

BARNET

LONDON BOROUGH

COMMITTEE REPORT

LOCATION: The Lewis W Hammerson Memorial Home, The Bishops Avenue,
London, N2 0BE

REFERENCE: TPO/00302/13/F **Received:** 30 May 2013
WARD: GS **Expiry:** 25 July 2013

CONSERVATION AREA Hampstead Garden
Suburb

APPLICANT: Marishal Thompson & Co

PROPOSAL: 1 x Oak (Applicant's Ref. T1), 1 x Cypress (Applicant's Ref. T2), 5
x Cypress (Applicant's Ref. TG1) – Remove, all standing in area
A1 of Tree Preservation Order.

RECOMMENDATION:

That Members of the Planning Sub-Committee determine the appropriate action in respect of the proposed removal of 1 x Oak (Applicant's Ref. T1), 1 x Cypress (Applicant's Ref. T2), 5 x Cypress (Applicant's Ref. TG1), all standing in area A1 of Tree Preservation Order, either:

REFUSE CONSENT for the following reason:

The loss of the trees of special amenity value is not justified as a remedy for the alleged subsidence damage on the basis of the information provided.

Or:

APPROVE SUBJECT TO CONDITIONS

1. The species, size and siting of the replacement tree(s) shall be agreed in writing with the Local Planning Authority and the tree(s) shall be planted within 6 months (or as otherwise agreed in writing) of the commencement of the approved treatment (either wholly or in part). The replacement tree(s) shall be maintained and / or replaced as necessary until 7 new tree(s) are established in growth.

Reason: To maintain the visual amenities of the area.

2. Within 3 months of the commencement of the approved treatment (either wholly or in part) the applicant shall inform the Local Planning Authority in writing that the work has / is being undertaken.

Reason: To maintain the visual amenities of the area.

Consultations

Date of Press and Site Notices: 13th June 2013

Consultees:

Neighbours consulted: 2

Replies: 1 0 support 1 objection

The grounds of objection can be summarised as:

- Argument based on cost to insurers does not take account of value and beauty of trees on the environment and health
- Contrary to government policy for a greener London
- Risk of heave
- Supporting data unreliable
- Value for wildlife
- Barnet is really suffering from these constant bullying tactics from these specialist firms.....it is quite clear you are being blackmailed non stop by the possibility of huge financial claims which hopefully will not change your attitude to the value and rightful TPO of the trees, but, nonetheless puts the council under huge amounts of pressure and ultimately it is the taxpayer who pays the bills [with health, loss of amenity and wildlife habitat], the knock-on effect is massive

MATERIAL CONSIDERATIONS

Relevant Recent Planning History:

Hammerson Memorial Home

Application Number: C01479
Decision: Approve with conditions
Decision Date: 13/07/1967
Proposal: **Erection of extension to existing Lewis W. Hammerson Memorial Home comprising two storeys with third roof storey.**

Application Number: C01479A
Decision: Approve
Decision Date: 27/06/1968
Proposal: **Erection of two extensions at the rear. (Details)**

Application Number: C01479C
Decision: Approve with conditions
Decision Date: 18/05/1970
Proposal: **Additional three parking spaces at rear of site in lieu of proposed parking at front**

Application Number: C01479D
Decision: Approve with conditions
Decision Date: 07/07/1971
Proposal: **Construction of new crossover**

Application Number: C01479E
Decision: Approve with conditions
Decision Date: 27/11/1974
Proposal: **Installation of fire escape and wheelchair ramp**

Application Number: C01479F
Decision: Application not required
Decision Date: 21/06/1976
Proposal: **Installation of windows at second floor level in front south west elevation**

Application Number: C01479G
Decision: Withdrawn
Decision Date: 6/10/1977
Proposal: **Fire escape**

Application Number: C01479J
Decision: Approve with conditions
Decision Date: 23/07/1980
Proposal: **Two storey side extension to provide eight single-person flats and four two-person flats.**

Application Number: C01479K
Decision: Approve with conditions
Decision Date: 03/12/1980
Proposal: **Two storey side extension to provide eight single person flats and four two person flats.**

Application Number: C01479N
Decision: Approve with conditions
Decision Date: 14/09/1983
Proposal: **Widening of vehicular access.**

Application Number: C01479P
Decision: Approve with conditions
Decision Date: 01/04/1987
Proposal: **Three storey side extension and provision of two car parking spaces (Outline)**

