



## COMMITTEE REPORT

**LOCATION:** 42 Woodside Avenue, London, N12 8AX.

**REFERENCE:** TPF/0364/18

**Received:** 1<sup>st</sup> August 2018

**WARD:** Totteridge

**Expiry:** 26<sup>th</sup> September 2018

**CONSERVATION AREA** N/A

**APPLICANT:** MWA Arboriculture Ltd

**PROPOSAL:** 2 x Conifer (applicant's ref. TG1) - Remove. Group G106 of Tree Preservation Order.

### RECOMMENDATION:

**That Members of the Planning Sub-Committee determine the appropriate action in respect of the proposed removal of 2 x Conifer (applicant's ref. TG1) – Group G106 of the 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 two replacement trees shall be agreed in writing with the Local Planning Authority and these replacement trees shall be planted before the end of the next planting season following the commencement of the approved treatment (either wholly or in part). If within a period of five years from the date of any planting, the tree(s) is removed, uprooted or destroyed or dies (or becomes, in the opinion of the local planning authority, seriously damaged or defective), further planting of appropriate size and species shall be planted at the same place in the next planting season.

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

Consultation was undertaken in accordance with adopted procedures which exceed statutory requirements:

Date of Site Notice: 9<sup>th</sup> August 2018

Consultees:

Neighbours consulted: 3

Replies: 0

## MATERIAL CONSIDERATIONS

### Relevant Recent Planning History:

Work to the 2 x Conifer (Thuja) Group G106 of Tree Preservation Order.

**TREN05349L** – An application to undertake works to 2 x Thuja trees standing in Group G107 and 2 x Thuja trees standing in Group G106 of Tree Preservation Order necessary to lay a duct within the adjacent footpath as indicated on Plan Drawing No. R82 C08.

- Conditional approval 1<sup>st</sup> September 1997

Building works at 42 Woodside Avenue, London, N12 8AX since the making of the Tree Preservation Order.

**N05349F** – Retention of existing house and the erection of 7 three-bedroomed houses at the rear of the site with parking provision for 8 cars (Outline).

- Conditional approval 25<sup>th</sup> May 1977

**N05349G** – Retention of existing house and the erection of 7 three-bedroomed houses at the rear of the site with parking provision for 8 cars.

- Conditional approval 25<sup>th</sup> January 1978

**N05349H** – Application to discharge details required under condition 4 of the planning permission granted on the 25<sup>th</sup> January 1978 “Retention of existing house and the erection of 7 three-bedroomed houses at the rear of the site with parking provision for 8 cars.”

- Approved 24<sup>th</sup> May 1978

**N05349J** – Single storey rear extension.

- Conditional approval 17<sup>th</sup> June 1986

No relevant development applications for 25, 26, 27, or 28 Claire Court.

Please note that there has been work to other Tree Preservation Order trees in the vicinity of 42 Woodside Avenue / 25, 26, 27 and 28 Claire Court details of which are not listed within this report.

## **PLANNING APPRAISAL**

### 1. Introduction

An application form proposing felling of “TG1 of MWA Arboricultural report” at 42 Woodside Avenue adjacent to the boundary with 25, 26, 27 and 28 Claire Court in connection with alleged property damage at 25, 26, 27 and 28 Claire Court was submitted via the Planning Portal in May 2018. Trees TG1 are described in the MWA report as “Cypress group” without clarification of number of trees. However, the position of the trees corresponds with group G106 of the Tree Preservation Order which comprises 2 Thuja – for the avoidance of doubt the trees are identified as “2 x Conifer” for this application.

There were various discrepancies and shortcomings in the information - clarification and additional information was thus requested. Following the receipt of further information and correspondence from the agent the application was registered on the 1<sup>st</sup> August 2018.

The application has been submitted by MWA Arboriculture Ltd acting on behalf of loss adjusters dealing with alleged subsidence at 25, 26, 27 and 28 Claire Court.

Claire Court is a development comprising 32 maisonettes which have been constructed on the former properties of 46 to 56 Woodside Avenue. Historic Ordnance Survey maps indicate that the Claire Court development was constructed between 1962 and 1969. The block including 25, 26, 27 and 28 Claire Court is located near to the south-eastern corner of the site close to the roadway (Woodside Avenue) and also the boundary with 42 Woodside Avenue.

