

23 MARCH 2010

NEW FOREST DISTRICT COUNCIL

APPEALS PANEL

Minutes of a meeting of the Appeals Panel held in Meeting Room C, Hythe and Dibden Community Centre on Tuesday, 23 March 2010.

Councillors:

p D Harrison
p J A G Hutchins
p C Lagdon

Councillors:

p Mrs A E McEvoy
p Mrs S I Snowden

In Attendance:

Councillor

Ms L C Ford

Officers Attending:

Miss J Debnam, A Douglas, A Luddington, E Williams, and for part of the meeting N Williamson.

Also Attending:

Mr and Mrs Cunningham, Ms Game and Mr and Mrs Sawle (Objectors)

23. ELECTION OF CHAIRMAN.

RESOLVED:

That Cllr D Harrison be elected Chairman for the meeting.

24. MINUTES.

RESOLVED:

That the minutes and confidential minutes of the meeting held on 9 March 2010, having been circulated, be signed by the Chairman as correct records.

25. DECLARATIONS OF INTEREST.

There were no declarations of interest made by any member in connection with an agenda item.

26. TREE PRESERVATION ORDER NO. 30/09 (REPORT A).

The Panel considered objections to the making of Tree Preservation Order 30/09 which related to 7 individual and 2 groups of trees in the gardens of Shalimar and Cap Ternay, Lime Walk, Dibden Purlieu. The Hearing had been preceded by a visit to the site which had viewed the trees from within the garden of Shalimar and also from Lime Walk and Water Lane, to the rear. The Panel had noted key relationships between the trees and other features in the landscape, had noted their appearance and general condition, and also formed a view on the amenity value of the trees when viewed from public viewpoints in the vicinity.

At the commencement of the Hearing Mr Sawle asked that the meeting be adjourned. He was aware that the Council had received a letter from Mrs Newcomb, the owner of Cap Ternay, in the early stages of the process of making the initial Tree Preservation Order (TPO). When he had inspected the file recently this correspondence had been removed and a subsequent request to have access to the letter, under the Freedom of Information Act, had been refused. Mr Sawle was in the process of appealing against the Council's decision to the Information Commissioner, on the basis that this correspondence had a direct bearing on the Council's decision with respect to the expediency of making the Order. He considered that his ability to present his case was prejudiced by the lack of access to this letter. He drew the Panel's attention to an Ombudsman's decision in 2004 in which Vale Royal Borough Council had been criticised for failing to disclose information to objectors.

The Panel was advised that the information that the Council could publish or otherwise disclose was controlled by statute. In general terms, any information that was provided to the Council in the belief that it would be kept confidential should be kept confidential. The Council's decision not to disclose the information had been taken on the basis of the tests required by the relevant legislation. In answer to questions it was confirmed that the correspondence in question had not been provided, separately, to Members of the Panel and they could not therefore be influenced by its content. The Panel's role was to examine the evidence placed before them, in support of the cases put forwards by both the Council's Arboriculturist and the objectors. The issue of expediency in making the Order should be adequately examined and explored within the forum of the Hearing and the ability of the objectors to present their case was not therefore prejudiced. The Panel's consideration would be untainted by whatever information Mr Douglas may or may not have considered when reaching his initial decision that it was expedient to make the Order.

Having considered the arguments put forwards by Mr Sawle and the Panel's legal adviser, Mr Williams, members concluded that they could adequately explore the merits, or otherwise, of making the Order on the basis of the representations of the parties present, and there would therefore be no benefit in adjourning the Hearing.

Mr Cunningham, one of the owners of Shalimar, considered that the imposition of the Order was an outrageous abuse of the TPO legislation. While the amenity value provided by the trees was agreed by all concerned he did not believe that the majority of the trees that were covered by the Order were under any threat at all, and consequently there were no grounds to prove that it was expedient to make the Order, as required by government guidance. Mr and Mrs Cunningham accepted that their letter to Mrs Newcomb about the possibility of felling trees along the boundary did demonstrate a threat to those trees (T1 and T2 in TPO 30/09) but

there was no threat to the other trees that were covered by the Order. The trees in their garden had been demonstrably well maintained over the 35 years that they had owned Shalimar and they had no intention of removing them. Without some evidence of threat, the test of expediency was not met and it was not open to the Council to make an Order covering those trees.

Mr Cunningham also believed that the Council has not fulfilled the requirement set out in the "Blue Book" guidance for there to be negotiations to resolve the objections to the making of the Order.

Mr Cunningham had received advice from Mr Douglas about how a boundary fence could be erected without affecting the trees along that boundary, and this had subsequently been confirmed by a fencing contractor. Mr Cunningham was happy that he could secure the boundary of his property without affecting trees T1 and T2. His view that the Council was acting improperly by imposing the Order on other trees in his garden had been confirmed by his own tree expert, Mr Sherlock.

Mr Sawle advised the Panel that he agreed with the imposition of the Order on trees T1 and T2, but not the remainder of the trees that were included. His arguments were set out in detail in his letters which were attached in Appendix 3 to Report A.

