

North Yorkshire Council

Community Development Services

Malton andThirsk Constituency Planning Committee

16 NOVEMBER 2023

CONFIRMATION OF TREE PRESERVATION ORDER ZE23/362/2023

CHESTNUT COTTAGE, BACK LANE, WOMBLETON,

Report of the Corporate Director Planning – Community Development Services

1.0 Purpose of the report

- 1.1 To determine the confirmation of TPO ZE/362/2023 with modifications.
- 1.2 The proposal has been brought to the Committee as this concerns a contested Tree Preservation Order.

2.0 EXECUTIVE SUMMARY

RECOMMENDATION: That the order be CONFIRMED with MODIFICATIONS as set out at the end of this report.

- 2.1 A provisional Tree Preservation Order was made on 18 August at Chestnut Cottage, Back Lane, Wombledon, North Yorkshire, YO62 7RL.
- 2.2 The property is a 'backland property' set back from the main village frontage and accessed off Back Lane. The trees subject of the order are at the western edge of the curtilage.
- 2.3 The order covers two trees (T1 – Horse Chestnut) and (T2 – Oak) which were the subject of a Conservation Area Tree Notification which contained works which officers were unsupportive of.
- 2.4 Objections have been raised, and it is considered that on balance, the sustained amenity value of the Oak is likely to be compromised, and that the order should be confirmed with only 1no. Horse Chestnut being subject of the Order.

ZE/362/2023 Chestnut Cottage, Back Lane, Wombledon, North Yorkshire YO62 7RL



North Yorkshire Council
Ryedale House
Malton
North Yorkshire
YO17 7HH

Tel: 0300 1312131
Website: www.northyorks.gov.uk

| Key | |
|-----|----------------|
| T1 | Horse Chestnut |
| T2 | Oak |

Date: 18.08.2023 Scale: 1:1250



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3.0 Preliminary Matters

- 3.1 The delegated report which sets out the justification for making the provisional order is appended as this information is not in the public domain. The making of the provisional order came about due to the making of a s.211 Notice on three trees (T1- Horse Chestnut, T2 Silver Birch, T3 Oak). Whilst there was no objections raised by the Council's Tree Officers to the removal of the Birch, concerns were raised about the scale of works to the Horse Chestnut and the felling of the Oak. The provisional Order therefore only covers two trees T1 Horse Chestnut and consequentially numbered T2 Oak.
- 3.2 A section 211 notice to the Council gives notification of proposed works, in reaction to this the council has six weeks to consider the works and either agree the works, or if there is concerns, the default position is to make a provisional Tree Preservation Order, to protect the trees from loss/harm and allow more time to consider whether alternative works are appropriate.
- 3.3 It is to be noted that the trees were subject to two Council tree officer assessments, independently conducted, which both concluded that they did not support the works proposed to the Horse Chestnut and to the Oak. One concluded that on balance that we do not object to the works, unless there was a desire to make a Tree Preservation Order. The other considered that an Order should be made, and provided a TEMPO assessment which is provided in appendix 1. A TEMPO assessment is a tool to assess the condition and character of trees(s). This demonstrates the overall balanced judgement to make the Tree Preservation Order in the first instance, and the decision was taken to make the Order covering the Horse Chestnut and the Oak.

4.0 Site and Surroundings

- 4.1 Chestnut Cottage is a backland site to the High Street Properties. It is situated within the Wombleton Conservation Area. The trees are sited at the western end of the curtilage of the property, the Horse Chestnut being adjacent to the access of Chestnut Cottage. Attached is the two Tree Officer's assessment of the trees.

5.0 Legislation

- 5.1 The power to make Tree Preservation Orders are in the 1990 Town and Country Planning Act, Special Controls. Chapter 1 Trees. Section 198. The following set out the stages and process for making TPOs. It is also updated by the 2008 Planning Act which is focused on a range of National Infrastructure regimes.
- 5.2 The process and detail is set out in The Town and Country Planning (Tree Preservation) (England) Regulations 2012. Part 2 Tree Preservation Orders, Regulations 3-12 inclusive.