It should be noted that there are mature Lime trees located in the Woodside Avenue pavement to the front of Claire Court. The street Limes are Council owned / maintained trees not included in a Tree Preservation Order. The potential involvement of the Highways Limes in the alleged property damage at Claire Court is being currently investigated and assessed by the Council’s Greenspaces / Insurance teams as a separate claim.

This application was originally listed as an agenda item for the meeting of the Chipping Barnet Area Planning Committee on the Thursday 13<sup>th</sup> November 2018 and a committee report was prepared for that meeting.

However, on the 12<sup>th</sup> November 2018 the Council received further information from the agent and also the owners of flats 25 and 27 Claire Court. The additional information required structural engineer assessment and further site investigation which could not be undertaken prior to the Committee meeting and as such consideration of the application was deferred to this current meeting of the Committee.

### 2. Appraisal

#### Tree and Amenity Value

The subject Conifer trees stand at 42 Woodside Avenue in front of the house and adjacent to the flank boundary with 25, 26, 27 and 28 Claire Court. They stand to the left of the

driveway entrance/egress onto Woodside Avenue (the driveway of 42 Woodside Avenue can also be accessed from another entrance/egress onto Little Cedars).

The Conifer trees subject of this application have both been identified on site as Thuja. They are mature trees approximately 18 to 20 metres in height. The tree closest to the roadway has a trunk diameter of over 66cm (at 1.5 metres above ground level) and the other tree in the group has a trunk diameter of 64cm. Both trees have had some minor previous lifting treatment to provide clearance over the driveway and public footpath in front of the property. Both trees appear in reasonable health with foliage of good form, colour and density showing throughout the vast majority of their crowns. There are a couple of very small isolated patches of brown foliage and also some very minor deadwood close to the trunks of the trees - which is typical of the species. These two trees have no obvious major structural faults.

The two trees stand next to each other and have a collective group amenity value that exceeds the value of the individual trees. They are clearly visible from along Woodside Avenue (with views of the trees being increased during the winter months due to their evergreen nature). Along with other mature trees adjacent, these subject Conifer trees make a very important contribution to the character and appearance of the area – helping to screen and soften the built form of the adjacent residential dwellings next to a very busy roadway, which is part of a thoroughfare running almost parallel and to the west of the main High Road (A1000). Retention of mature trees, such as the subject Conifers, helps to retain the suburban feel to the roadway, which is becoming increasingly urbanised in character.

#### The application

The application submitted by MWA Arboriculture Ltd was registered on the 1<sup>st</sup> August 2018. The reasons for the proposed removal of the two Conifer (Thuja) trees (applicant's ref. TG1) cited on the application form are:

*The above trees are considered to be a contributory cause of root induced clay shrinkage subsidence damage to the subject property.*

*Investigations in to the damage have been conducted and the following information/evidence obtained:*

- 1. Engineering opinion is that damage is due to clay shrinkage subsidence.*
- 2. Foundations are bearing on to clay.*
- 3. The clay subsoil has a medium to high volume change potential (NHBC Guidelines).*
- 4. A comparison between moisture content and the plastic and liquid limits suggests residual desiccation in TH/BH2 (March 2018) located to the right of the building and close to TG1.*
- 5. Live Cupressaceae spp. (cypress/thuja)) roots were recovered from below foundation depth in TP/BH2 to a depth of 3.0m below ground level, significantly below the foundation depth of 1.0m.*
- 6. The observed desiccation is coincident with recorded root activity.*
- 7. Desiccation is at depths beyond ambient soil drying effects and consistent with the soil drying effects of significant vegetation.*
- 8. Level monitoring for the period 15/06/2017 to 03/05/2018 has recorded a cyclical pattern of movement to the front of the building indicative of the contributory influence of TG1 on*

*soil moisture and volumes. The uplift phase of the building can only be attributable to an expanding clay soil from a desiccated (shrunken) state due to the soil drying effects of vegetation.*

*9. Drains can be discounted as a causal factor given the recorded desiccation and by reference to the level monitoring data.*

*10. No tree works have been carried during the claim, monitoring period or in the recent past.*

*11. A root barrier has been considered and discounted due to the separation distance between the trees and the building..*

*12. The technical evidence establishes there to be a nuisance and the damage makes it an actionable nuisance which needs to be abated.*

*Established evidential and legal tests pertinent to subsidence damage claims have been met and the evidence confirms that on the balance of probabilities the cause of the movement and associated damage is clay shrinkage subsidence with the subject trees being a contributory cause.*

*Given their proximity to the property, removal offers the only predictable arboricultural solution in abating their influence.*

The supporting documentation comprises:

- MWA Arboriculture Ltd “Arboricultural Appraisal Report Subsidence Damage Investigation at: 25-28 Claire Court Woodside Avenue London N12 8TD” dated 2<sup>nd</sup> May 2018.

