

## **The Ombudsman's final decision**

Summary: Mr X complains the Council failed to use proper process when deciding not to include a tree in an adjacent garden in a tree preservation order. The Ombudsman does not find the Council to be at fault.

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## **The complaint**

1. Mr X complains that the Council:
  - a) failed to consult properly with either him or the parish council when reaching a decision on which trees in the grounds of a property adjacent to his (Neighbour P), should be subject to a Tree Preservation Order (TPO)
  - b) failed to give proper consideration to his amenity when reaching a decision not to make a Horse Chestnut tree (Tree HC), subject to a TPO.
  - c) failed to properly consider his complaint about the decision not to protect Tree HC.

## **The Ombudsman's role and powers**

2. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)
3. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word 'fault' to refer to these. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
4. We cannot investigate a complaint if it is about a personnel issue. (*Local Government Act 1974, Schedule 5/5a, paragraph 4, as amended*)
5. It is not a good use of public resources to investigate complaints about complaint procedures, if we are unable to deal with the substantive issue.

## **How I considered this complaint**

6. I spoke with the complainant and read his complaint file. I made enquiries with the Council and researched the relevant law. I gave both the Council and the complainant the opportunity to comment on my draft decision.

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## What I found

### What should have happened

#### Tree Preservation Orders (TPOs)

7. A TPO is an order made by a council to protect specific trees, groups of trees or woodlands in the interests of amenity. The order prohibits the cutting down, topping, lopping, uprooting, wilful damage or wilful destruction of tree without the council's written consent.
8. Councils can make TPOs if it appears, "expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area."
9. The process can be initiated by the council or in response to a request by a third party. When deciding whether an order is appropriate authorities are advised to take into consideration what amenity means in practice. Amenity is not defined in law so authorities need to exercise judgment when deciding whether it is their powers to make an order.
10. Councils should take into account the extent to which trees or woodlands can be seen by the public. Government guidance says the trees, or at least part of them, should normally be visible from a public place, such as a road or footpath, or accessible by the public.
11. The authority should also assess the particular importance of an individual tree by reference to its characteristics, including its future potential as an amenity.
12. In some cases, a council may believe that certain trees are at risk as a result of development pressures and may consider, where this is in the interests of amenity, that it is expedient to make an order.
13. If a local authority decides to make an order, it will serve notice on people with an interest in the land, inviting representations about any of the trees covered by the Order. Following consideration of any objections and comments the authority can decide whether or not to confirm the order.

#### Decision making

14. The Council's constitution sets out that senior officers or other authorised persons have the power, in consultation with the Service Lead, for confirming/non-confirming, modifying, varying or revoking TPOs, where there is no objection within 28 days of the relevant notification being given. Such officers have the power to enter survey, examine and inspect premises and land for the purpose of determining whether any power should be exercised or statutory notices served.  
*(Para 18, Council Constitution)*

#### What happened

15. Mr X's garden fence backs onto his neighbour's garden, Neighbour P. Before the events described below, Tree HC was positioned just behind his neighbour's fence. Mr X said it provided a degree of screening. He said that during the summer it was a flowering tree and in the winter the close structure of its branches sufficiently diffused his view of his neighbour's property.
16. The Council says it received a telephone call from a possible purchaser of Neighbour P's house. The caller asked if the trees were protected and whether any felling would be allowed. The Council says that the nature of the conversation and the questions asked about the trees caused the Council concern relating to redevelopment and the possible pre-emptive removal of trees.

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17. A Council officer, Officer P, visited Neighbour P's garden to assess the trees. Officer P works under the authority of the Service Lead, Officer M. The Council says Officer P is a qualified arboricultural officer.
  18. It says it was his professional opinion that Tree HC showed signs of having undergone previous surgery. He thought it was of low quality and did not recommend it should be protected by a TPO. The Council say Officer P recalls the tree had been subject to pollarding/heavy reduction.
  19. Mr X says the Council failed to investigate where this view of the tree's condition came from. He says it is untrue.
  20. Mr X considers that Officer P made an 'unwarranted unilateral personal decision' to allow Tree HC to be felled. He says Officer P is not entitled to make decisions about tree preservation without reference to the elected Council.
  21. On 17 January 2018, the Council sent a provisional TPO notice in relation to four other trees in Neighbour P's garden, to Mr X and other neighbours. They were asked for their views on the potential TPO on the other four trees in Neighbour P's garden. The notice gave neighbours 28 days to raise objections.
  22. Mr X believes the Council should have placed a provisional TPO on all the mature trees in his neighbour's garden, to enable him, his wife and his neighbours to comment on the amenity and privacy issues associated with all of those trees.
  23. The Council received no objections to the provisional TPO.
  24. Mr X responded on 22 January 2018. He said, "As these trees are not on our land and they are the property of the owner of [Neighbour P] and not ourselves, I do not wish to make any comment as to whether the specified trees contribute to the amenity and character of the area's local bio-diversity. It is also not my wish to make comment in relation to any other person's intentions in respect of this matter."
  25. Some time in February 2018, Mr X says Tree HC was felled. He says that the privacy between his house and his neighbour's house has, 'completely destroyed the amenity value' between the two houses. He considers his property has been de-valued.
  26. On 7 March 2018 Mr X contacted the Council. He asked Officer P to visit him. He said he wished him to see the mess he had created. He says his request was ignored.
  27. On 10 April 2018, having received no objections to the TPO notice, it was formally confirmed.
  28. On 13 April 2018 Mr X wrote to Officer P again. He asked for a response to his 7 March 2018 letter. He said he received no response.
  29. On 19 May 2018 Mr X wrote to the Chief Executive of the Council. He made a formal complaint against Officer P.
  30. He referred to the Parish Council recommendation that the Council should prevent loss of trees, especially mature trees, whether subject to TPO's or not.
  31. He asked that the Council should investigate Officer P using ACAS. He also asked that another member of the Council's arboricultural team to visit him.
  32. On 30 May 2018, the Council acknowledged Mr X's complaint. It said his complaint would be dealt with by Officer M, the relevant service lead.