6.0 Consultation Responses and Background

- 6.1 A response was received from Cllr. Greg White concerning the making the Order and whether it was acceptable to protect trees of this type in a garden context. The Case Officer explained that each TPO is considered on its own merits, and that such trees could be subject of protection and be in a private garden.
- 6.2 An objection has been received from the owners of the Tree, Mr Tom and Mrs Carol Donnelly. The Donnelly's response (italicised in this section) has not been altered, but the Officer's response to their comments is provided after each paragraph so it is clear that each point they have raised is responded to. This is because a substantial amount of their response relates to the process:
- 6.3 *"In our opinion the TPO documents, the survey attachments and the covering letter, contain anomalies which we find perplexing. It could indeed be the case that the inaccuracies are such that the documents are invalid. The Tree Notice, ZE/13/01105/CAT, to which the covering letter refers, denotes T2 as being an oak whereas the Notice denotes T2 as being a Silver Birch. The TPO denotes the oak as T2 whereas the survey data attached to the TPO denotes the oak as T3. This is all very confusing and creates doubt as to what in fact can be removed! Bearing in mind the above and that the date of determination on our request for undertaking tree maintenance works has now expired, we will take further advice on the validity of the documents sent to us.*
- 6.4 Section 3.1 explains that the s.211 Notice referred to 3 trees and this order refers to two trees. Since Orders cannot include trees which are not part of the Order, T3 Oak in the assessment became T2 in the Order.
- 6.5 *We now turn to the conduct of NYCC in dealing with our case. It is this aspect about which we are most dissatisfied. In consideration of submitting the Notice for carrying out the tree works we elected to employ the services of a tree surgeon, David Bayes. On inspecting the trees and assessing the site he concluded that the trees were too confined, overbearing for the site and that the trees were unbalanced. None of these concerns have been referred to, commented on or addressed by NYCC.*

It was in fact the case that one of our main concerns was that the oak tree (T3 as denoted in the Notice) represented a hazard and a danger. We were advised that a site visit would be undertaken as part of the NYCC assessment. A tree officer, Lucy Toolan, was indeed assigned to the case and we were subsequently informed of her visit. This gave us reassurance that we would be able to relay our worries to the person undertaking the assessment. Our concern was that a recent storm event had led to a tree falling over at a neighbouring property causing structural damage. We discussed with Lucy our concern about the structural integrity of the oak tree. We pointed out that it

has a tall and slender trunk, the diameter being much less than other oaks of similar height which we have assessed in the locality, that it has a natural lean towards our house and that the tree sways violently during windy conditions. The size of the crown and the offset centre of gravity is such that we believe that the allowable stresses of the tree are being exceeded during windy conditions. We also discussed with Lucy that we would be prepared to replace the oak with a smaller, slower growing tree commensurate with similar lanes in other villages to fit in with modern living and maintain carbon sequestration and ecology requirements.

- 6.6 It was noted that the proposed works to the trees were accompanied by a justification, which is necessary to validate the notice. Officers, noting the response of the agent/ tree surgeon, must still come to their own professional judgement on the proposed works. Across the authority, CAT notices are initially considered by Planning Officers, who have to a greater or lesser extent experience of dealing with Trees. In this instance the Case Officer was unsure about the impacts of the works to the horse chestnut, and took advice from the Team Leader in Policy, and the advice of Two Council Tree Officers. There have therefore been a number of Officers involved in the decision to make the Order, including two professional arboriculture officers.
- 6.7 It should be noted by Members that whilst the ecological value of trees and their carbon sequestration merits are understood, trees are not made subject of Tree Preservation Orders on that basis, and *inter alia* nor would the proposal to replace a tree on such a basis count for permitting the felling of a tree. Furthermore, the trees are considerable distance from the property, and so in the extremely unlikely instant that the tree failed, it would impact on any building. This was set out clearly in the report.
- 6.8 *On receiving the TPO it became clear that another person, Alan Gilleard, had undertaken a further survey about which we had not been informed. The absence of Lucy's details on any of the documents suggests that she has not in fact been part of the assessment at all. In addition to our dissatisfaction that Alan Gilleard accessed our property without consultation, there is no reference to the trees stability and so we must now question as to whether or not our concerns were actually relayed on by Lucy. It is not satisfactory that our concerns and those of David Bayes have gone unanswered and appear to have simply been ignored. This suggests that an autocratic culture exists within the department.*
- 6.9 The justification provided by the Agent (Bayes Trees) States:

"T1) Horse chestnut is situated to the l/h/s of the property entrance. It is the most prominent tree and from which the property acquired its name. The

chestnut requires a formative prune to maintain form and balance and to lift the lower crown to 3.5 metres and a 20% crown thin.

