

**Tonbridge and Malling Borough Council**  
**Tree Protection Enforcement Protocol**  
**June 2021**

DRAFT



**Contents:**

- 1 Introduction and Context
- 2 Legislative Framework
- 3 Responding to complaints
- 4 Enforcement Investigations
- 5 Available Options for Action
- 6 Procedures and processes

DRAFT

## **1. Introduction and Context:**

- 1.1 This document is intended to provide comprehensive guidance on the framework for dealing with tree related enforcement issues in a clear, consistent and transparent manner and to ensure that enforcement investigations and decisions take place in accordance with current legislation and guidance.
- 1.2 Tree enforcement issues across the Borough fall into the following categories:
- Unauthorised removal of protected tree(s): Depending upon the size, species and prominence of the tree(s), the effect on visual amenity and the character of an area as a result will vary from case to case.
  - Unauthorised work to protected tree(s): The effect of work to tree(s) can vary from the expert removal of one minor limb to complete destruction. This can mean little or no effect on amenity or in severe cases a seriously detrimental effect and will always be dependent on the specific circumstances of the case.
  - Breach of tree protection conditions imposed on planning permissions: This can cause prejudice to the health/safety/life expectancy/appearance of the tree(s) and have consequences for the acceptability of a development in planning terms.
- 1.3 It is necessary to ensure a careful and balanced approach to the protection of valuable trees and enforcement of that protection across the Borough. It is acknowledged that to not do so could result in a serious impact on the quality of life for residents and visitors of the Borough. The overarching aim of this Protocol is therefore to ensure the appropriate enforcement of protected trees, within a clear and transparent framework in all cases. It should be read in conjunction with the Council's adopted Planning Enforcement Plan and associated guidance.

## **2. Legislative Framework**

- 2.1 Trees are protected by legislation when they are subject of Tree Preservation Orders or are within Conservation Areas (subject to certain exemptions). It is an offence to cut down, uproot, lop, top, wilfully damage or wilfully destroy a protected tree without having first obtained the necessary consent.
- 2.2 In the case of a tree protected by a Tree Preservation Order, the Council's consent is normally required prior to undertaking any works to the tree and this will require the submission of a formal application. Any consent may be subject to conditions, and there is a right of appeal to the Secretary of State against the refusal of consent or the granting of consent subject to conditions.

- 2.3 In the case of a tree in a Conservation Area, six weeks' notice must normally be served on the Council of any proposal to carry out works on the tree. If the Council takes no action within six weeks, the works may go ahead as notified.
- 2.4 Trees may also be protected by conditions imposed on planning permissions where the statutory and policy tests for doing so have been met. Such conditions typically require that new trees be planted and maintained, or that existing trees be retained as part of development, usually for a minimum of five years. An application can however be made to the Council to vary or remove a condition (such as to allow the removal of a tree). If planning conditions are not complied with, the Council has powers to serve an enforcement notice or breach of condition notice to secure compliance. There is a right of appeal to the Secretary of State against an enforcement notice.
- 2.5 There are two offences, which apply equally to trees protected by Tree Preservation Orders and those within Conservation Areas. Firstly, anyone who cuts down, uproots or wilfully destroys a tree, or who lops, tops or wilfully damages it in a way that is likely to destroy it, is liable, if convicted in the Magistrates Court, to a fine of up to £20,000. If the person is committed for trial in the Crown Court, they are liable if convicted to an unlimited fine. The Courts have held that it is not necessary for a tree to be obliterated for it to be "destroyed" for the purposes of the legislation. It is sufficient for the tree to have been rendered useless as an amenity.
- 2.6 Secondly, anyone who carries out works to a tree that are not likely to destroy it, is liable, if convicted in the Magistrates Court, to a fine of up to £2,500. Any proceedings for offences in this category must be brought within six months of the date the offence was committed.