- CET “Site Investigation Factual Report” for site investigations undertaken on 6<sup>th</sup> March 2018 (including trial pit / borehole data 06/03/2018; soil testing report 12/03/2018; root id 09/03/2018).

- Crawford “Technical Report of a suspected subsidence claim 25-28 Claire Court Woodside Avenue, London, N12 8T” dated 8<sup>th</sup> March 2017.

- Crawford “Addendum Technical Report... 25-28 Claire Court Woodside Avenue, London, N12 8TD dated 3<sup>rd</sup> April 2018.

- Crawford “Addendum Technical Report... 25-28 Claire Court Woodside Avenue, London, N12 8TD dated 23<sup>rd</sup> July 2018

- E-mail from the agent dated 25<sup>th</sup> May 2018 in which they state: *“please note that the repair costs are 22k for superstructure repair only and approx. 100k if a localised underpinning scheme is required to stabilise the property.”*

- Letter from the agent dated 28<sup>th</sup> June 2018 in which they state: “The property has not been underpinned and no building work undertaken” and made some further comments about the information in the other reports submitted as part of their application.

- Knight Associates Level Monitoring – 8 sets of Relative Survey Readings taken between 15<sup>th</sup> June 2017 and 9<sup>th</sup> November 2018.

- Letter from the agent dated 12<sup>th</sup> November 2018 written in response to the Committee Report published for the meeting of the Chipping Barnet Area Planning Committee on the Thursday 13<sup>th</sup> November 2018.

In addition to the submissions received from the agent the Council has also received:

E-mails dated 12<sup>th</sup> and 14<sup>th</sup> November 2018 with 10 photographs attached from the owner of 27 Claire Court.

E-mails dated 8<sup>th</sup> and 28<sup>th</sup> November 2018 with 7 photographs and a sketch plan of the layout of 25 Claire Court from the owners of 25 Claire Court.

The named applicant - Crawford and Company – is the loss adjuster dealing with the insurance claim made by the owners of 25 Claire Court and their neighbours at 26, 27 and 28 Claire Court; the agent their arboricultural consultant. It is clear from the submissions that this application has been submitted on behalf of the owners of 25 Claire Court and their neighbours at 26, 27 and 28 Claire Court - thus the owners of 25 and 27 Claire Court cannot be deemed as “third parties” for this application and their comments photographs and plan are being treated as additional application submissions rather than as neighbours expressing support for the application.

The owners of 25 Claire Court have confirmed that their submitted photographs were taken “*at the end of October and in early November*” and have also stated in their e-mails:

*We “are writing to express our extreme concern about the existing, and ongoing, subsidence damage to our home at no 25, and our neighbours' homes/properties at nos 26, 27, and 28 Claire Court, adjacent to no 42 woodside avenue, caused by their conifers and the 3 council owned lime trees situated on the pavement in front of nos 25-28 claire court...As you know MWA arborists (their report of 2/5/18) recommended that all of the trees causing the damage to our properties should be felled and we hereby strongly request that you allow the tree preservation order on our neighbours' trees to be removed to that end. We understand that there has been no response from them regarding this matter, which is most alarming. We would also request that the council owned trees are removed, as per MWA's report and do not find the suggestion of a root barrier satisfactory. Naturally, we want our properties restored to their original condition, and market value, as soon as possible.” “We would ask that you please expedite the structural engineer assessment and site inspection you mentioned, in time for the meeting in January, of all 4 flats this time, as the damage is worsening/spreading. We have also noticed that our floor has become uneven here and there, internal doors are no longer closing properly...plaster has burst in more than one place, gaps have appeared in our parquet flooring, and there is a gap appearing between the wall and the ceiling in one corner.”*

