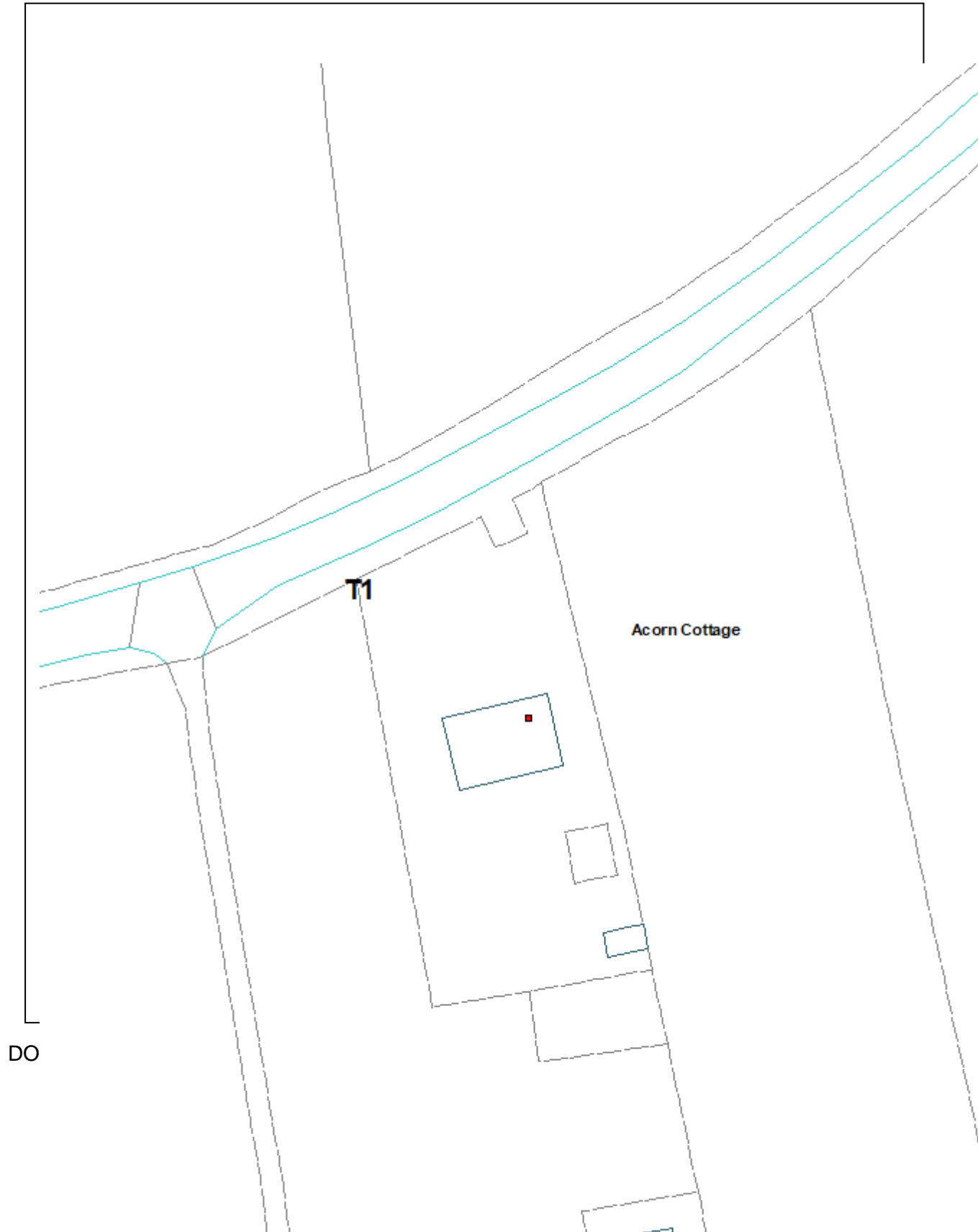


PLANNING COMMITTEE

14 March 2023

REPORT OF THE ASSISTANT DIRECTOR FOR PLANNING

A.6 23/00008/TPO, ACORN COTTAGE, STONES GREEN ROAD, TENDRING



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Application: 23/00008/TPO

Town / Parish: Tendring

Applicant: Property Risk Inspection Limited (Insurance Services)