### **3. Responding to complaints**

- 3.1 Investigations connected to alleged breaches of planning control in respect of tree protection legislation are in most cases instigated because of complaints received by the Council by members of the public. When this happens, investigations will commence in accordance with the Council's adopted Planning Enforcement Plan. This sets out that alleged works to protected trees rank as a top priority in all circumstances, with the target for initial site inspection being 1 working day. If the Council is advised of works taking place to protected trees all efforts will be made to ensure a visit can be undertaken within a quicker timescale so as to prevent irrevocable damage wherever possible. This prioritisation reflects the perceived urgency and level of harm arising to amenity or to areas or features that benefit from special protection.
- 3.2 At this stage the complainant is informed of the case officer's name and contact details. The named Officer will act as the main point of contact and will advise all parties on progress and outcome of the case. Additionally, Borough Council Members are informed of the receipt of allegations on a weekly basis.

## **4. Enforcement Investigations**

4.1 Our initial investigations will always involve research to establish:

- whether the tree is protected.
- whether any consent or permission has been granted for works; and
- who is responsible for the work being undertaken (either by act or instruction)

4.2 In all cases, this will involve both a desk-based assessment of the Council's official records, along with a land registry search along with a site inspection. The investigating planning enforcement officer will inspect the site in line with the Council's scheme of prioritisation and will also request that the Tree and Landscape Officer attends the inspection. If the Tree and Landscape Officer is unable to attend the inspection within the necessary timeframe, the investigating officer will subsequently discuss the evidence collated and establish whether a further inspection is required.

4.3 At the site inspection, potential transgressors will be asked to give an account of the activity taking place (if any is identified) and provide any relevant background information. If at any time during the inspection it appears to the investigating officer(s) that the person in question may have committed an offence and that answers to questions may be required as evidence, he or she will normally be invited to the Council's offices to undertake a tape-recorded interview under caution. This will be conducted under the provisions of the Police and Criminal Evidence (PACE) Act 1984 and the relevant Code of Practice will be adhered to

4.4 In some cases, it may however be necessary to caution a suspect during the site inspection itself. In such circumstances, this will be issued in accordance with the code of practice issued under the Police and Criminal Evidence Act 1984 and the suspect will be advised that he or she is not under arrest, is free to leave at any time and is entitled to legal representation.

## **5. Available Options for Action**

5.1 The Council has a range of possible courses of action available to deal with cases of unauthorised works on protected trees. These include the following:

- Initiate a prosecution
- Administer a simple caution
- Require the planting of a replacement tree for each tree destroyed, under section 206 of the Town and Country Planning Act 1990.

- Serve a replanting direction under section 207 of the same Act. This is a formal procedure to secure replacement planting, which can be invoked if the landowner does not otherwise comply with a duty to carry out replacement planting.
- Serve a Breach of Conditions Notice.
- Take informal action, such as written correspondence requesting remedial works and warning of the potential for legal action and fines if a further contravention occurs.

Prosecution:

- 5.2 This is likely to be the most suitable course of action in circumstances where a tree has been destroyed or works have caused significant harm and where it has been established that it is in the public interest to do so.
- 5.3 In most cases, a prosecution will not be brought if the works would have been allowed, had they been applied for. A prosecution will not normally be brought unless the unauthorised works have resulted in a loss of public amenity. When assessing amenity, the Council will use the same criteria-based approach as set out in the Tree Preservation Order Protocol, to be applied by the Tree and Landscape Officer who will be advising the investigating enforcement officer and legal team.
- 5.4 In determining the most appropriate and proportionate course of action in any given circumstance, the Council will take into account the following:
- the size of the tree(s)
  - the prominence of the tree(s)
  - the condition of the tree(s)
  - the life expectancy of the tree(s)
  - the seriousness of the offence
  - the loss of/effect on amenity
- 5.5 If a preserved tree has been removed without consent and is a single specimen 'amenity' tree in good condition and could not be adequately replaced by planting another tree, the Council will, in all but exceptional circumstances, be likely to prosecute those responsible for its removal. The Council will also seek to ensure the immediate provision (subject to planting seasons) of another tree.
- 5.6 With respect to Conservation Area trees, the seriousness of such an offence will be judged by determining if the tree would have been made the subject of a

draft Tree Preservation Order had the requisite notice been served. Where the tree would have been made the subject of an Order, the Council is likely to take the same action as indicated above.

