

TONBRIDGE & MALLING BOROUGH COUNCIL
PLANNING and TRANSPORTATION ADVISORY BOARD

29 June 2021

Report of the Director of Planning, Housing and Environmental Health

Part 1- Public

Matters for Recommendation to Cabinet - Non-Key Decision (Decision may be taken by the Cabinet Member)

1 TREE RELATED SERVICE IMPROVEMENTS AND TREE PRESERVATION ORDER PROTOCOL

Summary: This report seeks to provide an update to Members on the ongoing review into how the service deals with all tree related matters and consequently what changes to processes and procedures are needed to facilitate necessary service improvements. Alongside this, the report will set out the terms and scope for a published Protocol for adoption which will be intended to provide a clear and transparent framework in respect of how the Service will administer Tree Preservation Order work

1.1 Introduction

1.1.1 Members will be aware that the Development Management Team discharges the Council's functions in respect of tree-related matters. By way of background, in each of the following calendar years the Service has dealt with:

- In 2020, a total of 227 applications for works to protected trees were determined, a total of 211 notifications for works to trees in Conservation Areas were determined and a total of 8 new Tree Preservation Orders were made.
- In 2019, a total of 174 applications for works to protected trees were determined, a total of 181 notifications for works to trees in Conservation Areas were determined and a total of 9 new Tree Preservation Orders were made.
- In 2018, a total of 164 applications for works to protected trees were determined, a total of 179 notifications for works to trees in Conservation Areas were determined and a total of 6 new Tree Preservation Orders were made.

1.1.2 By the end of April this year, the Service had already determined 88 applications for works to protected trees, 72 notifications of works to trees in Conservation Areas and a total of 6 new Tree Preservation Orders have been made. Based on

those levels, it is clear that by the end of this calendar year, total numbers will exceed the levels experienced in recent years.

- 1.1.3 Historically, the Landscape Officer role has been primarily focussed on the determination of submissions in respect of protected trees and in the making and confirming of new Tree Preservation Orders when necessary. Additionally, the role has advised where necessary on planning enforcement related matters and advise Development Management case officers on the acceptability of landscaping schemes in connection with proposals for new development across the Borough where this has been possible within the hours available. As the level of cases in the central job activity has risen, this wider role has been reduced.

1.2 Legislative and policy background

- 1.2.1 The duty of the Council to protect trees within the planning process is contained within Part VIII [Special Controls] of the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991 and the related Regulations (The Act). The Act requires planning permissions to include appropriate provision for the preservation and planting of trees and to make TPOs as necessary in connection with the grant of such permissions.

- 1.2.2 Although it is the duty of the Council to protect trees within the planning process, the Act also provides the power to make TPOs in any other circumstances, provided it is 'in the interests of amenity'.

1.3 Current limitations

- 1.3.1 It has become increasingly apparent that our historic ways of working in respect of service delivery on tree related matters are becoming increasingly unfit for purpose. There is a service requirement to broaden the scope of the role of the Landscape Officer to respond to current pressures both in terms of the core job functions and also wider Landscape considerations. This will continue to ensure implementation of the statutory requirements of the local authority in all matters of Tree and Hedgerow Preservation in the Borough but wherever possible also to:

- Provide advice and guidance in landscape matters including the satisfactory implementation of planting schemes in accordance with approved policies and planning conditions
- Contribute to positive engagement with local communities and other stakeholders, providing the lead on landscape related matters
- Provide specialist landscape design advice to the Council's Development Management and Planning Policy staff and play a key role in specific strategic landscape projects
- Provide landscape design advice to applicants, council officers and councillors throughout the planning process - from pre-application to

planning applications and appeals including major planning applications and development proposals.

