

BARNET

LONDON BOROUGH

COMMITTEE REPORT

LOCATION: 2 Foxwood Close, London, NW7 3JF

REFERENCE: TPO/00662/13/H

Received: 21 October 2013

WARD: MH

Expiry: 16 December 2013

CONSERVATION AREA None

APPLICANT: OCA UK Ltd

PROPOSAL: 2 x Pine (T2 and T3 Applicant's Plan) – Fell. Group G1 of Tree Preservation Order.

RECOMMENDATION:

That Members of the Planning Sub-Committee determine the appropriate action in respect of the proposed felling of 2 x Pine (T2 and T3 Applicant's Plan), Group G1 of Tree Preservation Order, either:

REFUSE CONSENT for the following reason:

The loss of these 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 trees shall be agreed in writing with the Local Planning Authority and the trees shall be planted within 12 months of the commencement of the approved treatment (either wholly or in part). The replacement trees shall be maintained and / or replaced as necessary until 2 new trees 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: 14th November 2013

Consultees:

Neighbours consulted: 12

Replies: 0

MATERIAL CONSIDERATIONS

Relevant Recent Planning History:

Treeworks

TPO/00060/11/H - 3 x Pine (T1 and G2 of Applicants Plan) - Crown Clean by 10%, Deadwood. Group G1 and Standing in Group G2 of Tree Preservation Order

- Conditional approval 24th February 2011

602 Watford Way / 2 Foxwood Close - development

Land adjacent to 602 Watford Way - **W07936B** - Erection of two detached bungalows each with detached garage and private access road.

- Withdrawn 9th December 1986

Land adjacent to 602 Watford Way - **W07936C** - Erection of two detached bungalows each with detached garage and private access road.

- Withdrawn 9th December 1986

602 Watford Way - **W07936D** - Construction of six houses.

- Withdrawn 9th October 1987

602 Watford Way - **W07936F** - Erection of two detached houses in grounds of existing house. Formation of access road thereto and new vehicular access onto Watford Way.

- Refused 13th July 1988

602 Watford Way - **W07936G** - Erection of three detached houses with garages and access thereto from Watford Way.

- Conditional approval 3rd May 1989

602 Watford Way - **W07936J** - Three 5 bedroom detached houses with double garages.

- Conditional approval 12th October 1993

602 Watford Way - **W07936K** - Details of access road pursuant to condition 07 of permission W07936J.

- Approval 19th January 1994

2 Foxwood Close - **W07936L** - Single storey rear conservatory extension, single storey link between house and garage, detached greenhouse.

- Conditional approval 3rd November 1994

2 Foxwood Close - **W07936M** - Single storey extension to rear of detached garage.

- Refusal 17th September 1997

2 Foxwood Close - **W07936N** - Single storey extension to side of house.
- Conditional approval 21st September 1998

PLANNING APPRAISAL

1. Introduction

This application has been submitted by OCA (UK) Ltd acting as agent on behalf of loss adjusters dealing with a claim on the Buildings Insurance for 2 Foxwood Close, London, NW7 3JF.

The Tree Preservation Order was made on the 12th March 1987 and included 1 Horse Chestnut (designated T1 of the Order) and 4 Pine trees (standing within two groups: G1 and G2 of the Order) within the former property of 602 Watford Way. The Order was confirmed without modification on the 10th July 1987.

The site of 602 Watford Way has since been redeveloped as Foxwood Close - a private gated roadway of 3 detached dwellings. Of the five trees originally included within the Order, four are still standing – one of the Pines in group G2 of the Order has been removed.

In addition to the two subject Pine trees, the applicant also indicated that they wished to remove an offsite Oak tree standing adjacent on the recently redeveloped plot of land to the rear of 51 Uphill Road. This Oak is not included within a Tree Preservation Order and the site is not within a Conservation Area, but the tree was shown to be retained in the approved landscaping scheme and thus the landscape maintenance condition applies: *“Any existing tree shown to be retained or trees or shrubs to be planted as part of the approved landscaping scheme which are removed, die, become severely damaged or diseased within five years of the completion of development shall be replaced with trees or shrubs of appropriate size and species in the next planting season.”*

2. Appraisal

Trees and Amenity Value

The subject Pine trees stand together adjacent to the left hand (when viewed from the roadway) flank wall of the property and adjacent to the boundary with 1 Foxwood Close. The Pines predate the construction of the three residential properties - being specifically included within a Tree Preservation Order prior to the redevelopment of the former 602 Watford Way and retained throughout the construction of Foxwood Close. They are highly visible from along Watford Way helping to soften the urban appearance of residential dwellings when viewed from along this busy thoroughfare. They also help to add a sense of maturity to the Foxwood Close development.