The owner of 27 Claire Court has confirmed that their submitted photographs were taken on the 1<sup>st</sup> November 2018 and has also stated in their e-mails:

*“[I] wish to draw the Committee's attention to the worsening condition of the land surrounding the block of four flats in Claire Court after a particularly dry summer season.*

*I attach photographs illustrating some of the holes that have opened up in the earth and the enormous tree roots running over the land, front and back, leading right up to the doorways to my property. These roots are now much more visible and protrude above ground so that they are hazardous underfoot. In addition to my obvious concerns about the*

*damage to my property, I am also worried that the roots and holes are going to cause someone to fall and injure themselves. Even our pathways, where we should be safe, are being broken up by these roots...*

*Inside my property, the cracking caused by these tree roots is causing alarming deterioration...*

*With our properties now so undermined (and their value severely impacted) I am anxious that any remedy taken to address these problems will restore the stability of the four properties for the LONG TERM future.*

*The owners of these properties have a right to see their properties fully safeguarded and to be protected from yet further upheaval that will occur if properly effective action is not taken now.*

*With dry summer conditions reported to be a continuing feature of our weather pattern, I am keen to understand:*

- 1. the action that will be the MOST EFFECTIVE in protecting our properties*
- 2. if the Committee will authorise that particular action*
- 3. if an alternative remedy is authorised instead, what guarantee the Committee will provide regarding its effectiveness*
- 4. how the London Borough of Barnet will compensate the owners of these properties for further damage and upheaval in their lives in the event of tree root damage continuing or re-occurring.*

*I would be very grateful for an answer to the above questions.*

*In the meantime I strongly urge the Committee to take rigorous action that will ensure our properties and their value can be fully reinstated for the future, and our personal safety assured."*

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

*"1. There is some evidence of clay soil desiccation below the foundations. Ideally, if we had control borehole results and additional types of testing (as BRE recommended) e.g. Oedometer or soil suction tests the extent of soil desiccation could be confirmed.*

*2. Cypress [Cupressaceae spp.] roots identified at underside of foundation. Note Lime tree roots extend full depth of borehole 2.*

*3. Borehole relatively shallow and BH2 did not extend beyond zone of roots.*

*4. Some of the cracking to this wall can be attributed to the type of brick used, i.e. calcium silicate, and a lack of movement joint.*

*5. Level monitoring does show seasonal movement.*

*On basis of the above Thuja likely to be implicated as a contributory factor in some of the observed the damage, on basis of root ID the Lime probably the more significant factor."*

In the Crawford "Technical Report of a suspected subsidence claim 25-28 Claire Court Woodside Avenue, London, N12 8T" dated 8<sup>th</sup> March 2017 it is stated:

*"[the policy holder] advised that external cracking was noted by the previous owners of number 25 [Claire Court] in 2013. They contacted insurers at that time and Cunningham Lindsey were appointed to inspect. We viewed their report at the initial visit which confirmed that they inspected all of the flats. Only external cracking was present at that stage and they declined the claim on the basis the external cracking was not the result of foundation movement. A further inspection took place in May 2013 when [the policy holder] purchased number 25. The surveyor at the time noted only external cracking and considered this to be the result of thermal movement. The current internal cracking was noted in flat 25 by [the policy holder] over summer 2016. This progressed and insurers were notified."*

The Crawford report dated 8th March 2017 includes photographs and an "abbreviated description" of the damage which is summarised below:

- Flat 25  
Diagonal (hairline, 3mm and 4mm) cracks in the Dining Room.  
Cracking in the Porch, *"unrelated water ingress damage to ceiling."*  
Hairline cracks in the Kitchen and Bathroom - *"not subsidence related damage."*
- Flat 28  
Diagonal and vertical cracks (hairline, 1mm and 2mm) in the Rear Right-hand Bedroom, Rear Left-hand Bedroom, Hallway, Bathroom and Dining Room / Lounge.
- Flat 27  
Diagonal and vertical cracks (hairline, 1mm and 3mm) in the Dining Room, Lounge, Rear Left-hand Bedroom, Rear Right-hand Bedroom and Hallway.
- Flat 26  
Vertical cracks (2mm and 3mm) in the Kitchen and Dining Room (some crack(s) previously repaired).
- EXTERNAL  
Vertical and stepped/tapering cracks (1mm, 2mm, 3mm, 5mm, 7mm) in the Rear Elevation, Right-hand flank and Left-hand flank of the building (some cracks previously repaired).

