

Case 200600977: The City of Edinburgh Council

Summary of Investigation

Category

Local government: Planning: Tree Preservation Orders

Overview

The complainant (Mr C) raised a number of concerns about the tree preservation order (TPO) protecting trees on his land and The City of Edinburgh Council (the Council)'s response, in relation to the site, to a Public Local Inquiry (PLI).

Specific complaints and conclusions

The complaints which have been investigated are that the Council:

- (a) revoked the consent granted to Mr C in 1998 to fell trees covered by a TPO without a valid reason and without informing him of this fact (*upheld*);
- (b) gave Mr C erroneous information about the legislation governing TPOs (*upheld*); and
- (c) gave incorrect information to the PLI about the management plan in place for the Scheduled Ancient Monument (SAM) and trees on Mr C's land (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- (i) apologise to Mr C for wrongly informing him that the consent granted to him to fell the trees had expired;
- (ii) formally request the necessary information from Mr C on the trees to be felled so that their knowledge on the tree work is up-to-date;
- (iii) apologise to Mr C for giving him erroneous information about the legislation governing TPOs and about the statutory time limit placed on the removal of the trees;
- (iv) remind staff of the importance of giving accurate information in response to enquiries from members of the public;
- (v) apologise to Mr C for the fact that they gave incorrect information about the management plan to the PLI; and

- (vi) take steps to investigate how this error occurred and to ensure that officers are in possession of accurate information when responding to a PLI.

The Council have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

1. Mr C owns land upon which there is a ruined steading (the Monument) which is designated a Scheduled Ancient Monument (SAM) by Historic Scotland. The Monument is surrounded by trees which are protected by a Tree Preservation Order (TPO). Mr C had concerns that the trees were causing substantial damage to the Monument but that he could not remove these trees due to the TPO.

2. Mr C wrote to the Forestry Commission on 11 February 1998 about removing the trees in question. The Forestry Commission referred the matter to The City of Edinburgh Council (the Council) on 4 March 1998 because the trees were covered by a TPO. They enclosed their comments on the proposal and plans of the site showing which trees should be removed.

3. On 31 March 1998, the Council's Conservation and Design Team Leader wrote to Mr C that the Council had no objections to him felling the trees in the Forestry Commission's plan. On 29 May 1998, Historic Scotland wrote to Mr C to confirm that the Secretary of State was satisfied that the removal of trees from the SAM site could be carried out without detriment to the historic, archaeological or architectural integrity of the Monument. Mr C was, therefore, granted scheduled monument consent for the works.

4. In 1999, the Council drafted a new Rural West Edinburgh Local Plan (Local Plan). The process for the approval of the Local Plan went on for some years. Mr C objected to existence of the TPO during the Public Local Inquiry (PLI) into the Local Plan on the grounds that the trees were damaging the Monument. In 2004, the Council published the 'Finalised [Local Plan] Deposit Responses (Complete)'. This mentions Mr C's objections and states that these are 'not accepted'. The Council's response to the objections states that 'the Monument is immediately adjacent to trees that are protected by TPOs. There is an existing plan in place that allows the Monument to be maintained without damage being caused to the trees or vice versa'. It goes on to state that if essential works are required that will have an impact on the trees, consent will be required.

5. The Finalised Local Plan was published in November 2005 and was adopted by the Council on 1 June 2006. The Local Plan indicated that the PLI

Reporters had recommended that the TPO should be reviewed. The Council stated that the relevant legislation allows the Council to permit works to trees covered by a TPO where necessary and that the recommendation was, therefore, not accepted.

6. There followed correspondence between Mr C, the Council and the Scottish Public Services Ombudsman (SPSO) on the subject of the TPO and the management plan referred to by the Council in their response to the PLI. On 13 October 2006, the Council informed Mr C that any tree works granted consent by local authorities are statutorily extant for a two year period from the date the decision letter was issued and that in Mr C's case, the decision ceased to have effect on 31 March 2000. They also stated that the 'management plan' referred to in the 'Finalised Local Plan Deposit Responses' of February 2004 referred to the arrangements agreed with Historic Scotland for the maintenance of the SAM. They further stated that their response had made clear that, should essential work be required to be undertaken on the Monument in the future that could have an impact on the protected trees, consent would be required and that it was unlikely that consent would be withheld.