- 5.7 Where extensive works are undertaken without consent or prior notification in the case of Conservation Areas that would not have been agreed had an application been submitted, the Council will seek to prosecute those responsible. This generally applies where the appearance of the tree is altered to a point where there is a clear effect on visual amenity. Where these works have been undertaken to a poor standard remedial works will be required.
- 5.8 In cases where works are undertaken that would ordinarily have been acceptable, in terms of general form and extent, but to a poor standard, the Council will ensure that all necessary remedial works are undertaken as soon as possible. Where such remedial works are not undertaken in an acceptable timescale and in accordance with a specification issued by the Council, the Council will be likely to prosecute those responsible for the works.
- 5.9 In considering whether to bring a prosecution, regard will also be had to the likelihood of the offence being repeated and the degree to which a prosecution would act as an effective deterrent. Regard will also be had to any financial advantage perceived to have been gained by carrying out the unauthorised works and whether the perpetrator has been prosecuted, cautioned or warned for similar offences in the past.
- 5.10 Whilst ignorance of the law is not an excuse, all relevant issues associated with the case will be taken into account including, where appropriate, the attitude and circumstances of the perpetrator, any indication that he/she was acting in good faith or other relevant mitigating factors.
- 5.11 Two tests will be applied in cases where a prosecution appears likely, consideration of which will be undertaken in consultation with the Council's Legal Team:
- The Evidential Test: A prosecution will not be commenced unless there is sufficient, admissible and reliable evidence that the offence has been committed and that there is a reasonable prospect of conviction.
  - The Public Interest Test: A prosecution will only be brought where this is in the public interest. This can include using enforcement action as an effective deterrent.

Use of Cautions:

- 5.12 Cautioning may be applied in cases where a prosecution can properly be brought but where such action is not considered appropriate in the

circumstances of the case. These will be issued in accordance with the Council's published guidance.

### Replanting

5.13 Whenever a tree has been removed in contravention of the legislation, or because it is dead, dying or dangerous, there is an automatic legal duty on the landowner to plant a replacement tree of a suitable size and species at the same place as soon as reasonably possible (unless that requirement is waived by the Local Planning Authority). The replacement tree is then subject to the same protection as the tree that was lost. If the landowner fails to comply with this requirement, the Council may serve a Tree Replacement Notice within a period of four years to ensure compliance.

## **6. Procedures and processes**

6.1 Tree enforcement issues will be dealt with by the Planning Enforcement Team in liaison with the Tree and Landscape Officer and the legal team.

6.2 In each case where it is evidenced that unauthorised works have been carried out on a protected tree (or trees), the investigating officer will compile a report containing the following information:

- Summary of the breach as alleged.
- Description of the site, tree(s) in question and protection afforded.
- Explanation of desk-based and site-based investigations.
- Summary of all evidence collected.
- Summary of all expert arboricultural and legal advice (where necessary) obtained
- Recommendations for any further action for endorsement by the Development Control Manager

[Evidence collected and expert advice will be provided in writing and appended to the investigating officer's report]

6.3 Cases recommended for closure will appear on the weekly list provided to Members. Reasons for the closure will be reported in the same way as all other closed enforcement cases.

6.4 Ward Members will be updated by the investigating officer regarding any cases where recommendations for action are endorsed and a copy of the report and associated paperwork provided on a confidential and privileged basis. It is important to note that this documentation is not provided in full to complainants



in order that no prejudice arises in legal proceedings. Complainants will however be updated throughout proceedings by the investigating enforcement officer in accordance with the Council's Planning Enforcement Plan.

DRAFT