Address: 2 The Courtyards, Phoenix Square, Severalls Park, Colchester

Development: Application to fell Oak

1. EXECUTIVE SUMMARY AND RECOMMENDATION

- 1.1 The application to fell the Oak, situated on land where the ownership is unknown, is supported by evidence to show that the tree is the primary cause of subsidence related damage to the dwelling.
- 1.2 The issues raised in the representations objecting to the proposal to fell the tree refer to its amenity value and ecological benefits as well as its cultural importance and contribution to carbon sequestration. The representations do not contain any firm evidence that the tree is not the cause of damage to the dwelling. The objections are addressed in detail in this report.
- 1.3 If the application is approved, then the tree will be felled and repairs to the dwelling will be facilitated and funded by the Insurance Company.
- 1.4 If the application is refused, then the Council is likely to receive a claim for compensation in the sum of £80,000.
- 1.5 It is recommended that consent be granted for the felling of the tree and that replacement planting of a long living but smaller tree species, is secured by a planning condition. Field Maple (*Acer campestre*) would be an acceptable species.

2. PURPOSE OF THE REPORT

- 2.1 To consider the evidence submitted in support of the application to fell an Oak where it is claimed by the applicant that the tree is causing damage to property and to balance the case for the retention of the tree against a potential claim, made to the Council, for compensation.

3. DETAILS OF THE APPLICATION

- 3.1 The application to fell the tree was received on 3rd January 2023 and is supported by technical reports relating to the moisture content and load bearing capacity of the soil, the damage to the property and the protected tree.

4. LEGISLATION RELATING TO TREE PRESERVATION ORDERS (TPO)

- 4.1 Section 203 of the Town and Country Planning Act 1990 provides that a tree preservation order may make provision for the payment of compensation in respect of loss and damage resulting from the refusal of consent under the order or the grant of consent subject to condition. Section 24 of the Town and Country Planning (Tree Preservation) (England) Regulations 2012 provides formal guidance on the compensation process.
- 4.2 In the decision-making process a balance clearly needs to be struck between the Council's duties in relation to the protection the districts trees and the potential exposure to future claims for compensation. Additionally due consideration must be given to the rights of the landowners to the peaceful enjoyment of their property.
- 4.3 In essence the retention of a protected tree that is the subject of a subsidence related application will leave the Council vulnerable to a claim for compensation which is likely to place a considerable financial pressure on the Council.
- 4.4 A disputed claim for compensation is dealt with by the Land Tribunal. Whilst the direct cost of the process may be relatively low the engagement of representation in the court as well as engaging appropriate expert witnesses along with the provision and collation of evidence to repudiate the claim is likely to be significant.

5. EVIDENCE

- 5.1 In support of the application the applicant has submitted an Arboricultural Assessment Report, an Engineering Appraisal Report and a Site Investigation Report containing an analysis of the soil and its moisture content as well as root identification. They have also provided a Level Monitoring Report
- 5.2 As part of the application the applicant has submitted projections of the cost of repairs to show the difference between the cost of repairing the structure if the tree is removed compared with the cost of the repairs if the tree is retained. This shows that the cost of repairing the dwelling if the tree is removed is approximately £10,000 whereas the cost of structural repairs if the tree is retained will be something in the region of £90,000.
- 5.3 Refusal of the application will leave the council exposed to a claim for compensation for a sum in the region of £80,000.

6. ANALYSIS OF EVIDENCE.

- 6.1 In the first instance the evidence submitted by the applicant in support of their application to fell the Oak demonstrates that damage has occurred to the dwelling and that the dwelling is situated on a highly shrinkable clay soil
- 6.2 The evidence also shows that tree roots are present in the soil beneath the foundation and the Level Monitoring Report demonstrates that the damage to the dwelling is cyclical, meaning that the cracks open in the summer as the soil dries about and close in the winter when re-hydration occurs. This is a clear indication that the tree is implicated in the damage to the dwelling.
- 6.3 During a site visit the internal cracking to walls was viewed as well as the external damage to brickwork (where cladding has not been carried out).

