

BARNET

LONDON BOROUGH

COMMITTEE REPORT

LOCATION: 11 Oakleigh Park North, London, N20 9AN

REFERENCE: TPO/00511/13/B **Received:** 15 August 2013
WARD: Oakleigh **Expiry:** 10 October 2013
CONSERVATION AREA None

APPLICANT: Marishal Thompson and Co

PROPOSAL: 1 x Horse Chestnut (T2 Applicant's Plan) – Remove. Standing in Group G60 of Tree Preservation Order.

RECOMMENDATION:

That Members of the Planning Sub-Committee determine the appropriate action in respect of the proposed felling of 1 x Horse Chestnut (applicant's ref T2), Standing in Group G60 of Tree Preservation Order, either:

REFUSE CONSENT for the following reason:

The loss of the tree 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 12 months 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 1 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: 26th September 2013

Consultees:

Neighbours consulted: 9

Replies: 0

MATERIAL CONSIDERATIONS

Relevant Recent Planning History:

TREN09629B - Horse Chestnut - 30% crown density thin and lifting lower branches clear of footpath.

- Conditional approval 17th November 1993

N09629C/99/TRE - Horse Chestnut - Thinning by 20%, standing in G60 of Tree Preservation Order.

- Conditional approval 31st January 2000

N09629D/00/TRE - Horsechestnut - Thin by 20%.standing in group G60 of TPO.

- Withdrawn 17th March 2000

N09629E/05/TRE - Horse Chestnut - Reduce by approx 20-25%, thin out, deadwood, reshape, remove epicormic growth. Standing in Group G60 of Tree Preservation Order.

- Conditional approval 14th December 2005

TPO/00509/13/B - 1 x Horse Chestnut (T2 Applicants Plan) - Reduce to most recent previous points of reduction and lift to 5M. Standing in Group G60 of Tree Preservation Order

- Conditional approval 24th October 2013

PLANNING APPRAISAL

1. Introduction

This application has been submitted by Marishal Thompson and Co acting as agent on behalf of Infront Innovation a "subsidence claims management company" dealing with a case of alleged subsidence at 11 Oakleigh Park North, London, N20 9AN.

The application was initially submitted on the 20th May 2013. However, it was incomplete and additional supporting documentation/clarification was requested by the Council. All of the mandatory information was received on the 15th August 2013 and the application was therefore registered on that date.

The Tree Preservation Order was made on the 12th June 1969 and includes 4 trees at 11 Oakleigh Park North - 1 group (designated G60) consisting of 1 Thorn and 1 Horse Chestnut and 2 individually designated trees, 1 Crab Apple (T92) and 1 x Horse Chestnut (T93). Of the four TPO trees originally growing at the property only the subject Chestnut remains.

In addition to submitting this current application for the removal of the Chestnut (T2 of the applicant's plan), the agent (Marishal Thompson and Co) also submitted a separate application to reduce the tree to the most recent previous points of reduction and lift to 5M – which was granted conditional approval on the 24th October 2013 (TPO/00509/13/B).

2. Appraisal

Trees and Amenity Value

The subject Chestnut stands adjacent to the left hand (when viewed from the roadway) corner of the front boundary. Oakleigh Park North does not have any street trees and as such the large roadside trees growing within the front gardens of the residential properties (such as the subject Chestnut, which is one of the largest trees adjacent to the road) contribute significantly to the character and appearance of the area by helping to screen and soften the urban appearance of the dwellings. The subject Chestnut is highly visible and prominent from along the roadway and an estimate of its age suggests that it predates the construction of the house at 11 Oakleigh Park North and would have formed part of the original landscaping for the site.

About 15/16 metres in height it is a mature tree. The tree has been previously pollarded at about 6/7 metres and there has been significant regrowth from this treatment with the tree having grown out of that pollarding regime. The tree has been subsequently lifted, thinned and reduced and there has been vigorous regrowth. The tree has dense foliage – which is browning due to infection by Horse Chestnut Leaf Miner. Ivy growing up the trunk to a height of about 6/7 metres made close inspection of the trunk difficult (as did the dense regrowth from previous lifting treatment). However, there did not appear to be any major structural faults apparent.