Application Number: C01479Q
Decision Date: 23/11/1988
Proposal: **Three storey side extension to the south-west of the front elevation and a part ground, first and second floor extension to the north-east of the front elevation and provision of two parking spaces**

Application Number: C01479R
Decision: Approve with conditions
Decision Date: 26/03/1991
Proposal: **Details of design and external appearance, landscaping and protective fencing around trees, pursuant to conditions 5, 6 & 7 of planning permission ref. C01479Q for extensions and provision of two parking spaces**

Application Number: C01479W
Decision: Approve with conditions
Decision Date: 16/01/1995
Proposal: **Single storey extension to provide Occupational Therapy and Physiotherapy Wing. First floor extension to provide additional room.**

Application Number: C01479Y/02
Decision: Approve with conditions
Decision Date: 20/05/2002
Proposal: **Ground floor conservatory extension.**

Application Number: F/04617/12
Decision: Approve with conditions
Decision Date: 26/02/2013
Proposal: **Alterations to front block, including reconstruction of part of the roof, the enlargement of 1no. front dormer, 1no. rear dormer and 4no. windows to the rear.**

Application Number: F/02201/13 (and F/02882/13 – associated Conservation area consent)
Decision: Not yet decided
Decision Date: Not yet decided
Proposal: **Part demolition of existing care home (Use Class C2) and reconstruction of three storey building with rooms in the basement to provide 83 care units with communal and ancillary facilities and services. Provision of off-street parking; cycle storage and refuse. Associated hard and soft landscaping.**

1 x Oak and 6 x Cypress

Although there have been a number of treework applications elsewhere at the site, the only application in respect of any of the subject trees is:

Application Number: TPO/00731/12/F
Decision: Refuse
Decision Date: 24/01/2013
Appeal Decision: Appeal Dismissed
Appeal Decision Date: 24/05/2013
Proposal: 6 x Cypress trees – fell, standing in area A1 of Tree Preservation Order

PLANNING APPRAISAL

1. Introduction

An application form proposing felling of the Oak and 6 Cypress trees at the Lewis Hammerson Memorial Home ('Hammerson House') in connection with alleged property damage to the ground floor physiotherapy room at Hammerson House was submitted via the Planning Portal in July 2012, however, there were shortcomings in the information – clarification was thus requested. Further information was submitted on 7th August 2012 and then on 31st August 2012, but this was still incomplete. A further application form with updated and additional information was submitted via the Planning Portal on 15th February 2013, but this too was incomplete and clarification requested - eventually, although there were still some unanswered questions, information sufficient to validate the application was received on 30th May 2013 and it was registered accordingly.

As may be noted from the above planning history, Hammerson House has been extended at various times, and is currently subject of an application for "*Part demolition of existing care home (Use Class C2) and reconstruction of three storey building with rooms in the basement to provide 83 care units with communal and ancillary facilities and services. Provision of off-street parking; cycle storage and refuse. Associated hard and soft landscaping.*" (F/02201/13) (and associated conservation area consent). The redevelopment and the treeworks applications have been submitted separately and independently by different parties and both agents have been asked about the lack of holistic approach to the site:

- Why demolish so much of the existing built form but not that small section (if it is defective) given that some work is proposed in that area of the building as part of redevelopment proposal?
- Why the piecemeal approach with different applicants rather than a co-ordinated proposal?
- Why is one applicant showing tree removals because of alleged property damage whereas another is showing tree retention and alterations to the same part of building?

In response, the agent for the treework application has responded:

Our technical managers comments:

"The Physio extension is not being demolished. There are only internal modifications being undertaken to this area which could be affected by the continued presence of the implicated vegetation."

The agent for the redevelopment has responded:

Refurbishment/Redevelopment Strategy

The objective of the project is to provide improved care accommodation for local elderly people. The development strategy that has been devised to achieve this objective was first set out in the strategy document submitted to the Planning Department in July 2012, and includes the key requirement of maintaining 50 care rooms and supporting facilities throughout the development programme to accommodate existing residents. Retention of the front building, which in fact comprises 39% of the existing building footprint, is a key part of both the long-term scheme and the implementation strategy because it currently provides the main communal living facilities, and has surplus space on the upper floors that can be used to create additional care rooms in both the short and long term. Planning permission was granted earlier this year for a refurbishment scheme as a first phase of the project to provide these facilities.