The Crawford report dated 8th March 2017 states that: *"the damage falls into Category 3 of Table 1, Building Research Establishment7 Digest 251, which describes it as "moderate"."*

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 3 damage as *"Cracks which require some opening up and can be patched by a mason. Repointing of external brickwork and possibly a small amount of brickwork to be replaced. Doors and windows sticking. Service pipes mat*

*fracture. Weather-tightness often impaired. Typical crack widths are 5 to 15mm, or several of say, 3mm.”*

The majority of the cracks referred to in the Crawford Report dated 8th March 2017 are stated to be less than 3mm (which would correspond to Categories 0, 1 and 2 of the BRE classification).

However, from the photographs submitted by the owners of flats 25 of 27 Claire Court and subsequent site inspection of all four flats it appears that some of the cracks at 25, 26 and 27 Claire Court have progressed – with the worst damage being at flat 25, which is further from the subject TPO Thuja trees than flats 27 and 28. There are only a few very minor cracks apparent at Flat 28 (most of which do not appear to be related to subsidence).

In addition, a number of the observed cracks may not be attributable to vegetation related subsidence damage.

In the discussion section of the Crawford report dated 8th March 2017 it is stated:  
*“The external leaf of the cavity wall appears to be constructed using calcium silicate brickwork. This type of brick is prone to cracking as a result of thermal movements and a number of previous external repairs are evident around this property and the other blocks in the development where such movement has taken place in the past. Cracking is evident in areas which have previously been re-pointed and there is cracking visible which has not been repaired previously to all elevations. This external cracking could be due to further thermal movement or could be indicative of localised foundation movement. The pattern and nature of the relatively recent internal cracking noted within flats 25, 26 and 28 appears to be indicative of an episode of subsidence however further investigations will be required to confirm this.”*

As stated above our own structural engineer has commented that: *“Some of the cracking to this wall can be attributed to the type of brick used, i.e. calcium silicate, and a lack of movement joint.”*

In their letter dated 12<sup>th</sup> November 2018 the agent criticised the Committee Report previously written and published for the meeting of the Chipping Barnet Area Planning Committee on the Thursday 13<sup>th</sup> November 2018 because:

*“The officer’s report makes several references to the Crawford Technical report date 8th March 2017. This report was written without the benefit of site investigation results or level monitoring.*

*The Crawford Addendum report submitted with the application, was written once the above information was available allowing the engineer to confirm their opinion as to the cause of damage, i.e. root induced clay shrinkage subsidence.*

*It is concerning that the officer has not referenced this more pertinent document in their appraisal to give the committee a comprehensive understanding. The selective consideration of the technical information submitted questions whether a balanced view has been presented to the committee on which to base their decision.”*

In their letter dated 28<sup>th</sup> June 2018 the agent has stated that: *“Thermal movements were identified as one possible cause of the damage together with clay shrinkage subsidence in*

*the Crawford initial Technical report prior to further investigations being undertaken. Following site investigations the cause of the damage has been confirmed as root-induced clay shrinkage subsidence by investigation engineers.”*

It should be noted that the later Crawford reports (dated 3<sup>rd</sup> April 2018 and 23<sup>rd</sup> July 2018) have clearly been written as addenda to the report dated 8<sup>th</sup> March 2017 and do not contain any updated description or photographs of the damage. In addition, as noted above having reviewed all of the available information own structural engineer is still of the opinion that some of the observed damage can be attributed to the use of calcium silicate bricks and a lack of movement joint.

Details of the site investigations that have been undertaken on the 6<sup>th</sup> March 2018 are included within the submitted CET “Site Investigation Factual Report.”

The “Investigation layout plan” contained in the CET “Site Investigation Factual Report” appears to have incorrectly identified the location of the four flats (numbers 25 to 28) within the block and other submitted plans are also misleading.

Flats 25 and 27 are located on the ground floor of the building with Flat 25 occupying the northern half and flat 27 occupying the southern half of the building footprint. Flats 26 and 28 are on the first floor with Flat 25 occupying the northern half (above Flat 25) and Flat 28 occupying the southern half (above Flat 27).

