

# Risk Engineering

Risk Assessment and Risk Improvement

Increasing insight, reducing risk



Date of Assessment: 31 March 2023

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**Tonbridge & Malling Borough Council**

Kings Hill  
West Malling  
ME19 4LZ

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## Executive summary

### Scope and purpose

This report was commissioned by Tonbridge and Malling Borough Council (TMBC) to review and comment on the adequacy of the arrangements in place within TMBC for tree risk management. The main subject of this report is the effect of trees and tree roots on members of the public. This includes the adverse effect of tree root growth on property (mainly subsidence), but also direct damage by contact with property, trips over footways damaged by roots, and trees or limbs falling onto property or people. The purpose of the review was to assess TMBC's Tree Safety Policy with a subsequent grading of TMBC's tree liability to follow. This report consists of a desktop review of the corporate tree management strategy documentation.

The overall approach taken by Zurich Risk Engineering (ZRE) was to assess the existing system against the principles for effective asset management, ZRE's standards for risk management and relevant good practice such as the National Tree Safety Group 'Common sense risk management of trees.'

### Understanding the risks

Serious injury caused by trees is rare in comparison to the number of trees growing in the UK, however such incidents often attract the eyes of the media. For example, in July 2020 Wirral Borough Council was fined £100,000 by the HSE when a falling tree branch injured an expectant mother, tragically killing her unborn baby. In addition to fines, councils may face the costs of investigating and defending an HSE prosecution, as well as any civil claim that may follow.

Witley Parish Council v Cavanagh (2018) is an example of a prominent civil claim which recently went to the court of appeal. In this case, the claimant was injured when a tree adjacent to the Highway fell onto the bus he was driving. The council was held liable as they were unable to demonstrate a risk-based approach to their frequency of inspections.

Damage caused by tree roots can result in extremely large claims payments. Zurich Municipal receives some claims that cost several hundreds of thousands of pounds for individual incidents of damage, and one claim a number of years ago cost over £1 million. These claims can also stay open for a long time and require detailed investigation, which means there are the hidden costs of officer time that aren't covered by insurance.

The importance of effective management of trees is further emphasised by the threat to the country's tree stock posed by the arrival in 2012 of Ash Dieback (*Chalara fraxinea*). There are, of course, other causes for concern in the form of the Asian Longhorn Beetle, *Phytophthora ramorum*, Chestnut Blight and the Oak Processionary Moth (OPM). Climate change in the UK is forecast to expect hotter, drier summers. This is likely to have a negative impact on the health of many tree species as well as increasing soil desiccation resulting in the potential for worsening safety and subsidence risks.

The Council's statutory duties to third parties in respect of trees will mostly fall under the Highways Act 1980, the Occupiers' Liability Acts, the Health and Safety at Work etc. Act 1974 and the Management of Health and Safety at Work Regulations 1999. There are also common law duties that arise through nuisance in respect of encroachment of tree roots and through contract law.

The timescales and claims response protocols for the processing of liability claims are governed by the Court Procedure Rules (CPR) and are also important considerations in the risk management of trees for which TMBC is responsible. Failure to meet timescales may result in the defendant being liable to pay a penalty (fine) for failing to comply. Restricted timescales mean that organisations must be able to gather evidence efficiently and respond. Therefore, it is vital that relevant documentation in relation to tree risk management such as policies, procedures, risk assessments, training records and inspection and maintenance records are retained and are readily accessible.

Notwithstanding public liability exposure, an inconsistent approach does not allow the Council to establish the value of the asset and future financial and climate change planning requirements and opportunities. Relevant examples of good practice include the National Tree Safety Group's (NTSG) "Common sense risk management of trees" and Well-Managed Highway's Infrastructure Code of Practice (WMHI). Whilst WMHI doesn't directly relate to trees away from the Highway, a risk-based approach is suitable for the management of all trees across the council.

Responsibility for the management of trees is devolved to individual departments and teams. These assets are managed by specialist technical employees with assistance from other departments within the council. Their remit includes parks and open spaces and other properties. The tree risk policy document that was under review within this report formalises TMBC's strategy taking a holistic view of the risks faced by the assets whilst detailing the appropriate levels of inspection, maintenance and reactive actions when required.