7. Following an enquiry from Mr C, the Council wrote to him on 17 November 2006. They stated that the primary legislation for the statutory time limit placed on the removal of trees around the Monument was found at section 160 of the Town and Country Planning (Scotland) Act 1997 (the Act). They also referred to section 172 of the Act as being relevant. The Council confirmed that the letter concerning the removal of trees dated 31 March 1998 would have ceased to have effect on 31 March 2000.

8. The Council went on to state that their position was that the trees in question were covered by a TPO and that there did not appear to be an extant consent to fell TPO trees, or a woodland management plan. They explained that the Council, in responding to the PLI recommendation to review the TPO, had formally agreed not to remove it because the trees still merit protection, and the legislation is sufficiently flexible to allow the Council to permit works to the trees to maintain or protect the Monument.

9. The complaints from Mr C which I have investigated are that the Council:
(a) revoked the consent granted to Mr C in 1998 to fell trees covered by a TPO without a valid reason and without informing him of this fact;

- (b) gave Mr C erroneous information about the legislation governing TPOs; and
- (c) gave incorrect information to the PLI about the management plan in place for the SAM and trees on Mr C's land.

Investigation

10. During the course of this investigation, I examined correspondence between the Council and Mr C and other background documentation provided by Mr C. I discussed the complaints and events in detail with Mr C and also met with a Council Officer (Officer 1) to discuss Mr C's concerns. I made specific enquiries of the Council, Historic Scotland and the Forestry Commission and referred to the Act.

11. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the Council were given an opportunity to comment on a draft of this report.

Legislation

Town and Country Planning (Scotland) Act 1997

Power of planning authority to decline to determine applications

- 39 (1) A planning authority may decline to determine an application for planning permission for the development of any land if –
- (a) within the period of two years ending with the date on which the application is received, the Secretary of State has refused a similar application referred to him under section 46 or has dismissed an appeal against the refusal of a similar application, and
 - (b) in the opinion of the authority there has been no significant change since the refusal or, as the case may be, dismissal mentioned in paragraph (a) in the development plan, so far as material to the application, or in any other material considerations.

Tree Preservation Orders

- 160 (1) If it appears to a planning authority that it is expedient in the interests of amenity to make a provision for the preservation of trees or woodlands in their district, they may for that purpose make an order with respect to such trees, groups of trees or woodlands as may be specified in the order.
- (2) An order under subsection (1) is in this Act referred to as a 'tree preservation order'.
- (3) A tree preservation order may, in particular, make provision –

(a) for prohibiting the cutting down, topping, lopping, uprooting, wilful damage or wilful destruction of trees except with the consent of the planning authority, and for enabling that authority to give their consent subject to conditions;

Trees in conservation areas

172 (1) Subject to the provisions of this section and section 173, any person who, in relation to a tree to which this section applies, does any act which might by virtue of section 160(3)(a) be prohibited by a tree preservation order shall be guilty of an offence.

(2) Subject to section 173, this section applies to any tree in a conservation area in respect of which no tree preservation order is for the time being in force.

(3) It shall be a defence for a person charged with an offence under subsection (1) to prove –

(a) that he served notice of his intention to do the act in question (with sufficient particulars to identify the tree) on the planning authority in whose area the tree is or was situated, and

(b) that he did the act in question –

(i) with the consent of the planning authority in whose area the tree is or was situated, or

(ii) after the expiry of the period of six weeks from the date of the notice but before the expiry of the period of two years from that date.

(a) The Council revoked the consent granted to Mr C in 1998 to fell trees covered by a TPO without a valid reason and without informing him of this fact; and (b) The Council gave Mr C erroneous information about the legislation governing TPOs

12. I met with Officer 1 to discuss these complaints. He acknowledged that the Council should have informed Mr C that the consent would only last for two years and that this had not been done because tree work is usually carried out quickly. He explained that Mr C had claimed that the trees were dangerous and damaging the Monument. For this reason, the Council expected that the work would be carried out quickly in order to remedy the problems. He acknowledged that the conditions should have been made clear in the letter. He informed me that the Council are amenable to work being carried out on the trees and have no intention of taking any action against Mr C. The Council require another letter giving them details of the work which Mr C intends to carry out over the next two years. Officer 1 informed me that it is especially important

to get up-to-date information about the wildlife in the area. When this information is received, the Council will refresh the permission granted.