Boreholes/trial pits were dug – Trial Pit 1 (TP1) was dug adjacent to the front elevation of flat 25 Claire Court (incorrectly stated to be flat 28 on the “Investigation layout plan” of the CET “Site Investigation Factual Report”). Borehole 1 (BH1) was dug next to this trial pit. Trial Pit/Borehole 2 (TP2/BH2) was dug adjacent to the front elevation of 27 Claire Court. The submitted root identification indicates that *Tilia* spp. (Lime) roots were found in Borehole 1. *Tilia* spp. (Lime) roots and *Cupressaceae* spp. (a family of plants which includes a number of sub families and genus’) were found in TP2/BH2.

The Thuja trees subject of this application are within the *Cupressaceae* family. However, there are a number of other trees in the vicinity of 25 to 28 Claire Court that are also included within this plant family (including other Thuja and Cypress trees). The agent has not submitted any DNA testing to demonstrate that the *Cupressaceae* spp. roots found in TP2/BH2 at the underside of the foundations belong to the subject trees, however, “TG1” are the closest.

The excavation of Trial Pit 1 was abandoned at 1.7 metres although the underside of foundation had not been found and consequently the depth of the foundations of flat 25 Claire Court have not been established. The depth of the foundation for the 27 Claire Court corner of the building (as found in the Trial Pit/Borehole (TP2/BH2)) appears to be 1 metre. It is unclear why the depths of the foundations at either end of this block of flats are different as the agent has stated that: *“The property has not been underpinned and no building work undertaken and this would have been advised in the application if relevant.”*

As noted above, the Crawford report dated 8<sup>th</sup> March 2017 includes details of damage at flats 25 and 26 Claire Court – both on the opposite side of the block of flats from the Thuja

trees that are subject of this application (as noted above during the recent site visit the most extensive damage observed was to Flat 25). Indeed, it appears from the submitted information that the insurance claim was initiated by the owner of flat 25 Claire Court. It is thus unclear why, when asked for clarification, the agent asserted: *“[Trial Pit 1] TP1 is on the opposite side of the building from TG1 and is irrelevant in the context of the application.”*

In addition to incorrect identification of trees, there were other weaknesses in the application – for example, with reference to the site investigations submitted, our Structural Engineer noted: *“Ideally, if we had control borehole results and additional types of testing (as BRE recommended) e.g. Oedometer or soil suction tests the extent of soil desiccation could be confirmed.”* - however, the agent declined to provide this information.

Given their inclusion in the Order, it appears likely the Thuja predate the construction of Claire Court - thus the Local Planning Authority requested that the agent submit a ground heave assessment with this application. In their letter of the 28<sup>th</sup> June 2018 the agent responded: *“The technical information required under the guidance is listed in your letter. Heave assessment is not one of them. This is not a valid reason for refusing to register the application. Further, the trees do not predate the property and as such present no significant risk of heave.”*

It appears that the agent has not sought to undertake investigation or assessment to establishing the depth of foundations for the 25 Claire Court part of the building, why the building has differential foundations and whether this is having any impact on the observed damage, or trying to confirm exactly what of the observed damage is attributable to which trees and which to thermal movement.

Our Structural Engineer has confirmed that the submitted levels monitoring “does show seasonal movement” and that the “Thuja [are] likely to be implicated as a contributory factor in some of the damage.”

However, the observed damage appears to be attributable to more than one cause (i.e. some of the damage appears to be attributed to thermal movement of the calcium silicate brickwork and other damage could be attributed to other trees that are not subject of this TPO application) and the subject Thuja trees cannot be said to be the “effective and substantial” cause of or “materially contributed to” all of the damage at Flats 25, 26, 27 and 28 Claire Court.

In the circumstances it appears that removal of the TPO Thuja trees that are subject of this application would not address all of the observed damage and the properties of 25 to 28 Claire Court are likely to still suffer damage even if this application were to be approved (indeed removal of the subject Thuja trees could result in additional heave damage to the properties).

The owner of Flat 27 Claire Court has raised concerns about several surface roots apparent within the lawn areas of Claire Court and underneath the footpath at the property. From a site investigation it is apparent that most of the roots shown in the photographs

submitted by the owner of Flat 27 Claire Court do not belong to the 2 TPO Thuja trees that are subject of this application.