T2) Silver birch is situated between T1 & T3 and due to its close proximity with the neighbouring trees has a poor form with little or no space for future growth therefore requires removal.

T3) Oak is also situated in close proximity to its neighbouring trees and beginning to affect the growth of T1. Whilst the oak is of reasonable form its affects on the chestnut and itself are becoming detrimental to shape and form. Due to the size and shape of the garden 2 maturing trees would be overbearing and reduction of the oak would leave it much less desirable compared to the neighbouring chestnut, therefore requires removal. The above work would allow T1 the chestnut with the future space required to develop with unhindered growth and maintain its prominent position”

No mention is made of the stability of the Oak by the agent. Both Alan Gilliard and Alan Tomlinson, as the Council's qualified Arboricultural Officers visited the site, they did not enter the property but undertook their assessment from the close proximity of Back Lane. The Officers are only considering the works proposed in relation to their professional judgement. Which is what they are required to do.

6.10 *In view of the refusal of NYCC to our request for the removal of the oak and our current offer to fund mitigation measures, we insist that, in the event of the tree falling and causing damage to our property, NYCC will cover the cost of any repairs and clear up works. We would also request that this extends to any expense incurred by our buildings insurers in exercising their rights of subrogation in the event that it is an insurable loss and that we claim under our buildings insurance policy.*

6.11 Liability in respect of tree failures usually rests with the landowner. The Council's two arboricultural officers do not consider that the Oak presents a risk to person or property. The Order has been made on the basis that the Oak is not at risk, but if the sustained protection of the Oak is continued, and a more detailed assessment of the trees condition in the future finds there is a risk (and this applies to any tree subject of a TPO) then the owners can make a 5 day notice to the Council. Only if the tree did fail, and the Council was judged in the courts to have failed to take proper action to remedy the matter, then compensation could be awarded.

6.12 *In respect to the Tree Amenity Evaluation Method for Preservation Orders (TEMPO), we understand that there is some advantage for surveyors to have guidelines to work within. However, it is clear that applying this system rigorously, would mean that the only trees accruing a score of 6 or less and thus exempt from a TPO, would be if they were extremely old, dying and hidden from view. Forbes-Laird clearly advises that “the TEMPO system merely*

recommends a course of action. A tree scoring for example 15 points and so definitely meriting a TPO might not be included for protection for reasons unconnected with its attributes”.

- 6.13 It is correct that when trees which definitely merit a TPO, they may not be made subject of an order. This comes down to the key considerations of amenity and expediency which is undertaken by the planning officer, there are instances where it is not expedient to make an order, such as when the tree is within public ownership.
- 6.14 *It is our opinion that our trees fall into this category. In addition to our concerns that the oak tree poses a hazard as pointed out above, the trees are not of good form and are not balanced. In our opinion this is a direct consequence of the trees attempting to exist within a confined space. The oak tree leans towards the East and approximately 2/3rds of the crown of the chestnut tree is concentrated towards the West. Surely it would be better visually to retain one well balanced chestnut tree rather than two unbalanced trees?*
- 6.15 Mr and Mrs Donnelly, in their submissions raise the key area of discussion reading the making of the Order. This will considered in the assessment part of the report.
- 6.16 *The stated documents indicate that the trees provide character and appearance which would be typical of similar lanes located in other Ryedale villages. This is contrary to our own observations. Whilst semi mature trees still exist in such lanes, they are more remote from the dwellings. It is clear that where dwellings are closer to the lanes, any trees of size have been removed and, in some cases replaced with less intrusive trees. A sensible approach has been adopted, sympathetic to modern living. This is a thought process totally absent in our case.*
- 6.17 Your officers have considered the contribution of these trees to the character and appearance of Wombleton Conservation Area, they have not considered the situation of other back lane trees in Wombleton nor the wider area, as they are not required to do this in order to assess the trees. Nor are they able to judge replacing trees as an alternative to the retention of the current trees which are health and show no defects. The report did consider that the retention of the trees would not impact on the amenity of the occupants of any property.
- 6.18 *You comment in the covering letter that the works proposed are “fundamentally harmful and unnecessary”. We fail to see how professionally crowning the horse chestnut is harmful when the branches overhanging the lane are subject to potentially severe damage from large farm machinery which use Back Lane to access their farmland.*