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33. The Council called Mr X to arrange a visit by another officer, Officer T. Mr X said he did not want a visit from a 'subordinate officer'.
  34. On 19 June 2018 Officer M, responded. He said the Council had received no objections to the order made on 17 January 2018.
  35. He said Mr X's parish Council's aim to prevent the loss of trees, whether subject to TPOs or not was a 'laudable aim'. However, he said it did not override the consideration given by the professional arboricultural officer who determined whether it was expedient in the interests of amenity to make the TPO.
  36. Officer M said that government guidance says that part of the consideration of the amenity of selected trees is if removal would have a significant negative impact on the local environment and its enjoyment by the public. The Council, he said, needs to show that protection would bring a degree of public benefit in the present or future. Officer P considered Tree HC to have low public amenity value.
  37. He explained that Officer T was not a subordinate officer but responsible for the management of Officer P and the most senior and most experienced manager in the Council on matters relating to trees. He said the offer for Officer T to visit Mr X still stood.
  38. Mr X did not consider Officer M to have understood his complaint properly. He said if he had known that there was a risk to Tree HC because of a risk of development he, and others, would have better able to provide 'informed comment' on the matter or to raise objections. He set this out in a letter dated 7 July 2018.
  39. He said he did not receive a response to this correspondence. On 29 July 2018 he complained about the lack of response. He demanded that the person who had been allocated to investigate his complaint, should visit him.
  40. On 31<sup>st</sup> July 2018 the Council said they would move his complaint to stage 2 to be considered by the Council's monitoring officer.
  41. Mr X wrote to the Council again, setting out his complaint against Officer P in detail. He said that the Council had poorly handled what could have been a very simple matter. He said he only required an apology for the error of judgment and for a verbal or written warning to be issued. He considered the Council should pay for the replacement of Tree HC.
  42. On 13 August 2018 the Council responded. It said it did not consider Officer P to have done anything wrong. Instead, he found that Officer P had acted diligently.
  43. It did not consider any disciplinary action was required and did not need to consider Mr X's complaint using ACAS.
  44. It said it did not issue a consultation exercise when deciding to issue the provisional TPO as to do so could have put the trees it was considering protecting at risk. It explained that someone could have acted quickly to have them cut down before the provisional TPO was issued. It did not consider it was therefore appropriate to consult.
  45. The Council said that although Tree HC provided some screening to Mr X's property, this fact was not enough to justify including it in the TPO.
  46. It was confident the correct process had been used and directed Mr X to come to the Ombudsman if he was still unhappy.

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## Findings

### **The Council's ability to make a decision concerning Tree HC.**

47. Mr X believes that the Council made a mistake in failing to protect Tree HC. And that it has failed to apologise and remedy that mistake. It is not the Ombudsman's role to step into the shoes of council officers who are professionally qualified in the work they do and criticise their judgment, unless it is wholly without justification or it is irrational. Officer P is a qualified arboriculturalist. The Council says he considered that Tree HC was of low quality and would not afford the level of public amenity that was required for him to consider placing a provisional TPO on it. Mr X disagrees. He thinks Officer P was wrong. But, that is a matter of judgment. Officer P is qualified to make the decision he made and I do not find fault.
48. Officer P also had the authority to make the decision he made. His manager, Officer M, as the relevant Service Lead, has the power to make decisions in relation to TPOs and Officer P made his decision under his authority. Officer M has reviewed his decision and taken no issue with it. There is no fault.

### **The complaint**

49. Mr X was not satisfied with the way his complaint was handled. He felt that it was not investigated properly. The evidence indicates that the Council failed to respond, without prompting, to three of Mr X's letters. This is not good enough but I do not consider that it caused Mr X a significant injustice. When the Council did properly address itself to his complaint, it responded in detail.
50. Mr X thought the Council should have used ACAS guidance to investigate Officer P's actions. The Ombudsman does not comment on how the Council handles employee issues. But, in any event, the Council has been clear it did not consider it needed to initiate any investigation into the actions of Officer P as it did not consider he had done anything wrong. There is no fault here.

### **Final decision**

51. I have not found the Council at fault.

### **Investigator's final decision on behalf of the Ombudsman**