than that anticipated in June 2016. Albeit not the only tree

in Salthill Road, the oak tree is a significant feature and it is difficult to quantify the financial value of this amenity. Nevertheless, officers now consider that despite its high amenity value, this is outweighed by the significant financial cost to the Council should the tree continue to be protected by the TPO and remain.

- 7.3. Should the TPO remain in place, the route to resolution of the claim will include discussions with the claimant and, possibly, mediation. If agreement cannot be reached, then the claimant can refer the case to the Upper Tribunal (Lands Chamber). If litigation ensues, then the costs of expert evidence and a barrister in the case would escalate.

## 8. Consultation

- 8.1. The application to fell the tree was consulted upon in accordance with the Council's procedures in dealing with such applications. No wider consultation with the public or interested bodies has taken place since the decision on that application.
- 8.2. During the course of the application to fell the tree and the subsequent pre-litigation correspondence officers have sought the professional opinion of a structural engineer and both internal and external legal advisors.

## 9. Community impact and corporate risks

- 9.1. The felling of the tree would have a significant impact on the character and amenity value of part of Salthill Road Fishbourne. The retention of the tree, however, is likely to place an as yet undetermined financial liability on the Council (although likely to be c. £70,000 if any claim is uncontested).

## 10. Other Implications

<b>Crime &amp; Disorder:</b>	None
<b>Climate Change and Ecological Impact:</b>	The loss of the tree would have some limited impact on local wildlife including bat foraging opportunities.
<b>Human Rights and Equality Impact:</b>	None
<b>Safeguarding:</b>	None

## 11. Appendices

Appendix 1: Letter of 15 January 2018 from Freeths Solicitors

## 12. Background Papers

Report and Minutes of the 17 June 2016 Planning Committee regarding 15/03629/TPO

# FREETHS

Appendix 1:  
Letter of 15 January 2018  
from Freeths Solicitors

For the attention of Miss Di Lauro  
Chichester District Council  
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By Email and by DX

15 January 2018

Our Ref: SRB/1544/2041710/26/RB  
Your Ref: GL / TCP-19-004211, Legal Services

Dear Sirs

OAK TREE ON LAND WEST OF NO. 22 SALTHILL ROAD, FISHBOURNE, WEST SUSSEX  
SECTION 202 COMPENSATION CLAIM AGAINST CHICHESTER DISTRICT  
COUNCIL/REVOCATION OF TPO

As you know a Letter of Claim under a Section 202 recovery for compensation for losses associated with the Council's decision to refuse to permit tree removal was submitted by OCA UK Ltd to the Council dated 22 February 2017.

This indicated that statutory losses under the Section 202 recovery were estimated to be in the order of £54,000 + VAT + fees.

Since then, in our letter to you dated 4 April 2017 we clarified that the losses are likely to be in the order of £50,636.49 + VAT + fees. This figure was slightly lower than OCA's figure as, to assist you, we stripped out all superstructure repair costs that could be said to be required regardless of whether the tree was retained or removed, and as such arguably could not be said to flow from the refusal (the statutory test for recoverable compensation).

We have been liaising with you for some time now to explore whether the Council is committed to tree retention, and by association to duly paying the appropriate statutory compensation to the affected property owner for his associated losses; or whether on balance and on due consideration of all known factors, including the level of the statutory compensation payable, it would prefer to support tree removal.

As part of this process it is important for the Council to fully understand the statutory compensation sums that it faces, and to give due consideration to balancing its duty and obligation to protect the public purse with its interest in protecting a tree that it has previously identified as special.

## 1. COMPENSATION IF THE TREE IS RETAINED

We have previously provided a schedule of the estimated cost of the superstructure works that will be required if the tree is retained. (The schedule is entitled Client Estimate, and provides a superstructure repair total of £16,686.86).

As previously advised, the estimated cost for the piling scheme (below ground strengthening works) that will also be required if the tree is retained is £37,593.81 plus VAT. (We have previously provided a copy of the drawing on which the piling figure has been based).

Having duly deducted the cost of repairing superstructure damage that pre-dated the refusal i.e. £3,644.18 (please see the schedule previously provided entitled Policyholder Quotation), we advised that if the tree remains the likely recoverable cost flowing from the refusal would total £50,636.49 + VAT + engineering fees + adjusting fees + arborist fees + legal fees.

For the avoidance of any doubt this estimated sum breaks down as:

*Avoidable superstructure repair cost* - £16,686.86 less arguably unrecoverable superstructure repair costs of £3,644.18 = **£13,042.68**

*Avoidable below ground piling cost* - **£37,593.81**

**Total        £50,636.49 plus VAT plus all fees**

This is the avoidable loss that will be pursued against the Council under the Section 202 recovery if the tree remains.

It strikes us that a total figure of c. £70,000 may therefore not be wide of the mark as the statutory compensation cost to the Council for the avoidable repair costs and fees associated with tree retention.

In the event of the Council going on to unsuccessfully defend a Section 202 statutory recovery this could increase to some c. £100,000+, to include both parties' legal fees. (The figure will inevitably be substantially higher if the matter is contested all the way to a Lands Chamber hearing.)

## 2. COMPENSATION IF THE TREE IS REMOVED

We can confirm that if the tree is removed, then only limited repair will be required, which will be restricted to remedying the superstructure damage that pre-dated the refusal.

In that scenario the Section 202 compensation recovery will be broadly limited to just the professional fees associated with this further attempt to secure removal.

For indicative purposes only, we can advise that the legal costs in this respect are in the order of £4,750 plus VAT.

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### 3. APPORTIONMENT OF LOSS

Whilst accepting that the oak tree is the principal cause of the damage to the adjacent property, you have suggested that adjacent fruit trees may also have been implicated. You have also suggested that the parties appoint a joint expert to consider the extent to which the fruit trees may have contributed to the damage.

In response, as well as having concerns as to cost and further delay, we have reminded you that the Council's expert has recognised the oak tree to be the principal cause of damage, and that absent the oak tree the property will not need the piling and associated avoidable superstructure repair.

On that basis the piling and avoidable superstructure repair is an all or nothing loss squarely at the Council's door under the Section 202 statutory compensation provisions.

The apportionment exercise that you suggest may perhaps be more relevant to defending a loss in negligence or in nuisance (albeit the *Loftus Brigham v London Borough of Ealing* case suggests otherwise), but it has no place in this statutory context.

### 4. CONCLUSION

It has been some considerable time now since the affected owner of the property first engaged with the Council about the avoidable substantial repair cost that will flow if the tree is retained and the property has to be piled.

We have been happy to provide the Council with a further opportunity (post its refusal to grant permission for tree removal) to review the strength of its desire to retain the tree, albeit we have been disappointed and concerned at the length of time that this has taken.

If the Council prefers not to now use its powers to revoke the TPO, so that the tree can be promptly removed, then the substantial repairs will have to be proceed and the Section 202 recovery will be promptly progressed for the associated substantial losses (£50,636.49 + VAT + fees).

If instead the Council prefers to now revoke the TPO, then only minor repair will follow, and the statutory claim against the Council will be very substantially reduced, as outlined under 2. above.

The Council is aware that it is under a positive duty to protect the public purse so will no doubt wish to take into careful consideration whether there is sufficient merit and interest in retaining the tree/defending a compensation claim if it is at a cost to the Council (and to local Council tax payers) of potentially some £70,000 - £100,000+.

15 January 2018  
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# FREETHS

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We look forward to hearing from you. Please let us know as soon as possible should any further clarification be required.

Yours faithfully

*Freeths LLP*

Freeths LLP  
Please respond by e-mail where possible