The application

This application submitted by Marishal Thompson and Co was registered on the 15th August 2013. The reasons given for the proposed removal of this Horse Chestnut (T2 of the applicant's plan) 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 level and provide long term stability.*
- 2. Estimated costs of repair to the building are £50,000 if the influence of the tree(s) remain and £4,500 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).*

The agent has submitted various documentary evidence in support of this application. In addition the owner of the property has also submitted a "Preliminary Structural Engineering Report on Alleged Subsidence Damage" dated January 2011 by Halstead Associates in support of the application. All of this information has been assessed by the Council's Structural Engineer who has commented as follows:

Trees

The Marishal Thompson report shows the locations trees of around the property. Their report shows; the Horse Chestnut tree T2 at a distance of 11m from the building and 19m high, the Ivy CG1 next to the building and 3m high, three Cypress trees TG1 at a distance

of 6.42m from the building and 10.5m high, Ash tree T1 approximately 27m from the building and 21m high.

The other trees indicated are Ash TG3 and Cypress TG2.

The Cypress trees TG1 were removed on the 16/8/11.

The Horse Chestnut tree is noted as being significantly older than the building.

Damage

The damage is to the rear left hand side corner. The damage was first discovered in 1997, a Leyland tree was removed and 50% reduction to a yew tree following which the building stabilised and superstructure repairs were undertaken.

There is no Yew tree on the latest plan therefore this also appears to have been removed.

Damage re-occurred in December 2010.

The damage consists of cracks up to 4mm wide and is classified as category 2 damage in accordance with BRE Digest 251.

Subsoil investigations

Mat Lab carried out a subsoil investigation on 11/3/11. This consisted of a trial pit and borehole to the left hand side of the property.

Results of the investigation were as follows;

1. The foundations are 1000mm deep.
2. Firm/stiff brown Clay was encountered for the full depth of the borehole.
3. Roots extend to 4.0m depth.
4. Horse Chestnut and Cypress tree roots identified to 4.0m depth.

Soil Testing

The soil analysis results indicate the clay soil to have a medium to high shrink potential and the soil tests are not conclusive with regard to desiccation.

A ground heave prediction has not been undertaken however according to the oedometer test results the surface heave potential at the borehole location is 0mm to 20mm.

Monitoring

Level monitoring has been carried out from 14/10/11 to 2/4/13. An independent stable datum has not been used, instead location 1 on the front right hand corner has been relied upon to compare movement in the rest of the building. Location 1 is unlikely to be fully stable as the adjacent monitoring point 14 exhibits 4mm of movement.

Between 4/10/11 and 30/8/12 the monitoring indicates a significant upward movement along the left hand side flank wall, up to 12mm at the rear corner. This appears to be recovery (ground heave) of the soil following the removal of the Cypress trees opposite the flank wall. Thereafter the movement is relatively small, 2mm to 3mm.

The monitoring results are not consistent with seasonal movement and appear to reflect ground heave to the left hand side of the house following removal of the Cypress trees. The small movement recorded after 30/8/12 may be due to the minor effect of other nearby vegetation and/or not using an independent stable datum.

Drainage

No drain survey was provided, however the drains were re-lined as part of the 1997 repairs and the trial pit and borehole was dry.

Conclusion

The site investigation results indicate recovery of the soil (ground heave) to the left hand side of the house following removal of the Cypress trees.

The small movement recorded after 30/8/12 may be due to the minor effect of other nearby vegetation and/or not using an independent stable datum.

Roots have been found below the foundations and were identified as Cypress and Horse Chestnut roots. Although no roots from the Ivy were identified beneath the foundations, it is possible that these and the Horse Chestnut tree are having a minor influence on the foundations.

The fact that the focal point of the damage is the rear corner of the house and the Horse Chestnut is located opposite the front of the house would suggest the tree is a contributory factor in the damage, otherwise more damage would be observed at the front of the house.

Given that the Horse Chestnut tree T2 significantly predates the property, a heave assessment of all properties within the influence zone of the Horse Chestnut tree should be undertaken before the tree is considered for removal."