Different Applications

The approved refurbishment scheme does not in itself involve works that would affect the trees that are the subject of the insurer's application, and hence the planning application did not propose any works to those trees.

A separate TPO consent application has since been made by the insurers for works to trees at the north-east corner of the site, in response to an existing problem of subsidence damage to part of the front building. This is a separate issue because it would have arisen, even if Chalkford had not come forward with its care home improvement project. I note that the insurer has firm proposals to remove one oak tree and a small group of conifers, but advocates monitoring in respect of 3 more oak trees.

The arboricultural report prepared by CBA trees and submitted with the main works planning application does discuss the insurer's proposals at paras 5.4 to 5.6, even though the "main works" planning application does not affect the frontage building, and hence also has no direct impact on the trees in question in terms of its built form. However, as set out in the report, we consider there is a limited link between the two applications insofar as the need for tree protection measures during construction operations for the trees subject to the insurance claim, is dependent on the decision you make about their removal. Please note that CBA Trees are amending paras 5.5 and 5.6 of their report to take account of our inquiries with the insurer's consultants, which indicate that their current application for tree-removal does not in fact include the additional trees they have identified as requiring monitoring.

Appearance of conflicting proposals

There appears to be a misunderstanding about the relationship between the planning application proposals for tree retention and the insurer's proposals for tree removal and monitoring. We consider they are consistent in 2 ways. Firstly the insurer is only seeking to remove trees which affect the front building that is being retained in the care home improvement project. Secondly we have not put forward detailed protection measures for the trees in question during the proposed construction operations at this stage, pending a decision by the Council on whether their removal is justified.

2. Appraisal

Trees and Amenity Value

The six Cypress trees stand on the north-eastern flank boundary of Hammerson House, 50A The Bishops Avenue, adjacent to 50 The Bishops Avenue, the Oak is immediately adjacent to easternmost Cypress. The trees have a concrete parking area to the south. The crown shape of the trees has been affected by their close proximity to each other. The

group of trees extends from approx. 20 - 60 metres back from the highway boundary and form an important screen between the properties. There is a small group of other Oaks close to the boundary, between the subject trees and the public highway, and there are a large number of other trees at the site. Hammerson House is a residential nursing home which provides accommodation to many elderly patients.

The subject group of trees is clearly visible from The Bishops Avenue, also above and between properties from Byron Drive. The Cypress trees are particularly apparent in winter when the evergreen conifers are markedly more prominent than the deciduous trees nearby. The group of trees provide important screening between the residential institution and large domestic dwelling adjacent.

The value of the trees for screening between properties is of particular importance given the need to maintain privacy and prevent overlooking as Hammerson House is a residential nursing home and the flat roof of the single storey rear extension adjacent to the trees at 50 The Bishops Avenue is used as terracing with large outdoor dining table and chairs together with an elevated platform.

The Oak is described as T1 by Marishal Thompson (the agent for the treework application); it is T88 of the CBA Trees Tree survey and schedule submitted as part of the redevelopment proposals.

- Marishal Thompson suggests that the Oak is approximately 16 metres in height, significantly older than the property, and is 7.5 metres from the building.
- CBA assess the Oak to be 18 metres in height, stem diameter (at 1.5m) of 490mm, good physiological condition, good structural condition, and of BS 5837: 2012 Category B1+2 (i.e. of moderate quality with an estimated remaining life expectancy of at least 20 years with arboricultural and landscape values).

The six Cypress trees are described as T2 and TG1 (5 trees) by Marishal Thompson and as Group G13 of the CBA arboricultural information.

- Marishal Thompson suggests that the Cypresses are approximately 16 metres (T2) and 18.5 metres (TG1) in height, significantly older than the property, and 8.8 (T2) and 7.2 (TG1) metres from the building.
- CBA assess the Cypresses to be 18 metres in height, stem diameters (at 1.5m) of 340 - 650mm, 1st and 3rd of the group are multi-stemmed, good physiological condition, fair structural condition, and of BS 5837: 2012 Category C2 (i.e. of low quality with an estimated remaining life expectancy of at least 20 years with landscape value).