Ms Game, one of the owners of Langstone, the property adjacent to Shalimar, was concerned that if the trees in Cap Ternay were not properly managed they would present a threat from falling branches. Parents delivering or collecting children from Noadswood School, opposite, parked along this stretch of road. A tree in her own garden had shed a branch onto the road and she had needed to employ a tree surgeon to remedy a fault in the tree and return it to a safe condition.

In answer to questions from Mr Douglas, Mr Cunningham did not agree that there had been any meetings to negotiate on the trees included in TPO 30/09.

In answer to questions from members of the Panel Mr Cunningham confirmed that:

- He had no plans to sell the land for development;
- When the electricity company had pruned the hornbeam in his front garden, to protect their cables, he could have sought more radical work to the tree but had not done so;
- He had fixed a tin roof on the top of his wood store so that debris falling from the trees was now much less of an issue for him than previously.
- He considered that the cost of bureaucracy to process tree works applications in respect of trees in his garden would be a waste of public resources;
- He did not expect that the imposition of the Order would promote any maintenance work being done to the trees in Cap Ternay;
- He did not consider that long term protection of his trees, in isolation from the rest of the belt of trees along the Water Lane frontage, was a legitimate determination within the terms of the "Blue Book" guidance;
- He would not have any objection to an Order covering the entire belt of trees along the Water Lane frontage.

Mr Sawle agreed that the trees along the Water Lane frontage provided strong visual amenity to the area, but would dispute whether the trees would meet the test of expediency in making such an Order and he would be likely to object on that basis. By the same criteria, he continued to object to the inclusion of trees T3-T6 as they did not meet the expediency test, being managed well, in accordance with sound arboricultural practice.

Ms Game also questioned whether any of the 66 trees along the Water Lane frontage were under sufficient threat to meet the expediency test. Following the installation of floodlights by Noadswood School, the tree belt provided essential protection for the amenities of nearby residents, who were considering strengthening the planting. She did not object to the protection of trees T1 and T2.

In answer to questions from the Panel's legal adviser Mr Cunningham confirmed that he would favour the imposition of an Order covering trees T1 and T2. Mr Sawle did not agree that the expediency test had been satisfied in respect of these trees. All parties agreed that the trees provided sufficient visual amenity to warrant protection by an Order.

Mr Douglas, the Council's Arboriculturist, advised Members that he had visited the site and made the TPO because of the letter sent to Mrs Newcomb by Mr and Mr Cunningham, as attached at Appendix 4 to Report A. Mrs Newcomb had invited him to her property and asked for advice. On site it was obvious that there were other trees, offering high visual amenity, that warranted protection and TPO 23/09 had been made. There had been mistakes in the plotting of the trees on that Order and following meetings with the trees' owners that Order had been revoked and a fresh Order made, number 30/09, that excluded 2 trees. As there was no need to remove trees in order to erect a fence, Mr Douglas had been concerned that other trees were potentially under threat. His sense of concern was heightened as he could see that the oak tree in Langstone had been subject to radical tree surgery in the past, and he had no evidence of the motivation for that, at that time. He believed Mr Cunningham had changed his views on trees T1 and T2. There had been some discussion about potential redevelopment on Cap Ternay at some time in the future. Groups G1 and G2 and tree T7 were in the grounds of Cap Ternay and the owner did not object to the Order. The trees in the groups did not each necessarily warrant individual protection. Their amenity value arose from their collective value as groups of trees.

Tree T6, the hornbeam, made a significant contribution to the street scene in Lime Walk. It was hoped that negotiations with the utilities company had secured that 3 ply ABC cables, such as that in Lime Walk, would in future be fitted with a sleeve for protection, removing the need for significant pruning of adjacent trees, as had been the case with T6.

Mr Douglas reminded the Panel that the TPO did not prevent future maintenance of the trees. The only difference was that prior consent must first be obtained through the submission of a Tree Works Application, for which there was no charge. This process provided the trees' owner with the added benefit of free arboricultural advice. From the Council's point of view, the TPO allowed a measure of control of the scale and type of works that could be done to the trees.

Mr Douglas believed that the requirement to negotiate had been fulfilled as he had held 2 meetings with Mr and Mrs Cunningham, each of which had lasted more than 1 hour. He suggested that negotiation did not necessarily equate with agreement being reached.

Mr Douglas reiterated his belief that trees T3 to T6 offered high visual amenity and should enjoy a safe useful life in excess of 10 years, as required in the "Blue Book" guidance. He noted that Mr Cunningham and Mr Sawle seemed to have no problem with a TPO covering all the Water Lane frontage trees, and commented that the advice they had been given by their tree expert, to the effect that such an Order could not include multiple properties, was incorrect.

He believed that the expediency test was met in respect of all the trees. The letter at Appendix 4 demonstrated the threat to the trees on the boundary between Cap Ternay and Shalimar, and suggested potential threat to the other trees, as did the previous work to the oak in Langstone. Cap Ternay was a potential redevelopment site and only those trees in those grounds that were worthy of protection had been included in the Order. The lack of maintenance of the trees on the site was not a matter for consideration in the current discussion. The TPO would ensure that the trees received proper consideration as part of any future proposals. He advocated the confirmation of the Order as set out.