- 1.3.2 Members will be aware that the existing part time post is currently vacant following a retirement. A temporary resource has been obtained to ensure continuity of service in the immediate term. Alongside this, officers are seeking to undertake a recruitment exercise to secure a full-time resource going forward; this change in establishment was approved by the General Purposes Committee on 16 June.
- 1.3.3 Further to the additional hours created by the full-time post, to build in further resilience within the post, officers are conducting a thorough review of internal processes surrounding all tree related administrative work to ensure it is suitably streamlined, efficient and effective in allowing for work to be suitably focused on the most important aspects of the function. For example, current practice has been for correspondence to go directly to the Landscape Officer rather than to a generic email account. This has now been amended so that the generic account can be consistently monitored regardless of the workload commitments of the Landscape Officer.
- 1.3.4 Taken in combination, this will ensure that all necessary functions of the landscape post can be effectively undertaken in all respects.
- 1.3.5 One key factor in this is centred on the need to develop a transparent and robust process for dealing with all aspects of making and confirming new Tree Preservation Orders. It is fully accepted that presently the processes currently in place are not sufficiently clear to all interested parties, or equally applied and that has caused many involved in the process to become disenfranchised and sceptical around the routes of decision making in this respect. Efforts have been made to improve this including the more recent use of TEMPO assessments to inform our decision making so that there is a consistent format but this now needs to be developed further to include the whole process.
- 1.3.6 As part of this, it is recognised that the service has not been able to proactively review the efficacy and appropriateness of historic TPOS, particularly those which cover large areas. In this respect, the Planning Practice Guidance (the "PPG") is clear that reviewing orders helps to ensure that protection is still merited and Orders contain appropriate classifications. For example, authorities should consider reviewing Orders protecting trees and woodlands affected by development or other change in land use since the Order was made. In addition, the PPG advises that authorities may wish to set up a programme to review Orders that include the area classification. For the service presently, this is undoubtedly a limitation, particularly when investigating alleged unauthorised works to trees, for example.
- 1.3.7 It is also recognised that currently the service has no in-house expertise in landscape-based assessments for Development Management purposes other than the knowledge held by individual case officers and their commitment to

increasing this knowledge through available training opportunities. This is an identified weakness particularly at the current time when the team is experiencing high numbers of speculative applications on sites that may have landscape implications – either due to their relationship with nationally designated landscapes such as Areas of Outstanding Natural Beauty or when considering more localised sensitivities. Recently, this has resulted in the need for us to obtain the services of an external consultant to defend decisions at appeal and provide application specific advice on landscape related matters. Whilst there is always a role for external advice, for example if there are a very specific set of circumstances in which they have expertise, both from a resilience and cost perspective it is considered beneficial to have the opportunity to utilise an in-house resource in the first instance.

1.4 Identified service improvements and implementation

Enhanced interaction with Development Management and Planning Enforcement

- 1.4.1 To a large extent, this should arise as a result of a new post holder joining the team, effectively implementing the various strategies described and having a suitable degree of experience and knowledge in landscape related matters.
- 1.4.2 In terms of planning enforcement specifically, Members will be aware that the Council has an adopted Planning Enforcement Plan in place which is subject to regular review. The Plan is accompanied by individual Protocols which are intended to deal in more detail with certain topics. It is suggested that a further Protocol be developed explaining precisely how unauthorised works to protected trees will be investigated, how evidence will be collected and how decisions will be made as to what action, if any, should be taken when breaches are identified. The detail of this appears elsewhere on this agenda.

Member Training

- 1.4.3 Members will be aware that some time ago a Member Briefing Paper was produced and circulated addressing how trees are considered within the planning system. At the time the note was circulated, the intention had been to subsequently provide Members with some practical field-based training to bolster the briefing note and to give Members the opportunity to engage and ask questions. Unfortunately, it was not possible to undertake such training last year, but it is considered that this could be arranged during the summer, once a new officer is in post, subject to any necessary risk assessments being in place. Officers would welcome any suggestions Members have on how this training could best be undertaken to ensure it is optimised.

Internal processes and public information

- 1.4.4 Ultimately, the intention is for the eventual post holder to positively engage with reviewing our processes on an ongoing basis, but it is considered there is a need to ensure processes are improved in the immediate term to ensure the post holder

starts from an improved position. As such, holistic review of all our tree-related internal processes is currently being undertaken by officers. The aim of this review is to ensure that resources are being directed towards the most important workstreams whilst building in necessary resilience at the same time.