The Pines are mature trees, one about 18 metres in height, the other in excess of 20 metres. They have dense foliage of good colour throughout their crowns and have had only minor previous pruning. The larger Pine (T2 of the Applicant's Plan) does have a noticeable lean towards the east. There is nothing to suggest that the degree of this lean has increased recently.

The application

This application submitted by OCA (UK) Ltd was registered on the 21st October 2013. The reasons given for the proposed removal of these two Pine trees (T2 and T3 of the applicant's plan) cited on the application form are:

- 1. The above tree works are proposed as a remedy to the differential foundation movement at the insured property and to ensure the long term stability of the building.*
- 2. The above tree works are proposed to limit the extent and need for expensive and disruptive engineering repair works at the insured property. In this instance the estimated repair costs are likely to vary between £16,000 and £299,000 depending upon whether the tree/s can be removed or have to remain.*
- 3. The above tree works are proposed to limit the duration of any claim period and therefore allow the landowner their right to the peaceful enjoyment of their property.*
- 4. It is the case that an alternative to felling such as pruning or significant "pollarding" of the tree would not provide a reliable or sustainable remedy to the subsidence in this case. We do not consider that any other potential means of mitigation, including root barriers, would be effective or appropriate in the circumstances.*
- 5. I consider that in this specific instance the planting of a Silver Birch tree, 10-12cm stem girth, container grown and planted at a location within 1-2m of the stump of the English Oak tree within G2, would be a suitable replacement. Given the very close proximity of Pine T2 and T3 to the front left corner of the insured property and the very limited space available to plant suitable replacements, without a significant risk of a future tree related subsidence event. We consider that no replacement trees should be planted at the front left corner of the insured property."*

The supporting documentary evidence submitted has been assessed by the Council's Structural Engineer who has commented as follows:

Trees

The OCA report shows the locations trees of around the property. Their report shows the Pine trees T2 and T3 opposite the left hand side of the house. T2 is 5.9m from the building and 24.8m high, T3 is 5.5m from the building and 23m high.

The other trees indicated are Pine T1, Oak T4, Apple T5, Sycamore G1, Oak and Sycamore G2 and Leyland Cypress H1.

Damage

The House was constructed circa 1994.

The damage to the building was discovered in March 2009, repaired early 2010. Cracking re-occurred in October 2010, and further damage occurred in late 2011.

The damage consists of cracking up to 2mm wide to the left hand side and rear of the house. No plans or sketches were provided to show the pattern or distribution of the cracks.

The damage is classified as category 2 in accordance with BRE Digest 251.

Subsoil investigations

CET carried out a subsoil investigation on 28/5/09, 8/4/11 and 18/10/12. These consisted of trial pits and boreholes, to the left hand side of the house and at the rear property.

Results of the investigations were as follows;

- 1. The foundations vary between 900mm and 1100mm deep.*

2. *Stiff brown Clay was encountered for the full depth of the boreholes.*
3. *Roots extend to 3.2m next to the left hand side flank wall and 2m depth at the rear.*
4. *Pine tree roots identified in the left hand side borehole and Oak roots identified in the rear borehole.*
5. *Both boreholes were dry.*

Soil Testing

The soil analysis results indicate desiccation to 3m depth under the left hand side flank wall and at 1.5m depth under the rear foundations

No ground heave prediction has been calculated.

Monitoring

Level monitoring has been carried out from 14/4/11 to 12/1/12.

Most of the recorded movement is occurring at the front left hand side and at the rear. The pattern of movement appears to be modified by the dry spring and wet summer of 2011, however the monitoring results do indicate a seasonal trend of movement.

Further monitoring was undertaken from 10/1/13 to 24/7/13. The seasonal movement is relatively small over this period, most likely due to the high rainfall experienced in the June and July of 2013.

Drainage

The only drain surveyed was to the gully next to the left hand side flank wall. No significant defects were identified.

The trial pits and boreholes were dry, and the cyclical pattern of movement demonstrated by 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 Pine trees T2 and T3 are likely to be implicated in damage to the left hand side of the building.

The house was constructed circa 1994 and therefore the foundations should have been constructed in accordance with the guidelines for building near trees current at the time of construction.

No ground heave assessment has been undertaken, this is recommended were the trees proposed for removal pre-date the building.