The trees also contribute to the character and appearance of this part of the Hampstead Garden Suburb Conservation Area - which is internationally renowned for the way in which mature landscape features have been incorporated into the built environment. The Hampstead Garden Suburb Conservation Area was designated in December 1968. It is one of the best examples of town planning and domestic architecture on a large neighbourhood or community scale which Britain has produced in the last century, and is acknowledged nationally and internationally. Page 23 of the the adopted Hampstead Garden Suburb Design Guidance notes: *“Open spaces and landscaping created the special character of Hampstead Garden Suburb. Many groups of houses were placed to retain existing trees of landscape significance, particularly oaks. The retention of mature trees and hedges is vital to the Garden Suburb scene and many trees are protected by Tree Preservation Orders. The removal of mature trees from residential properties will be permitted only where a clear case exists to justify such action.”*

Although within the Hampstead Garden Suburb Conservation Area, The Bishops Avenue benefits from a separate Character Appraisal Statement - Section 10 of the Appraisal Statement refers to 'The contribution made by green spaces and trees' noting "The large size and scale of planting of these gardens form an important part of the semi-rural character of the AvenueThe lines of trees in verges and along front boundaries add grandeur to the Avenue, guide the eye along, and clearly define spaces." and "This boundary between public and private further underlines the exclusivity of properties and the area providing soft screening and privacy. As such they are a vital part of its special character."

It should be noted that the relevant Order "Borough of Finchley Tree Preservation Order (The Bishops Avenue) No 7" was made in 1961 and area A1 is described as "The several trees of whatsoever species standing in the area numbered A1 on the map" situated at "Land adjoining Hyde House, The Bishops Avenue". Hammerson House, 50 The Bishops Avenue, Byron House and Byron Drive now occupy the Hyde House and adjacent A1 land - the trees thus pre-date the development currently on site and were retained during the redevelopment.

The six Cypress trees have been subject of a recent application to fell (TPO/00731/12/F) submitted by Mr Mumin Yildiz acting as agent for the owner of the adjacent property, 50 The Bishops Avenue. The application was refused under delegated powers on 24th January 2013 – an appeal was lodged against the refusal which was determined by an Arboricultural Inspector appointed by the Secretary of State on 24th May 2013. The appeal was dismissed, the Inspector concluding:

- "I find that the appeal cypress trees have amenity value as part of the characteristic tree cover in the local landscape. I am satisfied that the proposed felling has the potential to have an adverse effect on amenity and on the character of the Hampstead Garden Suburb Areas A and B Conservation Area.
- I find that the grounds for the felling are not supported by the evidence and that the potential and adverse effects of the proposed works on amenity outweigh the condition and other circumstances of the trees.
- I conclude that the proposed felling of the appeal trees is not warranted on the evidence and I therefore dismiss the appeal in respect of the 6 cypress trees."

The application

The application submitted by Marishal Thompson & Co (arboricultural consultant for the building insurer) was registered on 30th May 2013. The reasons for the proposed removal of the 7 trees cited on the application form are:

1. *The tree works are proposed to stop the influence of the tree(s) on the soil below building foundation and provide long term stability.*
2. *Estimated costs of repair to the building are 50k if the influence of the tree(s) remain and 15k if the proposed tree works are allowed to proceed. Granting permission will limit these costs. In the event of a refusal we, or our clients, will seek to secure compensation for the additional costs incurred through Section 202(e).*
3. *It is the expert opinion of both the case engineer and Arboriculturalist that on the balance of probabilities the supporting information demonstrates the influence of the tree(s).*
4. *Further monitoring results may be submitted if these become available during the course of this application.*

The supporting documentation comprised:

- Marishal Thompson Reduced Format Arboricultural Report and cover letter to Crawford and Company dated 3rd May 2012
- Crawford Technical Report dated 9th November 2011 including site plan
- Crawford Addendum Technical Report dated 6th June 2012
- Level monitoring comprising 7 readings between 2/2/12 – 15/2/13
- Matlab Site Investigation Report dated 6th March 2012 including site and drainage layout, CCTV drain survey, drainage repair quotation, foundation pit record, penetrometer plot
- Matlab Laboratory Report dated 12th March 2012 including root identification, oedometer results data, soils report
- e-mail clarification as to which extension details were of relevance

The Council's Structural Engineer having assessed the information, notes:

Trees

The Marishal Thompson report shows the locations trees of around the property. Their report shows; the Oak tree T1 at a distance of 7.5m from the building and 16m high, the Cypress tree T2 at a distance of 8.8m from the building and 16m high, the Cypress tree TG1 at a distance of 7.2m from the building and 18.5m high.

The other trees indicated are Oak TG2, T3 and T5, and Cypress TG3.

All trees noted as being significantly older than the building and are recommended for removal subject to heave assessment.