13. I asked Officer 1 about the legislation which governed the length of time which the consent lasted. He acknowledged section 172 of the Act was not the correct legislation to have referred to. He informed me that section 39 of the Act was the reason why the consent was only valid for two years. He explained that there were also regulations governing this but failed to specify what these were. He stated that the letters to Mr C had been edited by somebody who did not have the appropriate legislative knowledge, and that this person had removed some of the necessary facts about the legislation, thereby making the letter inaccurate.

14. I made further enquiries of the Council as I did not consider that section 39 of the Act was relevant to this case. They agreed and stated that sections 160(3)(c) and 160(4) were those which applied. These state that the Council is entitled to give their consent subject to conditions. The Council went on to state that TPOs drawn up by them make use of this power and incorporate relevant provisions into their terms.

15. The Council explained that it was standard practice at the time when Mr C was given consent not to include a time limiting condition because it was assumed that, by their nature, works to growing trees would be carried out quickly once consent was given. They stated that current practice is to stipulate that work to trees, once approved, must be completed within a specified time. This is now done because trees continue to grow and circumstances change so that work approved may no longer be appropriate. The Council told me that this had been explained to Mr C and, while the previous consent has not been revoked, he was requested, given the passage of time and in order to keep records up-to-date, to forward a covering letter and a survey of the trees to clarify the extent of the tree works now intended. They stated that Mr C has consistently declined to do so.

16. Mr C explained that the felling of the trees in question was an ongoing job and that he had already cut down in the region of 150 trees. Mr C also stated that he had no record or recollection of the Council requesting information from him as they said they had.

(a) Conclusion

17. In their letter of 13 October 2006, the Council informed Mr C that the consent for tree works had ceased to have effect on 31 March 2000. They informed Mr C that consent for tree works is statutorily extant for a two year period from the date of the decision letter and gave several statutory references in support of this fact. None of the statutory references provided stipulated that there was a two year period of validity for such consents and I could find no other statutory provision for this timescale.

18. The Council reiterated their position that there was no extant consent to fell the trees in their letter of 17 November 2006 and during my meeting with Officer 1. Finally, in their letter to me of 30 April 2007, the Council stated that the previous consent had not been revoked but that Mr C had been asked to provide details of the outstanding tree works which he intended to complete. I could find no evidence of such a request being made.

19. The Council informed Mr C that the consent which had been granted to him on 31 March 1998 ceased to have effect on 31 March 2000. Mr C was not given prior notice of the supposed cessation of the consent and did not discover that the consent had supposedly ceased to apply until several years after the supposed cessation. In response to my enquiries, the Council stated that the previous consent had not been revoked. Although the Council have now changed their position on the validity of the consent; because they told Mr C in no uncertain terms that the consent was no longer valid, because they did not give Mr C notice of the supposed cessation and because I could find no valid reason for the revocation of the consent in such a way; I, therefore, uphold this complaint.

20. It is understandable that the Council wish to have up-to-date information about the tree works being carried out on the trees by Mr C. I do not, however, think that the Council approached this end in an acceptable way. It is an offence to fell trees covered by a TPO without a valid consent and this offence can result in fines of up to £20,000 per tree. Mr C was naturally worried that he might incur a large fine for the work which he had carried out. If the Council wished for up-to-date information, they should have clearly requested this from Mr C in order that they could agree on the remaining work to be carried out.

(a) Recommendation

21. The Ombudsman recommends that the Council apologise to Mr C for wrongly informing him that the consent granted to him to fell the trees had expired. She also recommends that the Council formally request the necessary information from Mr C on the trees to be felled so that their knowledge on the tree work is up-to-date. The Ombudsman welcomes the fact that the Council now stipulates that work to trees must be completed within a specified timescale as this should minimise the risk of similar situations arising in the future.