- 6.4 The damage to the external walls exhibits signs of tapering cracks which is typical of tree related damage to buildings.
- 6.5 The evidence provided is sufficient to show the key elements of tree related subsidence and identify the Oak closest to the dwelling as the primary cause of the damage.

7. REPRESENTATIONS

7.1 Following receipt of the application 35 letters of representation objecting to the proposed felling of the tree have been received. In essence the reasons set out in the representations are:

- The tree is a fine specimen of considerable age.
- The tree is older than the dwelling.
- The tree has high ecological value
- The damage to the property predates the change in ownership of the property.
- Risk of heave if the tree is removed.
- That the foundations are not sufficient to support the dwelling.
- Have Building Regulations been complied with.
- That the granting of consent to fell the tree would undermine the integrity of the TPO system.
- Alternative forms of maintenance/cropping and overall reduction in the size of the tree should be considered.
- That the information provided in relation to CO2 emissions relating to underpinning are provided solely in relation to a cost benefit to the insurance company.

7.2 It is acknowledged and accepted that the tree is over 200 years old and a very good specimen that fully merits protection by means of a TPO, however the age of the tree in relation to the property and the change of ownership does not alter the fact that tree roots are present beneath the building and consequently implicated in the damage to its structure.

7.3 It is also acknowledged and accepted that the tree has a very high ecological value and is a host to many hundreds of species including birds, mammals and invertebrates, however whilst some weight is accorded to the ecological benefits of the tree they must be balanced against the rights of the homeowner to the peaceful enjoyment of their property. In this regard the ecological benefits will broadly accord with those of other mature Oaks in the district and no specific or special benefits have been identified to merit the retention of the tree on ecological grounds.

7.4 In terms of the risk of 'Heave' this matter is addressed by the insurance company in the evidence submitted in support of the application and is not considered to be a real risk by them.

7.5 With regard to the depth and adequacy of the foundations it should be noted that they are likely to have been constructed in accordance with Building Regulations that were applicable at the time of the construction of the dwelling. This has been confirmed by the National House Building Council (NHBC) who dealt with the building regulations and signed off the construction under reference no

11875264. The NHBC document retention policy is 15 years, so the records associated with Acorn Cottage are no longer held by them.

- 7.6 Additionally, the current owner would not have been aware of the adequacy of the foundations (or otherwise) at the time of purchase of the dwelling. A similar situation was dealt with by the Courts (Land Tribunal) in *Burge and another v Gloucestershire Council (2016) UKUT 300 (LC)*. In this case the court held that compensation was payable by the Council despite the inadequate foundations of a conservatory.
- 7.7 Although this award for compensation has been the subject of a successful appeal the judge's conclusion in the Appeal case was that for reasons set out in the appeal, he would allow the appeal, however he acknowledged that, on reconsideration, the decision may still be the same. It was his view that the errors he has discerned in the Tribunal's approach make it necessary, for the claim to be determined afresh. It will, of course, be for the Tribunal to decide whether any further evidence ought now to be admitted.
- 7.8 The above case has effectively been referred back to the Land Tribunal for reconsideration. In this regard the court cases described above provide an indication of the process of disputing a claim for compensation.
- 7.9 The claim that the application to fell a tree implicated in structural damage to a dwelling may undermine the integrity of the TPO system is acknowledged however the Town and Country Planning (Tree Preservation) (England) Regulations 2012 includes provisions for the payment of compensation in cases such as this so this issue is fully integrated into the TPO system.
- 7.10 With regard to the proposal that the size of the tree should be reduced to control or restrict root activity and moisture abstraction; results of the then Office of the Deputy Prime Minister (ODPM) sponsored research undertaken by the Horticultural LINK Project 212 (HortLINK) in May 2004 at East Malling Research (Hipps, 2004) shows that pruning within arboricultural industry guidelines is ineffective in controlling water use.
- 7.11 The research clearly and unequivocally demonstrates that thinning has no effect at all. Only a crown reduction of over 70 per cent by volume, which equates to a 35 per cent crown reduction, has any effect and then it is for one season only (if that) and the reduced trees use more water in the following season (Hipps, 2004).
- 7.12 In essence the HortLINK study concludes: – Total tree water use (transpiration) was reduced by crown reduction in the year of pruning. – Total tree water use (transpiration) was unaffected by crown thinning in the year of pruning. – Crown reduction reduced soil drying by trees in the year of pruning, but the effects were generally small and disappeared within the following season, unless reduction was severe, in which case the effects were larger and persisted for up to two years. – Crown thinning did not reduce soil drying. – Crown reduction increased subsequent shoot extension and epicormic growth. – The new shoots grew more rapidly and produced larger leaves.