Damage

The damage is to the single storey extension which was constructed in 1995. The damage was discovered in October 2011.

The damage consists of cracks up to 5mm wide and is classified as category 2 damage in accordance with BRE Digest 251.

The construction of the extension appears to be load-bearing masonry walls on a trench fill foundation with a ground bearing slab.

Subsoil investigations

Mat Lab carried out a subsoil investigation on 13/2/12. This consisted of a trial pit and borehole to the rear of the property.

Results of the investigation were as follows;

1. The foundations to the extension are 910mm deep.
2. Firm/stiff brown Clay was encountered for the full depth of the borehole.
3. Roots extend to 2.0m depth.
4. Oak tree roots identified to 2.0m depth.
5. Water main failed pressure test.

Soil Testing

The soil analysis results indicate the clay soil to be highly shrinkable and desiccated at 2.25m depth.

The clay soil at 1.5m depth and above does not appear to be desiccated. This is probably due to the investigation being undertaken in February when the upper levels of soil have been re-hydrated by rainfall and the trees have been dormant for about four months.

A ground heave prediction has not been undertaken however according to the oedometer test results the surface heave potential at the borehole location is up to 30mm.

Monitoring

Level monitoring has been carried out from 2/2/12 to 15/2/13. An independent stable datum has not been used, instead location 1 on the rear left hand corner has been relied upon to compare movement in the rest of the building.

The rear right hand corner, locations 5, 6 and 7, do exhibit some seasonal movement, the maximum movement being 6mm.

There is negligible movement recorded along the rear elevation, locations 2, 3 and 4, and the movement at the front, locations 8, 9 and 10 is not consistent with seasonal movement. This may be due to not using an independent stable datum.

Drainage

The drain survey showed one drain run was in a poor condition and failed the water test.

However the trial pits and boreholes were dry and the cyclical pattern of movement demonstrated by some of the monitoring indicates the underground drainage was not implicated in the damage; water leaking from drainage usually causes progressive widening of the cracks.

Conclusion

The site investigation results indicate the rear extension has been affected by subsidence due to tree root action.

Roots have been found below the foundations and were identified as Oak roots. The most likely source of these roots shown on the Marishal Thompson plan is the Oak tree T1 which is 7.5m from the building.

Although no roots from the Cypress trees were identified beneath the foundations, the extension is within the influence zone of T2 and TG1.

The extension foundation depth does not meet NHBC guidelines for building near trees. On the basis of the proximity of the Oak tree T1 the recommended depth according to the NHBC guide is 2.8m deep.

A heave assessment of all properties within the influence zone of Oak and Cypress trees should be undertaken before the trees are considered for removal.

The following points may also be noted:

It appears that the damage is to the rear section of the single storey physiotherapy extension constructed in 1995 (pursuant to planning application reference C01479W), which has trench fill foundation. This part of the building was added onto an earlier three storey extension constructed in 1990/1 (pursuant to planning application reference C01479Q) which has piled foundations. The 2011 Technical Report notes that "The cracking at the front elevation junction appears to be the result of some differential movement between the extension and the main building and is not connected to the damage currently affecting the rear section of the extension.

BRE Digest 251 *Assessment of damage in low-rise buildings* includes a 'Classification of visible damage to walls with particular reference to ease of repair of plaster and brickwork or masonry'. It describes category 2 damage as "*Cracks easily filled. Recurrent cracks can be masked by suitable linings. Cracks not necessarily visible externally; some external repointing may be required to ensure weather-tightness. Doors and windows may stick slightly and require easing and adjusting. Typical crack widths up to 5mm.*" The BRE Digest concludes "Category 2 defines the stage above which repair work requires the services of a builder. For domestic dwellings, which constitute the majority of cases, damage at or below Category 2 does not normally justify remedial work other than restoration of the appearance of the building. For the cause of damage at this level to be accurately identified it may be necessary to conduct detailed examinations of the structure, its materials, the foundations and the local clear ground conditions. Consequently, unless there are clear indications that damage is progressing to a higher level it may be expensive and inappropriate to carry out extensive work for what amounts to aesthetic damage." – It should be noted that, independently from this treework application, this part of the building is to be modified as part of the redevelopment proposals.

The soil testing was undertaken in February 2012, with the trial pit / borehole being in the rear corner of the extension adjacent to drainage Run 1. The CCTV details show this drain run to be defective, Marishal Thompson have confirmed that the drainage repairs 'were started and completed on the 2nd July 2012'. It is possible that leaking drainage in addition to the time of year may have affected soil moisture levels.