6.19 The proposed works involved crown lifting to 3.5 metres and 20% crown thinning- these were judged to be harmful to the tree and unnecessary. Crown thinning is no longer recognised as being good practice, and crown lifting of this scale would undermine the tree's natural growing habit by removing key limbs. A crown reduction is a different practice and is focused on the edges of the tree's crown, and is used to ensure that when traffic passes trees the likelihood of damage and wounds is minimised- which is the scenario that Mr and Mrs Donnelly have referred to. Both Arboricultural Officers did not support the crown thinning and Alan Gilleard specifically advised the following to the CAT case officer:

“Crown thinning is a form of pruning that has fallen out of acceptance in recent years.

Crown thinning rarely achieves the stated aims of increased light to dwellings and/or gardens without high percentages of branches being removed that would be detrimental to the condition and form of affected trees.

Crown thinning results in the loss of leaf cover, to the detriment of the trees' physiological condition. Thinning often results in overly open canopies, stimulating reactionary shoot growth which can reduce access to natural light through the canopy and will inevitably require further thinning works. Thinning also creates pruning wounds that are susceptible to infection and decay, and that the tree will typically attempt to occlude with wound wood. The production of reactionary shoot growth and wound wood can compromise the trees' ability to grow and develop, and to respond appropriately to existing or unrelated infection and decay.

Thinning can also compromise the structural condition of trees. This includes the forming of “lion-tail” branches with poor weight distribution and limited future management options, and increased strain on unions through the removal of mutually supporting structures. These can all lead to previously unforeseen structural issues, including branch failure.

Trees distribute dynamic wind loading through mass damping. The following excerpt from the American Journal of Botany (James et al, 2006) outlines the following: “The branch mass contributes a dynamic damping, termed mass damping, which acts to reduce dangerous harmonic sway motion of the trunk and so minimizes loads and increases the mechanical stability of the tree.” In essence, a full tree crown reduces motion of the tree under wind loading and increasing its mechanical stability. Thinning, even at low percentages, has the potential to undermine this and negatively affect tree stability, and so should be avoided unless it can be demonstrated that there is a clear benefit to be gained from the works.

The above effects of crown thinning, in addition to impacting the condition of the tree, can also negatively impact tree amenity. Dense reaction growth, “lion-tail” branch

form or occasional failure as an inadvertent result of crown thinning all contribute to a negative impact to tree form and amenity value.

As such, crown thinning is considered an ineffective and management intensive practice with negative physiological and structural implications for affected trees, and should typically be avoided unless there is a clear benefit to be gained and negligible impact to the tree, or where it can be suitably justified.”

The Council has therefore been given specific, technical advice as to why such practices are no longer being supported. Planning officers, who are not arboriculturalists, rely on specialist technical advice that they are provided with. The matter of formative pruning is also unspecified in its extent.