1.4.5 An important part of this also includes making improvements to publicly held information, via the website for example.

1.4.6 In association with all of the above, it is considered that a specific Protocol is needed enshrining precisely how all matters pertaining to Tree Preservation Orders will be implemented going forward. This is discussed in more detail below.

1.5 The Protocol

1.5.1 The ultimate aims sitting behind the Protocol are as follows:

- To substantially improve the consistency and robustness of our assessments in considering whether new Tree Preservation Orders should be made and confirmed
- To ensure greater transparency in our decision making through clear channels, thorough assessments and schemes of publication
- Increasing public confidence and understanding in the system
- Increase our ability to be proactive through, for example, the review of historic Orders.

1.5.2 The draft Protocol is attached to this report at **Annex 1**. It is accepted that the document is in draft form only and Members will want to provide detailed comments, which are welcomed in the interests of ensuring the document can act as a truly positive tool for decision making. This is reflected in the recommendations that follow at Section 1.9 of the report.

1.5.3 Within this context, Members will note that very specific language is used within the Protocol around notifying interested parties at the point of making a new TPO. This is a markedly different process to that which takes place in respect of planning applications. Upon making a TPO, the local authority must as soon as practicable serve “persons interested in the land affected by the Order” (the precise term used in the Legislation). Members should note that this is not the same duty placed on us in consulting on planning applications which requires adjoining landowners to be consulted. Persons interested in land affected by an Order are clearly defined as being every owner and occupier of the land affected by the order and every other person whom the authority knows to be entitled:

(a) to cut down, lop or top any of the trees to which the order relates; or

(b) to work by surface working any minerals in, on or under the land affected by the order.

- 1.5.4 Most commonly, this means landowners, developers with an option agreement on the land and adjoining landowners that have a right to undertake works to the trees in question (i.e. where branches overhang a boundary). In effect, whilst anyone can ask that a TPO is made on any land, where it is in the interests of public amenity, it is only those who would have direct interests on the land on which the trees sit that we are required to notify and collect representations/objections from. This is because protecting the trees could have a prejudicial impact on those interests. It is those interests the consultation exercise is focusing on, not whether the wider community considers the trees to be worthy of protection or not. As such, the Protocol seeks to make clear that representations received will only be taken into account in deciding whether to confirm an Order where a clear interest is demonstrated in accordance with the relevant legislation. Where wider representations are made, the officer report will make this clear and set out that these have not been considered in accordance with the Protocol.
- 1.5.5 The Protocol makes clear that at this time all decisions related to the making and confirmation of TPOs are delegated to the Director of Planning, Housing and Environmental Health as set out by the Constitution. However, as per the legal implications below, there are specific constitutional circumstances in which TPOs can be referred to Members via a planning committee, although in practice this provision has been utilised in very few, complex and highly controversial situations. Officers understand that this has been the subject of concern amongst Members recently, due to some of the challenges and historic practices detailed above. It is therefore suggested that a defined period for review be built into the adoption of the Protocol to ensure the vacant post can be suitably filled and the changes to our ways of working have time to bed in following implementation. The strong hope being that once the improvements have been made and implemented, Members will have a renewed confidence in officer delegated powers and the active role the Protocol plays in that. Specifically, Members will note that the Protocol makes express reference to engagement with the Ward Councillors if sustained objections are received to new TPOs having been made. It is considered prudent to test this for a 6-month period following appointment of a permanent post holder to establish how successful it is and what issues might still be arising for Members.
- 1.5.6 Equally, part of our internal review on process is currently centring on clear reports detailing our assessments into whether TPOs should be made and how objection have been considered and addressed. A draft officer report template is attached for consideration and a revised version will be appended to the Protocol along with the TEMPO assessment once finalised.
- 1.5.7 Whilst there is no positive duty to require the Council to publish TPOs and associated paperwork electronically, officers are investigating opportunities to do

so in line with our own digital strategy and in the interests of transparency. Details of how this can best take place is not included within the Protocol as drafted as it is important that we establish fully what technological options are properly available to us. It is therefore suggested that internal work in this respect continues and overt reference to how this will be achieved in the longer term should be subject to consideration at the point of the 6-month review. In the meantime, Ward Members will be sent copies of the officer report and TEMPO assessment at the point any decision is made as to whether to make (and subsequently whether to confirm) a TPO.