The review of the corporate tree management strategy and the policy therein demonstrates there is well-documented evidence of a risk-based approach that TMBC have adopted in relation to their management of their tree liability risks. This report has found no major faults in the documentation that has been presented however does make some recommendations to improve how the document can be relied upon from a claim's defensibility perspective.

A scored grading of TMBC's holistic approach to managing this risk may be conducted at a later stage to confirm that the best practice detailed in this document is being supported and adhered to.

### **Overview of risk recommendations**

To improve the risk management and claims defensibility of this policy the following recommendations have been made:

#### Numbered

1. Inclusion of the Highways Act 1980 when discussing relevant legislation that the policy considers.
2. Provide an explanation of the various levels of inspection depending on the tree type should be presented before Policy 2.
3. Removal of the comparison of strategies adopted by neighbouring councils.
4. Basic inspections should be discussed before moving onto expert inspections.
5. Include an explanation of the actions the council will take following a report of a hazardous tree damaged by a storm.
6. Include a caveat to the tapping of trees following a storm incident "if safe to do so".
7. Include a third category that stipulates if no further action is required.
8. Inclusion of a categorisation detail in the expert inspection form.
9. Inclusion of a categorisation detail in the basic inspection form.
10. Removal of the strategic objective to digitise records from the policy document.

#### Miscellaneous

- There should be a specific policy that sets out TMBC's stance on complaints from third parties regarding trees and what the response timescales for these should be
- "Lay" and "Detailed" inspections should be detailed as numbered policies with greater explanation given to when they should be adopted as is done with "basic" and "expert" inspections.

### **Participants**

The assistance of the following participants is acknowledged, with thanks:

Darren Lanes – Head of Street Scene and Leisure (TMBC)  
James Fay - Interim Leisure Services Manager (TMBC)  
Dominic Reynolds - Senior Exchequer Assistant (TMBC)

## Risk factor information and assessment

### Asset Management and Liability - Risk Grading

Location	Remote
Scope	Primary
Description	Asset Management and Liability Management System
<b>Introduction and Best Practice</b>	
<b>Recommendation - 001</b>	
<p><u>Comments</u></p> <p>The policy document is introduced with a synopsis on the importance of trees to TMBC noting their value to the organisation before giving a background of risk management in relation to trees. It highlights that the frequency of incidents that occur that would cause damage and/or injury are deemed as being “extremely low” and acknowledges that there is no research that suggests the overall risk presented by trees has not increased in recent times. There is no set standard way in which a policy must be written however this report finds the introduction to this risk is a good summarisation of the risk presented by trees and therefore sets a good context for the policy about to be discussed.</p> <p>The document then moves to discuss the history of claims relating to TMBC noting that since 2002 there have been a total of thirty-three claims resulting in £40,000.00 in claims pay out and noting that these all relate to property damage rather than any injuries. The inclusion of this can be helpful to internal stakeholders however this can be used as a guide to potential claimants as well for setting an understanding of the type of claims typically dealt with.</p> <p>The scope of the policy looks specifically at the areas of responsibility that are covered by TMBC, this is an essential requirement as it identifies what areas and tree’s TMBC may be liable for. This sub-section identifies these areas adequately.</p> <p>The aims presented by this policy identifies the scope of the policy itself in its intention to create a safe, attractive, and sustainable environment and to provide formal direction in the best methods for achieving this.</p> <p>The legal implications are highlighted under responsibilities pertaining to the Occupiers Liability Act 1957 confirming this policy complies with the common duty of care. Other relevant legislation is highlighted as being relevant to tree risk management policy including:</p> <ul style="list-style-type: none"> <li>• Occupiers Liability Acts 1984</li> <li>• Local Government (Miscellaneous Provisions) Act 1976</li> <li>• Countryside and Rights of Way Act 2000 (CRoW)</li> <li>• Wildlife and Countryside Act 1981</li> <li>• Management of Health and Safety Regulations 1999</li> </ul> <p>All legislation mentioned is considered part of best practice however it would be recommended to mention the Highways Act 1980 at this point as many incidents involving trees happen near or on highways.</p> <p><u>Recommendation</u></p> <p>Include mention of the Highways Act 1980 when listing the legal obligations, if there is a separate policy that relates to Tree’s and Highways, then this should be at least signposted within this subsection of the policy.</p>	



