



COMMITTEE REPORT

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

REFERENCE: TPF/0364/18

Received: 1st August 2018

WARD: Totteridge

Expiry: 26th 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: 9th 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 1st 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 25th 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 25th January 1978

N05349H – Application to discharge details required under condition 4 of the planning permission granted on the 25th 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 24th May 1978

N05349J – Single storey rear extension.

- Conditional approval 17th 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 1st 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.

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 1st 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 (shrunk) 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 2nd May 2018.
- CET “Site Investigation Factual Report” for site investigations undertaken on 6th 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 8th March 2017.
- Crawford “Addendum Technical Report... 25-28 Claire Court Woodside Avenue, London, N12 8TD dated 3rd April 2018.
- Crawford “Addendum Technical Report... 25-28 Claire Court Woodside Avenue, London, N12 8TD dated 23rd July 2018
- E-mail from the agent dated 25th 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 28th 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 – 7 sets of Relative Survey Readings taken between 15th June 2017 and 13th September 2018.

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 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 8th 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 Establishment 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 may fracture. Weather-tightness often impaired. Typical crack widths are 5 to 15mm, or several of say, 3mm."*

However, 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).

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."*

Details of the site investigations that have been undertaken on the 6th 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. The site plans included within the submitted Crawford reports have identified the correct location of the four flats within the block.

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 8th 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. 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 28th 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 sought to submit the minimum amount of information necessary to enable the registration of an application - rather than undertaking thorough investigation and assessment such as 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 the damage."

However, the damage noted in the Crawford report dated 8th March 2017 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).

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).

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 25th 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 28th 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 25th 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 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 28th 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 the 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.