In answer to questions from the objectors, Mr Douglas advised that:

- It would not have been correct to delay imposing the Order as the Council could not take the risk that the trees would be removed;
- The TEMPO scoring system that had been used in respect of TPO 23/09 was no longer in use by the Council and had not been used in the assessment of the trees that should be protected in TPO 30/09.
- He had placed considerable weight on the letter reproduced at Appendix 4 to the report in reaching his conclusion that the Order was justified;
- He could not clearly recollect when he had visited Mrs Newcomb for the second time. It was at that meeting, which had also included Mr Luddington, another of the Council's Arboriculturists, that he had received a further letter from Mrs Newcomb. This was however after TPO 30/09 had been made and the letter's contents were therefore not relevant to his thought processes in deciding to make the Order.
- He had not read the notes on the letter handed to him, which was the source of concern to Mr and Mrs Cunningham and Mr and Mrs Sawle. The side issues associated with the site were not of relevance to the making of the Order. He certainly had no recollection of the letter's contents.
- In deciding whether to make the Order and the trees that should be included he had confined himself to the amenity value provided by the individual trees and groups of trees; and also the factors that might constitute a threat to trees, including the letter set out in Appendix 4.

Members were reminded that whether or not Mr Douglas' perceptions of threats to the trees had been tainted was not relevant to the current consideration. The Panel was untainted by previous information and it was much better if they remained so. Further exploration of such issues would not assist their consideration.

Following some debate between Mr Douglas and the objectors as to whether there had been any negotiations on TPO 30/09, the Chairman adjourned the meeting for some informal discussions to take place.

When the meeting resumed it was agreed that Mr Douglas had held discussions with the neighbours on the flawed TPO, number 23/09, in the light of which amendments had been made, leading to revisions to the trees included in the current Order, number 30/09. There had been no specific negotiations on TPO 30/09.

The Panel was also advised that, if the Order was modified at this meeting, to exclude trees T3, T4, T5 and T6 neither Mr and Mrs Cunningham nor Mr and Mrs Sawle would raise any objection to the inclusion of the trees along the rear boundary in a wider TPO covering the entire Water Lane belt of trees.

The Panel was advised that there must be concerns about any agreement that appeared to fetter the objectors' legal right to object to any future TPO on their properties. There was also some doubt as to whether a TPO could be amended by the imposition of a condition, as suggested, relating to a subsequent Order.

In answer to a further question from Mr Sawle, Mr Douglas confirmed that the trees in Mr Cunningham's garden "had not, not been looked after" but he was unable to confirm that the works carried out were in accordance with what he would have advised.

In answer to questions from members of the Panel, Mr Douglas confirmed that:

- There was no evidence to suggest that, in future, charges may be introduced for the submission of Tree Works Applications.
- The Council's tree officers would provide advice on proposed tree works which would reflect the best interests of the trees concerned.
- The sole source of professional advice available to the Panel on the amenity value of the trees and their condition was his professional advice, together with their own judgement having viewed the trees.

In summing up, Mr Douglas confirmed that the current Order, number 30/09, had been made following discussions with Mr Cunningham in the light of the previous, flawed, Order number 23/09. The trees offered high amenity value in the surrounding area, when viewed from Lime Walk and Water Lane, they offered in excess of 10 years of safe, useful life, and he believed the test of expediency had been met.

In summing up, Mr Cunningham advised that he was happy for the Order to protect all of the trees on Cap Ternay, and for all the trees along the Water Lane frontage to be covered by a separate Order. If that was to happen he would not object to the inclusion of current trees T3, T4 and T5. Those trees should be protected within that context and not in isolation. That way the community could see what was being done and why. Mrs Cunningham confirmed that she agreed with that view.

Mr Sawle welcomed the discussions that had taken place at this meeting which he felt had clarified views. He did not object to the inclusion of the trees in Cap Ternay. He did not however believe that the test of expediency had been satisfied in respect of trees T3, T4 and T5, which were under sound arboricultural management. His preference would be for just trees T1 and T2 to be protected by this Order. He would however understand if all the trees along the Water Lane frontage were protected, not just those in Shalimar.

Ms Game confirmed that she could understand if the Order was confined to just trees T1 and T2.

The Hearing was then formally closed to allow the Panel to debate the merits of confirming, not confirming or amending the Order.

The Panel was satisfied that all of the trees offered high amenity value in the surrounding area and that the test of expediency had been met in respect of trees T1, T2, T7 and Groups G1 and G2. There was however a difference of view about whether trees T3, T4, T5 and T6 should be protected within this Order. Some members considered that these trees should be excluded and that separate consideration should be given to protecting trees T3, T4 and T5 within an additional TPO that covered all of the trees, within the many properties along the Water Lane frontage.

The Panel considered and rejected a proposal that the Order should be amended by the deletion of trees T3, T4, T5 and T6. The majority of the Panel was satisfied that the test of expediency had been met on those trees as well. It was accordingly:

RESOLVED:

That tree preservation order number 30/09 relating to land of Shalimar and Cap Ternay, Lime Walk, Dibden Purlieu be confirmed without amendment

CHAIRMAN