**Policy 1 – Monitoring and Inspection****Recommendation - Nil**Comments

The document clearly states that the Council is responsible for monitoring the health and safety of all mature trees by way of inspection. This policy is expanded on by following guidance set out by HSE in regards to “Zoning” (HSE, 2013) , two categories of zones are identified that are determined by the frequency of visitation each site would receive. This follows best practice set out by HSE. There is a clear stipulation that mature trees (which is referred to in other parts of the policy) are defined as trees being over 6 meters tall.

Recommendation

Nil

**Policy 2 – Expert Inspection Frequency****Recommendation – 002, 003**Comments

This policy deals specifically with the inspection of “mature” trees as previously defined in the first policy. The stipulation of this policy is that the council will carry out “expert” inspections within a three year period. This is stipulated before the explanation is given of the requirements of an “expert” inspection.

The policy itself is a sound explanation on the frequency of expert inspections however and is therefore fit for purpose.

Recommendation

1. Explanation of the levels of inspection should be defined before Policy 2 makes mention of their requirement for a specific categorisation of tree.
2. Preceding the “Policy 2” being raised, there is a comparison of the neighbouring councils attitudes to tree inspection. Albeit this comparison is useful information, it is more useful to internal stakeholders at TMBC and therefore should not form part of the policy document that could be disclosed to third parties if requested under a Freedom of Information Act (FOI2000) Request. This comparison gives potential claimants ammunition to cross examine other councils and dispute the actions of TMBC. This policy document should relate to the policy of TMBC alone.

**Policy 3 – Basic Inspection Frequency****Recommendation - 004**Comments

As with Policy 2, this policy speaks of about basic inspections and their requirement to be undertaken annually on all mature trees that have been identified at priority sites. The frequency identified complies with the recommended frequency of inspection.

Recommendation

If expert inspection requirements are identified from basic inspections, basic inspections should be detailed first to assist the flow of reading the policy document.

**Policy 4 – Post Storm Condition Inspections****Recommendation – 005, 006**Comments

Policy 4 states that basic inspections will be conducted at priority sites “as soon as conditions permit and as staffing allows.” It also notes that this will only be conducted following Metrological Office ‘named’ storms. By leaving a certain level of ambiguity regarding the call out times for these inspections, this aids in claims defensibility as well as assisting in the operational management of this policy requirement.

Recommendation

1. Post storm reports are most likely to be called in to the council with the third party requesting an inspection, within Policy 4 it is recommended that there is mention of requests for reactive inspections following complaint that still allows for reasonable management of these inspections.
2. Within the Policy 10 there is mention that trees that pose an immediate threat should be taped off. The act of taping off a tree should mention specifically that this should be done when it is safe to do so or following an expert inspection. This removes the unreasonable expectation that council employees would be going to trees that have been identified during hazardous weather conditions to immediately carry out this action.

**Policy 5 – Qualifications (Expert Inspection)****Recommendation - Nil**Comments

The levels of qualification required for “Expert” inspections is clearly demonstrated.

Recommendation

Nil

**Policy 6 – Qualifications (Basic Inspection)**Comments

The levels of qualification required for “Basic” inspections is clearly demonstrated.

Recommendation

Nil

**Policy 7 – Expert Inspection Scope****Recommendation - Nil**

Comments

There are expert forms of inspection in place. These inspections would be used to address the structural condition of the tree will be focused on with re-inspection recommendation and/or management recommendations being given at this point. This is viewed as good practice.

Recommendation

Nil

**Policy 8 – Basic Inspection Scope****Recommendation - Nil**Comments

There are basic forms of inspection in place. This inspection would be a ground based visual inspection to check for obvious potential hazards, a link to the potential hazards is identified.