(b) Conclusion

22. The Council informed Mr C that the primary legislation for the statutory time limit placed on the removal of the trees was found at section 160 and section 172 of the Act. When I made enquiries they also told me that section 39 was relevant and reiterated that section 160 applied.

23. Although section 160 gives the Council the power to place time restrictions when consent is granted to carry out work on TPO trees, none of the legislation quoted by the Council places a statutory time limit on the consent. Furthermore, there is no evidence that the Council exercised their power to place a time limit on the consent in Mr C's case.

24. The Council told Mr C that the consent to fell trees was statutorily extant for two years. Both Mr C and I have enquired about the legislation for this time limit. The legislation quoted by the Council does not place a statutory time limit on such consents. Furthermore, I could find no legislation which imposed such a time limit. I, therefore, uphold this complaint.

(b) Recommendation

25. The Ombudsman recommends that the Council apologise to Mr C for giving him erroneous information about the legislation governing TPOs and about the statutory time limit placed on the removal of the trees. She also recommends that council officers should be reminded of the importance of giving accurate information in response to enquiries from members of the public.

(c) The Council gave incorrect information to the PLI about the management plan in place for the SAM and trees on Mr C's land

26. In their response to the Local Plan PLI, the Council stated that there was a management plan in place which allowed the Monument to be maintained

without damage being caused to the trees and vice versa. Mr C questioned what management plan the Council were referring to.

27. The Council explained to me that it was their belief from the correspondence from Historic Scotland to Mr C, coupled with the relevant SAM legislation, that before any works were carried out, a plan of operations and SAM consent had to be approved and granted by Historic Scotland. Given that works had started on the site around the Monument it was wrongly assumed that such a plan had been submitted or approved. They stated that they did not hold a copy of such a plan. They agreed that this matter was referred to in the Council's statement of case to the Local Plan PLI in which Mr C was involved. They stated that Mr C, therefore, had the opportunity, as part of the process, to correct any errors in the Council's positions but that he appeared not to have done so. The Council stated that the Local Plan had been adopted and it would not be appropriate to re-open the issue at this time.

28. Mr C explained that the Council's response to the PLI had been misleading and this had prevented him from responding to the PLI in a meaningful way.

(c) Conclusion

29. In their response to the PLI, the Council stated that there was a management plan in place which allowed the Monument to be maintained without damage being caused to the trees and vice versa. They later explained to the SPSO and to Mr C that they had been referring to the plan of operations and SAM consent which had been granted by Historic Scotland. The Council did not have a copy of any such management plan.

30. Historic Scotland granted Mr C SAM consent for the tree work to be carried out as they were satisfied that this could be done without damaging the Monument. Historic Scotland gave Mr C some directions about how the work should be carried out and how vehicles should access the site in order to prevent damage to the Monument.

31. The SAM consent granted by Historic Scotland does not amount to a management plan. Furthermore, the consent granted provides for the trees in and around the monument to be felled. It, therefore, cannot be said that there was any arrangement in place which allowed the Monument to be maintained

without damage being caused to the trees. Because the information contained within the Council's responses to the PLI was incorrect, I uphold this complaint.

(c) Recommendation

32. The Ombudsman recommends that the Council apologise to Mr C for the fact that they gave incorrect information about the TPO to the PLI. Furthermore, the Council should take steps to investigate how this error occurred and take steps to ensure that officers are in possession of accurate information when responding to a PLI.

33. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify her when the recommendations have been implemented.

24 October 2007

Explanation of abbreviations used

Mr C	The complainant
The Monument	The ruined steading owned by Mr C
SAM	Scheduled Ancient Monument
TPO	Tree Preservation Order
The Council	The City of Edinburgh Council
Local Plan	The Rural West Edinburgh Local Plan
PLI	Public Local Inquiry
SPSO	The Scottish Public Services Ombudsman
The Act	The Town and Country Planning (Scotland) Act 1997
Officer 1	A Council Officer

List of legislation and policies considered

Town and Country Planning (Scotland) Act 1997