- 6.20 *The documents make poor judgements. For example, it is stated that the proposed works would have a detrimental effect on carbon sequestration. In our opinion retaining the tree actually increases carbon emissions due to the tree shading our house over parts of the day which reduces heat mass/retention within the building requiring the need for turning on the heating.*
- 6.21 Whilst the Tree Officer’s assessment makes reference to these matters, the Tree Preservation Order has not been made on the basis of ecological implications, nor carbon sequestration or wider carbon emissions of the property as a whole. It is principally made on the basis of amenity and expediency and this is considered in more detail in the assessment section.
- 6.22 *We have undertaken a count of vehicles and pedestrians using Back Lane. Our survey concluded an average of only 9 car users per day and even fewer pedestrians. This does not suggest that the tree is of high amenity value. We could point out many thousands of trees within the region which are much more highly visible and accessible to the public but not subject to any tree management restrictions. This situation is discriminatory and not justifiable.*
- 6.23 It is clear that amount of travelling vehicles is then low, and unlikely to result in a situation where the Horse Chestnut could be harmed by passing traffic. Amenity value of younger trees also takes into account their ability to grow, and it is considered that either tree is allowed to grow would contribute to the character and appearance of the Conservation Area – which is an area designation and extends to the back lane, as part of the historic layout of the village.
- 6.24 *In conclusion, despite there being anomalies within the various documents associated with the TPO decision, which may or may not invalidate them, we do feel victimised and discriminated against. We see little prospect of being able to undertake maintenance to the trees in the future. As the trees mature, they will only be viewed by NYCC as more of an asset under the TEMPO measurement system.*

- 6.25 The covering letter which is sent out with the Tree Preservation Order sets out that applications for works can still be made- which is the same as now- given the trees are already subject to protection by their location within Conservation Area. But an application for works to a TPO tree allows a process of negotiation and does not prevent works which the Council judges are reasonable and necessary to take place.
- 6.26 Mr and Mrs Donnelly are unhappy with the imposition of the order upon them and their property. They judge it to be discriminatory and victimisation. Given the nature of making Tree Preservation Orders, and this being a contested order, Officers have chosen to seek to have this order be considered by Members. The Donellys have not experienced any different treatment than any other CAT notification where Officers deem the works to be of such significant harm to warrant a provisional order to give immediate protection to the trees- otherwise the works can be undertaken. There is now the opportunity to consider the merits of the Order in more detail, and to allow further consideration to take place.
- 6.27 The property and trees in question are in a Conservation Area. This does mean that there are restrictions, applied nationally, to works to trees and property, which outside of these areas would not need the consent of the Local Planning Authority. Officers would judge that this is not discrimination, but application of legislation, and the application of a judgement to protect trees which contribute to the character and appearance of the Conservation Area.
- 6.28 *We have pointed out our dissatisfaction at the way in which NYCC undertook the survey, the blinkered way in which the TEMPO system has been applied and unsubstantiated comments used to evaluate the request for undertaking the tree work. We find it upsetting that our obvious concerns have gone unanswered and as a customer of NYCC astonished that we are left in such a position. Undertaking the requested works would improve the visual attributes of the remaining tree, maintain the appearance of the lane in keeping with similar lanes located within other Ryedale villages and would mitigate against a dangerous and increasing hazard.*
- 6.29 This is a matter of judgement and this is set out in the report below.
- 6.30 *We now await your detailed response to the issues raised above. Should there be elements of the above that you construe to be a complaint against NYCC rather than an appeal against the decision made then please advise of your complaint procedure or whether or not we should refer directly to the Council Ombudsman.*
- 6.31 This response was passed to the complaints team, and they decided it was appropriate for there to be a specific response to the consultation response complaint. The complaint is being considered as part of the consideration of this

TPO and a full response will be provided to the objectors will be made in due course. They are aware that this TPO is being considered by the Committee and Officers have made them aware of this report. There is no right of appeal against the making of a TPO, but its legality can be challenged. Your Officers consider that the making of the provision TPO has been correctly described, made, and served within the 6 week consideration period for Conservation Area Tree Notices. The consideration of the order is separate to the complaint, and is to be undertaken as part of this report to Members regarding the Confirmation of the Order. There is a judgement to be made around whether or not the Order should be confirmed in its current form and this is set out in the assessment below.