The first paragraph of the Marishal Thompson letter addressed to Crawford and Company (loss adjusters) with the Reduced Format Arboricultural Report states "As agreed at our meeting on 5th July 2011 we have removed any reference to heave or the requirement for additional investigations from the main body of the report and included that information for your attention within the cover letter." Table 1 of the cover letter is entitled 'Current Claim Requirements: Possible Heave Considerations', below the title block is written "These requirements may be subject to review following additional site investigations" and the last column of the table, headed 'Requirements' specifies for TG1 "Remove and treat stump to inhibit regrowth subject to heave assessment" and "Remove subject to heave assessment" for T1 and T2; Table 2 of the cover letter is entitled 'Future Risk Recommendations: Possible Heave Considerations', below the title block is written "These requirements may be subject to review following additional site investigations" and the last column of the table, headed 'Requirements' specifies for TG2 (2 Oaks) "Remove and treat stump to inhibit regrowth subject to heave assessment" and "Remove subject to heave assessment" for TG3 (2 Cypresses), T3 (Oak) and T5 (Oak); "No" is the response to 'Is there a potential recovery action?'

The Technical Synopsis of the Marishal Thompson Reduced Format Arboricultural Report notes that "Roots recovered from TH1 have been formally identified as *Quercus* spp. The most likely origin of the roots is T1 (Oak).....Although no roots were found from T2 (Cypress) and TG1 (Cypress) due to their size and location in respect of the damaged area of the property, they are also likely to be a contributory factor. Based on our observations on site and with reference to supporting technical information, it is our opinion that T1 (Oak) will be exerting the principal vegetative influence in respect of the current damage. T2 (Cypress) and TG1 (Cypress), are considered a secondary capacity when compared to T1 (Oak)." However, it should be noted that although Oak T1 may be the closest Oak to the trial pit, there are a number of other Oaks in proximity to the

extension; and although no Cypress roots were identified from the borehole, the Cypress tree(s) rather than the Oak(s) are closest to the highlighted area of damage.

The Recommendations in section 6 of the Marishal Thompson Reduced Format Arboricultural Report are set out in two tables – Table 1 “Current Claim Requirements” is essentially the same as Table 1 of the cover letter referred to above but omits ‘Possible Heave Considerations’ and ‘subject to heave assessment’; Table 2 “Future Risk Recommendations” also has the same omissions compared with that in the cover letter (additional work is also listed to another Oak (T4) and a shrub group (SG1)).

The Tree Preservation Order area designation predates the development of Hammerson House (and its subsequent extensions). The site includes a significant number of trees - the CBA Trees Tree Survey (submitted as part of the redevelopment application) details 88 individual trees, 13 groups of trees and a hedge – a number of which are of considerable age (likely to date from the original Bishops Wood). Marishal Thompson identify that all of the subject trees are ‘significantly older than property’. The absence of heave information (apart from the oedometer test results) is therefore a significant omission.

3. Legislative background

Government guidance advises that when determining the application the Council should (1) assess the amenity value of the tree and the likely impact of the proposal on the amenity of the area, and (2) in the light of that assessment, consider whether or not the proposal is justified, having regard to the reasons put forward in support of it. It should also consider whether any loss or damage is likely to arise if consent is refused or granted subject to conditions.

The Town and Country Planning (Tree Preservation) (England) Regulations 2012 provide that compensation is payable for loss or damage in consequence of refusal of consent or grant subject to conditions. The provisions include that compensation shall be payable to a person for loss or damage which, having regard to the application and the documents and particulars accompanying it, was reasonably foreseeable when consent was refused or was granted subject to conditions. In accordance with the 2012 Regulations, it is not possible to issue an Article 5 Certificate confirming that the tree is considered to have ‘outstanding’ or ‘special’ amenity value which would remove the Council’s liability under the Order to pay compensation for loss or damage incurred as a result of its decision.

In this case the applicant has indicated that “*Estimated costs of repair to the building are 50k if the influence of the tree(s) remain and 15k if the proposed tree works are allowed to proceed*” – although it appears that proposed redevelopment and modifications have been disregarded.