7.13 In terms of the information provided in relation to CO2 emissions this is really a peripheral matter in the consideration of the application which hinges on the basic elements of: actual damage to the building, the type of soil in the area, the presence of tree roots beneath the dwelling and the seasonal and cyclical nature of the damage which have all be addressed by the applicant.

8. **CONCLUSION.**

8.1 The high amenity value of the Oak and the benefits that it provides by way of its visual amenity and ecological values are fully recognised. It is accepted that; in the normal course of event the tree would have a long safe useful life expectancy.

8.2 However, the value of the tree must be balanced against the right of the resident to the peaceful enjoyment of their property and the potential claim for compensation against the Council for the cost of the resultant works to repair the dwelling should be tree be retained.

8.3 The evidence submitted in support of the application is sufficient to implicate the protected Oak as the primary cause of damage to the dwelling.

8.4 On balance it is considered that the amenity and other values of the tree do not outweigh the rights of the homeowner and the potential claim for compensation against the Council for cost of the repairs to the dwelling and consequently consent will be granted for its removal.

9. **Additional Considerations**

9.1 **Public Sector Equality Duty (PSED)**

In making your decision you must have regard to the PSED under section 149 of the Equality Act 2010 (as amended). This means that the Council must have due regard to the need in discharging its functions to:

- A. Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
- B. Advance equality of opportunity between people who share a protected characteristic and those who do not. This may include removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; taking steps to meet the special needs of those with a protected characteristic; encouraging participation in public life (or other areas where they are underrepresented) of people with a protected characteristic(s); and
- C. Foster good relations between people who share a protected characteristic and those who do not, including tackling prejudice and promoting understanding.

The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, being married or in a civil partnership, race including colour, nationality and ethnic or national origin, religion or belief, sex and sexual orientation.

The PSED must be considered as a relevant factor in making this decision but does not impose a duty to achieve the outcomes in section 149 and section 149 is only one factor that needs to be considered, and may be balanced against other relevant factors.

It is considered that the recommendation to grant permission in this case would not have a disproportionately adverse impact on a protected characteristic.

9.2 Human Rights

In making your decision, you should be aware of and take into account any implications that may arise from the Human Rights Act 1998 (as amended). Under the Act, it is unlawful for a public authority such as the Tendring District Council to act in a manner that is incompatible with the European Convention on Human Rights.

You are referred specifically to Article 8 (right to respect for private and family life), Article 1 of the First Protocol (protection of property) and Article 14 (right to freedom from discrimination).

It is not considered that the recommendation to grant permission in this case interferes with local residents' right to respect for their private and family life, home and correspondence or freedom from discrimination except insofar as it is necessary to protect the rights and freedoms of others (in this case, the rights of the applicant). The Council is also permitted to control the use of property in accordance with the general interest and the recommendation to grant permission is considered to be a proportionate response to the submitted application based on the considerations set out in this report.

9.3 Finance Implications

Local finance considerations are a matter to which local planning authorities are to have regard in determining planning applications, as far as they are material to the application.