9.0 Main Issues

9.1 The main issue is whether the Tree Preservation Order should be sustained for both trees.

10.0 Assessment

10.1 The two key factors for considering whether a Tree Preservation Order should be made are Amenity and Expediency:

Amenity

10.2 Amenity, whilst not defined in law, is a matter of judgement for the Local Planning Authority. In terms of the purpose of TPOs, they should be used to protect selected trees and woodlands if their removal would have a significant negative impact on the local environment and its enjoyment by the public. Before authorities make or confirm an Order they should be able to show that protection would bring a reasonable degree of public benefit in the present or future. Matters to consider are:

Visibility

The extent to which the trees or woodlands can be seen by the public will inform the authority's assessment of whether the impact on the local environment is significant. The trees, or at least part of them, should normally be visible from a public place, such as a road or footpath, or accessible by the public.

Individual, collective and wider impact

Public visibility alone will not be sufficient to warrant an Order. The authority is advised to also assess the particular importance of an individual tree, of groups of trees or of woodlands by reference to its or their characteristics including:

- size and form;
- future potential as an amenity;

- rarity, cultural or historic value;
- contribution to, and relationship with, the landscape; and
- contribution to the character or appearance of a conservation area.

Other factors

Where relevant to an assessment of the amenity value of trees or woodlands, authorities may consider taking into account other factors, such as importance to nature conservation or response to climate change. These factors alone would not warrant making an Order, as previously mentioned.

- 10.2 The agent's submission notes the prominence of the Horse Chestnut. It is a tree which is still in a relatively early stage in its lifespan, and, given the opportunity, would only grow and its contribution to the character and appearance of the Conservation Area would only increase. There are instances of trees along the Back Lane of Wombleton, whether they are planted with purpose, or self-seeded, or have grown out of a hedge- irrespective of their circumstances, legislation gives them an automatic degree of protection if they are in a Conservation Area to afford the local planning authority to give the trees additional protection if it is deemed they so require it (subject to amenity and expediency). But even if such trees were limited, the amenity value of those trees that are there is enhanced as they are more visible and prominent as a result. It is the case that views of the trees are not achievable from the Main Street. The Back Lane of Wombleton is capable of being used by members of the public for access and it marks the extent of the Conservation Area, and therefore its contribution to the Conservation Area is more localised, but it still makes a significant contribution, and one which will only increase over time.
- 10.3 The Oak sits slightly deeper into the site. It also has an amenity value, and is a relatively young tree, but it is less prominent than the Horse Chestnut. It is sited close to the boundary wall with the neighbouring property, and a shed has been sited over part of the trees root zone. These as actions and as a context will not help the tree to thrive.
- 10.2 It is agreed that it is the Horse Chestnut which has the greater impact in the landscape and the setting of Back Lane, and it is acknowledged that as the trees grow, they will compete, and this would be to the detriment of both trees.

Expediency

- 10.3 Members are aware that Local Planning Authorities can make a Tree Preservation Order (TPO) if it appears to them to be *'expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area'*. In this respect, 'expediency' means that there is a risk of a tree/s being felled or harmed such that their amenity value is so undermined or that the works could result in eventual loss. An Order prohibits the cutting down, topping, lopping, uprooting or wilful destruction of trees without the Local Planning Authority's written consent.

10.4 The works to the horse Chestnut remain harmful and the tree has the capacity to make a significant, long term amenity contribution to the Wombledon Conservation Area, It is considered that it is expedient to continue to afford this tree the protection of a Tree Preservation Order.

10.5 Whilst the expediency argument is clear for the Oak Tree, its very presence will in time undermine the Horse Chestnut and vice versa, and so it is considered that it is not justified to sustain the Oak's retention through a TPO as it could result in the loss of amenity in both trees in due course.

11.0 Conclusion

11.1 It is considered that Officers took the necessary steps to protect the trees in the public interest which they felt were going to be subject to works which would result in either their loss (Oak) or harm (Horse Chestnut). Your Officers have had more time to consider the longer term implications of protecting both trees subject of this Order, it is considered that the Order should be modified to remove the Oak tree. This is because both trees will influence the other's growing habit, and it judged that it is expedient to protect the current and longer term amenity value of the Horse Chestnut as the priority.

12.0 RECOMMENDATION

12.1 That Tree Preservation Order ZE23/363-2023 shall be Confirmed with the following Modification:

Removal of T2 (Oak).