The Court has held that the proper test in claims for alleged tree-related property damage was whether the tree roots were the ‘effective and substantial’ cause of the damage or alternatively whether they ‘materially contributed to the damage’. The standard is ‘on the balance of probabilities’ rather than the criminal test of ‘beyond all reasonable doubt’.

In accordance with the Tree Preservation legislation, the Council must either approve or refuse the application i.e. proposed felling. The Council as Local Planning Authority has no powers to require lesser works or a programme of cyclical pruning management that may reduce the risk of alleged tree-related property damage. If it is considered that the amenity

value of the tree is so high that the proposed felling is not justified on the basis of the reason put forward together with the supporting documentary evidence, such that TPO consent is refused, there may be liability to pay compensation. It is to be noted that the Council's Structural Engineer has noted "Roots have been found below the foundations and were identified as Oak roots. The most likely source of these roots shown on the Marishal Thompson plan is the Oak tree T1 which is 7.5m from the building. Although no roots from the Cypress trees were identified beneath the foundations, the extension is within the influence zone of T2 and TG1." albeit having concerns about the foundation construction of the extension and heave implications.

The compensation liability arises for loss or damage in consequence of a refusal of consent or grant subject to conditions - a direct causal link has to be established between the decision giving rise to the claim and the loss or damage claimed for (having regard to the application and the documents and particulars accompanying it). Thus the cost of rectifying any damage that occurs before the date of the decision would not be subject of a compensation payment.

If it is concluded that extension stabilisation works would be required in any event, regardless of the proposed tree removal; or if the removal would create even greater problems due to heave; it may be argued that loss or damage would not be in consequence of a refusal of TPO consent to fell.

However, if it is concluded on the balance of probabilities that the roots of Oak T1 and Cypresses TG1 and T2 are the 'effective and substantial' cause of the damage or alternatively whether they 'materially contributed to the damage' and that the damage would be addressed by the trees' removal, there is likely to be a compensation liability (the applicant indicates repair works would be an extra £35,000 if the trees are retained) if consent for the proposed felling is refused.

COMMENTS ON THE GROUNDS OF OBJECTION

Matters addressed in the body of the report.

EQUALITIES AND DIVERSITY ISSUES

The Equality Act 2010 (the Act) came into force in April 2011. The general duty on public bodies requires the Council to have due regard to the need to eliminate discrimination and promote equality in relation to those with protected characteristics such as race, disability, and gender including gender reassignment, religion or belief, sex, pregnancy or maternity and foster good relations between different groups when discharging its functions.

The Council have considered the Act but do not believe that the application to remove TPO trees because of their alleged subsidence involvement, submitted by arboricultural consultants on behalf of building insurers, would result in discrimination or fail to promote equality for any of the groups as noted in the Act.

CONCLUSION

The application submitted by Marishal Thompson & Co, arboricultural consultant on behalf of the building insurers of Hammerson House, proposes the removal of an Oak and six Cypress trees standing adjacent to the boundary with 50 The Bishops Avenue because of their alleged implication in subsidence damage to the property.

The proposed felling of the trees would be significantly detrimental to the streetscene and would fail to preserve or enhance the character or appearance of the Hampstead Garden Suburb Conservation Area.

The Council's Structural Engineer has assessed the supporting documentary evidence and has noted that the subject Oak is the closest to the property and the most likely source of roots found at the underside of the foundations. Noting also, however, that the foundations do not accord with NHBC guidance and having significant concerns about heave implications and the lack of information.

Bearing in mind the potential implications for the public purse, as well as the public amenity value of the trees and their importance to the character and appearance of the Hampstead Garden Suburb Conservation Area, it is necessary to consider whether or not the proposed felling is justified as a remedy for the alleged subsidence damage on the basis of the information provided, particularly in the light of the Structural Engineers' concerns about heave and the proposals, regardless of tree removal, for extensive demolition and redevelopment works at the site.

If it is concluded on the balance of probabilities that the Oak's and Cypresses' roots are the 'effective and substantial' cause of the damage or alternatively whether they 'materially contributed to the damage' and that the damage would be addressed by the trees' removal, there is likely to be a compensation liability (the applicant indicates repair works would be an extra £35,000 if the trees are retained) if consent for the proposed felling is refused.

However, particularly given the amenity value of the trees, if it is concluded that extension stabilisation works would be required in any event, regardless of the proposed tree removal; or if the removal would create even greater problems due to heave; it may be argued that loss or damage would not be in consequence of a refusal of TPO consent to fell, and that it would be justifiable to refuse the application.