Recommendation

Nil

**Policy 9 – Successive inspections****Recommendation - Nil**Comments

This policy addresses the approach that TMBC have adopted to successive inspections on the same tree. The recommendation that is set out in this policy is that the trees should be inspected during different seasons in successive years to give a multi-seasonal view of the overall health of the tree. This demonstrates a good risk management practice to determine the overall health of a living and seasonally affected asset. This also reflects the decision in *Cavanagh v Witley* which advises that inspections should be carried out in and out of leaf.

Recommendation

Nil

**Policy 10 – Remedial Action Categorisation (Post Expert)****Recommendation - Nil**Comments

The categorisation of remedial action timescales laid out in this part of the policy reflect the best practice (Smiley et al, 2017). There is a note attached to this policy that suggests that a tree that is an immediate danger to the public will be “taped off” until a time that the necessary works can be completed to make the tree safe.

Recommendation

Nil

**Policy 11 - Remedial Action Categorisation (Post Basic)****Recommendation - 007**

Comments

The categorisation of remedial action timescales laid out in this part of the policy reflect the good practice (Smiley et al, 2017). This policy also notes a risk-based approach to the basic inspections with works being deemed necessary for safety reasons will take priority. This conforms to best practice (Ball, 2011). The inclusion however of only two categories (High priority and urgent) however means that there is no category given for “no action required until next scheduled inspection” as per policy 10.

Recommendation

Include a third category that details if no further action is required until the next inspection.

**Policy 12 – Recording of Inspections (Expert)****Recommendation - 008**Comments

The information that is gathered as part of the expert inspection covers most of the relevant information that would be required from an insurance standpoint if the tree was to be involved in a claim. The only other addition that would be required for this would be the response category that the inspection has identified. Although this could be detailed in the “Recommended Remedial Action” question, having a specific requirement to fill this in offers the best available information to aid claims defensibility.

Recommendation

Specifically ask for the categorisation of response that the inspection requires on the basic inspection sheet.

**Policy 13 – Recording of Inspections (Basic)****Recommendation - 009**Comments

The information that is gathered as part of the basic inspection covers most of the relevant information that would be required from an insurance standpoint if the tree was to be involved in a claim. The only other addition that would be required for this would be the response category that the inspection has identified. Although this could be detailed in the “Recommended Remedial Action” question, having a specific requirement to fill this in offers the best available information to aid claims defensibility.

Recommendation

Specifically ask for the categorisation of response that the inspection requires on the basic inspection sheet.

**Recommendation - 010**Comments

The policy document concludes with the commitment that tree safety will be delivered ahead of environmental improvements. This statement clearly demonstrates a strong commitment to the risk-based approach laid out in this policy.

There is a commitment to the continued training of individuals responsible for the management of tree assets within their organisation.

There is a commitment to further develop the way that information relating to tree asset management is recorded by way of developing a digital record system, although this statement is reasonable and laudable, it may not be required to be included in the tree risk policy specifically as this forms part of a strategy rather than policy.

The policy is then finalised with a commitment to be reviewed annually as part of the Councils Operation Risk Register. This forms part of best practice in risk management as it demonstrates there is a cyclical review process of this risk.

Annexes to the policy are appropriate and support the policy objectives well.

Recommendation

Remove the strategic objective for an upgrade to digital record systems from the policy document.

## References

Ball, D., 2011. Common sense risk management of trees: guidance on trees and public safety in the UK for owners, managers and advisers. Common sense risk management of trees: guidance on trees and public safety in the UK for owners, managers and advisers.

HSE (2013), Management of the risk from falling trees or branches, Series: Sector information minutes SIM 01/2007/05, viewed 30/03/2023

Smiley, E.T., Matheny, N.P. and Lilly, S.J., 2017. Tree risk assessment. In Routledge Handbook of Urban Forestry (pp. 478-488). Routledge.

## Final remarks

I would like to thank those who participated in this assessment for their assistance and co-operation. If there are any questions arising from this report, or further details are needed, please let Zurich know as soon as possible.

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