- 1.5.8 Importantly, the draft Protocol also references the need to review historic TPOs. At this time, little in the way of detail is provided other than a scope for prioritisation. This will undoubtedly be a significant project that needs to be carefully defined and properly resourced. As such, whilst it is rightly enshrined within the draft document at this time, further work to establish detailed parameters will be required. Again, any feedback Members have on how they wish to see this undertaken would be useful.

1.6 Legal Implications

- 1.6.1 Not having a comprehensive and consistent Protocol in place could increase the risk of Council decisions being challenged both through appeal and judicial review.

1.7 Financial and Value for Money Considerations

- 1.7.1 Having a comprehensive Protocol in place will ensure appropriate skills and expertise are utilised in an efficient and cost-effective manner and limit exposure to costs awards being made against the Council in appeal scenarios.

1.8 Risk Assessment

- 1.8.1 Not having a full-time officer in post would mean that the full range of functions the service needs to undertake in respect of tree and landscape work could not be carried out to an optimum level.
- 1.8.2 Not taking the opportunity to review all internal processes alongside the recruitment of a new full-time officer would risk that resource becoming focused on processes and activities that did not make the most efficient use of their time, potentially to the detriment of other, more important tasks.
- 1.8.3 Not having the Protocol in place could delay effective decision making, increase the likelihood of challenges and limit the Council's ability to effectively resource key development management operations. Furthermore, the absence of a Protocol could give rise to a risk of losing important trees within the Borough that warrant protection. Not being able to proactively review historic Tree Preservation Orders risks the ability of the Council to take appropriately, effectively and

proportionately remedial and/or punitive enforcement action where necessary to do so.

1.9 Policy Considerations

1.9.1 The service improvements set out within this report are in accordance with the Council's wider corporate priorities in respect of the climate change agenda.

1.10 Recommendations

1.10.1 That Members **AGREE** the proposed strategy as set out in this report, namely:

- 1) The principle of a Tree Preservation Order Protocol be adopted subject to consideration by the Cabinet following on from any necessary amendments to the draft document to reflect all feedback from this Advisory Board to ensure it is fit for purpose, with a 6-month review period following the successful appointment to the Tree and Landscape Officer post. Final authority to be delegated to the Director of Planning, Housing and Environmental Health in consultation with the Cabinet Member for Strategic Planning and Infrastructure.
- 2) Officers will seek to develop a new Protocol further to the adopted Planning Enforcement Plan setting out in detail how alleged unauthorised works to protected trees will be investigated and how any evidenced breaches will be addressed.
- 3) Officers will progress on-site Member training event(s) to enhance the information provided within the Member Briefing Note at a practical level, following the successful appointment to the Landscape Officer post. Final arrangements for how the training event(s) will take place will be delegated to the Director of Planning, Housing and Environmental Health in consultation with the Cabinet Member for Strategic Planning and Infrastructure.
- 4) Officers will continue to develop detailed parameters for the review of historic TPOs across the Borough reflecting all feedback from this Advisory Board to ensure it is suitably focused and has a defined and achievable scope.
- 5) Officers will build into 1 – 4 (inclusive) a review period to take place 6 months following the successful appointment to the Landscape Officer post to be reported to this Board for consideration of an updated, refined Protocol as necessary.
- 6) Officers will continue to review and improve all tree-related internal processes and administrative work and to ensure Members are regularly updated on improvements made.

The Director of Planning, Housing and Environmental Health confirms that the proposals contained in the recommendation(s), if approved, will fall within the Council's Budget and Policy Framework.

Background papers:

Draft Tree Preservation Order Protocol

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