The “council owned trees” referred to by the owners of Flat 25 Claire Court are not included within the Tree Preservation Order (TPO). They are not, and cannot be, subject of this TPO application.

### 3. Legislative background

As the two Thuja trees are included in a Tree Preservation Order, formal consent is required for their treatment from the Council (as Local Planning Authority) in accordance with the provisions of the tree preservation legislation.

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 trees are 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 the agent’s e-mail dated 25<sup>th</sup> May 2018 it is stated: *“please note that the repair costs are 22k for superstructure repair only and approx. 100k if a localised underpinning scheme is required to stabilise the property.”* In their letter dated 28<sup>th</sup> June 2018 the agent states: *“The options are superstructure repairs only (crack repair, redecorating etc) and underpinning. The repair costs for superstructure works only and underpinning should the trees not be removed were advised to the council via email on the 25<sup>th</sup> May. To confirm, the estimated costs are £22k and approx. £100 respectively.”*

However, as noted above, even if it is concluded that the Thuja are implicated, the damage appears to be attributable to more than one cause (i.e. some of the damage appears to be attributed to thermal movement of the calcium silicate brickwork and other damage could be attributed to trees that are not subject of this TPO application). It would not be possible to claim several times over for the same repairs, so there would be some apportionment between multiple causation.

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 removal. Unlike the Council owned / maintained street Limes, the Local Planning Authority has no powers to require lesser works or a programme of cyclical pruning management to the privately owned TPO Thuja that may reduce the risk of alleged tree-related property damage. If it is considered that the amenity value of the Thuja trees is so high that the proposed removal 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 that the *"Thuja [are] likely to be implicated as a contributory factor in some of the damage"* - albeit that he has advised there are other causative factors in the damage e.g. *"Some of the cracking to this wall can be attributed to the type of brick used, i.e. calcium silicate, and a lack of movement joint."*

The statutory 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, or rectifying damage which is not attributable to the subject trees, would not be subject of a compensation payment.

If it is concluded that other factors (e.g. the use of calcium silicate bricks and lack of movement joint, and / or other trees that are not subject of this TPO application) were a substantial cause of damage and / or addressing such factors together with pruning would resolve the alleged problem, regardless of the proposed Thuja removal; or if the removal of the Thuja trees 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 remove the subject Conifer trees (applicant's ref. TG1).

However, if it is concluded on the balance of probabilities that the roots of the two Thuja trees are the 'effective and substantial' cause of damage or alternatively whether they 'materially contributed to the damage' and that the damage would be addressed by the trees' removal, there may be a compensation liability if consent for the proposed felling is refused - the applicant/agent indicates repair works for 25, 26, 27 and 28 Claire Court may be an extra £78,000 if the subject Conifer trees are retained (reference to underpinning costing only £100 in the agent's letter dated 28<sup>th</sup> June 2018 is likely to be a typographic error).

## **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**

The agent, MWA Arboriculture Ltd, proposes to remove two Conifer (Thuja) trees standing at 42 Woodside Avenue because of their alleged implication in subsidence damage to 25, 26, 27 and 28 Claire Court.

The Council's Structural Engineer has assessed the supporting documentary evidence and has noted that the subject Conifer trees are likely to be implicated as a contributory factor in some of the observed damage. However, there are shortcomings in the information provided, other trees could be contributory factors in the damage, and some of the damage noted can be attributed to the thermal movement (expansion/contraction) of the calcium silicate brickwork – not *“of root induced clay shrinkage subsidence.”*

Bearing in mind the potential implications for the public purse, as well as the public amenity value of the subject Conifer trees, it is necessary to consider whether or not the proposed removal of these trees is justified as a remedy for the alleged subsidence damage on the basis of the information provided.

If it is concluded on the balance of probabilities that the two Thuja trees' roots are the 'effective and substantial' cause of damage or alternatively whether they 'materially contributed to the damage' and that the damage would be addressed by the removal of these two trees, there may be a compensation liability (the applicant/agent has indicated that repair works to 25, 26, 27 and 28 Claire Court may be an extra £78,000 if the trees are retained) if consent for the proposed tree removals is refused.

However, particularly given the amenity value of the trees, if it is concluded on the basis of the available information that removal of the two Thuja trees is excessive and has not been demonstrated to be necessary; or if the removal of these trees 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.