The damage consists of cracking in the flank wall of the rear left hand side (when viewed from the roadway) of the property. The reports submitted in support of this application note the cracks to be between 2 and 5mm in width – which corresponds to category 2 damage in accordance with the BRE Digest 251.

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 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."

The Council's Structural Engineer has noted that "*The soil analysis results indicate the clay soil to have a medium to high shrink potential and the soil tests are not conclusive with regard to desiccation.*" It should be noted that the report containing the soils analysis

is dated 8th April 2011 and that the soil sample(s) that were tested date were taken on the 22nd March 2011.

The report by Marishal Thompson Group dated 10th May 2013 (submitted by the agent in support of this application) notes that a group of Cypress trees listed as TG1 of the applicant's plan and growing adjacent to the area of damage was removed on the 16th August 2011.

The Council's Structural Engineer has noted that the level monitoring results between 4th October 2011 and 30th August 2012 show a significant upward movement which *"appears to be recovery (ground heave) of the soil following the removal of the Cypress trees [TG1 of the applicant's plan]... The small movement recorded after 30/8/12 may be due to the minor effect of other nearby vegetation and/or not using an independent stable datum."*

Roots analysis of the soil sample(s) taken on the 22nd March 2011 found Cypress and Horse Chestnut tree roots below the depth of the foundations. The group of Cypress (TG1 of the applicant's plan) have since been removed. The Council's Structural Engineer has advised that *"it is possible that these [roots from adjacent Ivy] and the Horse Chestnut tree are having a minor influence on the foundations."*

As noted above there is an extant consent to undertake pruning treatment to the Horse Chestnut. Given the importance of the Chestnut, it may be considered appropriate to undertake the treatment consented under application TPO/00509/13/B then monitor the impact of the action prior to assessing whether further action such as cyclical pruning or felling the Chestnut would be justifiable / necessary.

Given that the monitoring data indicates a recovery following the removal of the Cypress (TG1 of the applicant's plan) and that the relatively small movement measured thereafter could be due to *"not using an independent stable datum,"* and that the damage is assessed as BRE Category 2, it may be questioned whether the proposed removal of the TPO Chestnut at this juncture is excessive / premature.

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 "the estimated repair costs are likely to vary between £4,500 and £50,000 depending upon whether the tree can be removed or has to remain."

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. However, it may be noted that consent has recently been granted for pruning of the tree.

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 suggests that upward movement may be heave following the removal of the Cypress trees (TG1 of the applicant's plan), but that the Horse Chestnut may have "*a minor influence on the foundations.*" The Council's Structural Engineer has also raised concern that a stable datum was not used for the level monitoring.

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 the pruning treatment approved under reference TPO/00509/13/B would address the problem, or if the damage was attributable to other causes; 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 Horse Chestnut's roots are the 'effective and substantial' cause of the damage or alternatively whether they 'materially contributed to the damage' and that the damage would only be addressed by the tree's removal, there is likely to be a compensation liability (the applicant indicates repair works would be an extra £45,500 if the tree is retained) if consent for the proposed felling is refused.

COMMENTS ON THE GROUNDS OF OBJECTION

N/A.

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 would have a significant impact on any of the groups as noted in the Act.

CONCLUSION

This application is for the proposed removal of the Horse Chestnut because of its alleged implication in subsidence damage to that property.

The proposed felling of the Horse Chestnut would be significantly detrimental to the streetscene.

The Council's Structural Engineer has assessed the supporting documentary evidence and has noted that the level monitoring results suggest that upward movement may be heave following the removal of the Cypress trees (TG1 applicant's plan), but that the Horse Chestnut may have a minor influence, although *"the small movement recorded after 30/8/12 may be due to the minor effect of other nearby vegetation and/or not using an independent stable datum."*

Bearing in mind the potential implications for the public purse, as well as the public amenity value of the tree and its importance to the character and appearance of Oakleigh Park North, 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 the recovery noted following the removal of the Cypress trees and the extant permission to undertake pruning treatment to the Horse Chestnut subject of this application.

The Council must decide whether it is prepared to refuse consent to the proposed removal of the tree and face a possible compensation claim potentially in excess of £45,500 or allow the removal of the tree subject to replacement planting.