The Updated Engineering Appraisal Report by Cunningham Lindsey dated March 2013 (submitted by the applicant as part of this application) states that "the level of cracking to the property is slight with cracks up to 2.0mm in width. At ground floor level there is cracking within the main lounge, rear middle reception room, kitchen and within the entrance hall. At first floor level there is cracking within the left hand bedrooms, rear middle bedroom, right hand bathroom and within the landing. There is distortion to some of the window openings and to the rear patio door frames."

However, the Case Officer could not see any cracking within the ground floor entrance hall or the left hand bedrooms on the first floor (although access was not possible to one of these) during his site inspection and the nanny confirmed that she was unaware of any cracking in these areas. Most of the cracks that were evident were very fine – corresponding to BRE category 1 damage, the widest cracks corresponded to category 2 damage of 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 1 damage as “*Fine cracks which can be treated easily using normal decoration. Damage generally restricted to internal wall finishes; cracks rarely visible in external brickwork. Typical crack widths up to 1mm.*” Category 2 damage is described 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 property of 2 Foxwood Close was built circa 1994 and according to the submitted site investigations the foundations vary between 900mm - 1100mm deep. The trees predate construction of the property and these foundation depths are shallower than the NHBC guidelines that would have been current at the time.

The Council’s Structural Engineer has noted that “*The soil analysis results indicate desiccation to 3m depth under the left hand side flank wall and at 1.5m depth under the rear foundations.*”

The Council’s Structural Engineer has also noted that “*the monitoring results do indicate a seasonal trend*” and Conifer roots were found at a depth of 3.2 metres in the borehole dug next to the south-eastern corner of the building (about 4.5 metres from the subject Pine trees).

On this basis the Council’s Structural Engineer has concluded that “*the Pine trees T2 and T3 are likely to be implicated in damage to the left hand side of the building.*”

The Updated Engineering Appraisal Report states that if the proposed tree removals are not allowed “it may be necessary to consider underpinning of the foundations of the property in the area of damage, in addition to structural crack repair and redecoration needed to repair the damage. As previously outlined there is evidence of movement to the rear and left hand sections of the property and the earlier investigations identified roots to a depth of 3.2m and with desiccation to a depth of 5.0m. Accordingly a piled stabilisation

solution would be required and consideration would need to be given to the installation of a complete piled raft. Such works would involve the need for the internal floors to be removed with associated disturbance to the kitchen and cloakrooms. The anticipated cost of such a solution would be significant and probably in excess of £260,000. In addition the property would be uninhabitable for at least six months and a claim for loss of rent would therefore be incurred. Costs would be in the region of £39,000.”

It should be noted that these repair proposals greatly exceed the recommendations within the BRE Digest 251 for repair of category 1 and 2 damage.

No ground heave prediction has been submitted to the Council.

In addition if the ‘landscape’ Oak tree growing at the site to the rear of 2 Foxwood Close was removed this may have some affect on the property damage.

3. Legislative background

Government guidance advises that when determining the application the Council should (1) assess the amenity value of the tree(s) 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 “in this instance the estimated repair costs are likely to vary between £16,000 and £299,000 depending upon whether the tree/s can be removed or have 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.

If it is considered that the amenity value of the trees is so high that their proposed felling is not justified on the basis of the reasons 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 stated that “the

site investigation results indicate the Pine trees T2 and T3 are likely to be implicated in damage to the left hand side of the building.”

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 proposed removal of the two subject Pine trees would not 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 roots from these Pine trees 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 removal of the subject Pine trees, there is likely to be a compensation liability (the applicant indicates repair works would be an extra £283,000 if the trees are 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 two Pine trees because of their alleged implication in subsidence damage to that property.

The proposed felling of these Pine trees would be significantly detrimental to the streetscene of Watford Way and public amenity.

The Council’s Structural Engineer has concluded that “*the Pine trees T2 and T3 are likely to be implicated in damage to the left hand side of the building.*” However, the property was built with foundations shallower than the NHBC guidelines; no prediction of ground heave has been submitted; and the proposed repairs greatly exceed the BRE Digest 251 recommendations.

Bearing in mind the potential implications for the public purse, as well as the public amenity value of the trees and their importance in the streetscene, 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.

The Council must decide whether it is prepared to refuse consent to the proposed removal of these tree and face a possible compensation claim potentially in excess of £283,000 or allow the removal of the trees subject to replacement planting – whilst the applicant has indicated that they consider “no replacement trees should be planted at the front left corner of the insured property” they have not indicated any objection to replacement planting elsewhere at the property.

Site plan

