

**UPDATE ON RECENT SCOTTISH GOVERNMENT PLANNING APPEAL DECISION**

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**A) INTRODUCTION**

This report advises of a recent appeal decision by the Scottish Government Directorate for Planning and Environmental Appeals relative to the case set out below.

**B) RECOMMENDATION**

Members are asked to note the contents of the report.

**C) DETAILS OF APPEAL DECISIONS**

**PLANNING APPEAL DECISION – TENA – 130-2000  
FAILURE TO REPLACE TREES REMOVED IN CONTRAVENTION OF A TREE  
PRESERVATION ORDER ON LAND SOUTH OF CUMBERLAND AVENUE  
HELENSBURGH G84 8QG**

**DATE OF DECISION – 5 June 2013**

Authorisation to serve a Tree Replacement Notice (TRN) on this site was given by Committee on 19<sup>th</sup> December 2012. The TRN required a total of 109 trees to be replanted.

An appeal against the serving of the TRN was subsequently lodged and the appeal was dealt with by way of written representations and an unaccompanied site visit by the Reporter. The decision in this case was to uphold the notice but alter the number of trees which required to be replanted from 109 to 28.

In reaching a decision the Reporter concluded as follows:

- The Reporter found that a TRN could not be served as a breach of the Tree Preservation Order itself (TPO), due to the wording of the TPO, which stated that trees cut down or felled did not require to be replanted in a woodland (the notice is in accordance with the wording of the 1975 Tree Regulations). However, the Council's legal argument that a TRN could and should be served under Section 168(1)(a) of the 1997 Act was upheld. The Council's approach was therefore found to be legally correct, contrary to the arguments of the Appellant that the Council had no powers to require any tree replanting on the site.
- The numbers of trees required to be replanted was reduced. The primary reason for the reduction in numbers is the Reporter concluding that the felling of all trees on the 20m slope was "urgently necessary" in the interests of safety, and therefore replanting was

not required as it was allowed under Section 160(6)(a) of the 1997 Act. This removed 67 trees from the TRN.

- The Reporter determined that the 67 trees felled without authorisation on the 20m slope would be susceptible to falling due to windthrow caused by the felling of surrounding larch and other trees (authorised by PPSL 18.5.11 due to disease and/or the dangerous condition of the trees). The Reporter considered that this would lead to a greater susceptibility to windthrow on the remaining trees, which were on a raised and now more exposed slope, adjacent to residential properties, and potentially without a sufficiently robust root system to withstand winds due to their more sheltered growth history.
- The Reporter also determined that in addition to the 67 trees above, in the absence of any detailed survey after 2005, an additional allowance of a 20% reduction in the number of trees replanted on site to allow for losses since the 2005 survey was appropriate.
- Notwithstanding this, the Reporter did conclude **that an enforceable breach of control had taken place on the lower section of the site**. On the basis of the arbitrary 20% reduction, the Reporter reduced the number of trees required to be replanted on this lower section to the following 28 mixed species. The numbers in brackets refer to the trees on site identified in the original 2005 survey.

§ *One ash tree Whip 175cm to 200cm (Tree 88)*

§ *Four silver birch trees Whips 175cm to 200cm (Trees 87 193 201 and 203)*

§ *One fir tree Whip 175cm to 200cm (Tree 206)*

§ *Three hawthorn trees 231 233 236 Whips 175cm to 200cm*

§ *Seventeen Lawson cypress trees Whips 175cm to 200cm (Trees 126 127 128 129 130 131 132 133 134 183 185 187 188 189 190 192 and 200)*

§ *One sycamore tree Whip 175cm to 200cm (Tree 191)*

§ *One willow tree Whip 175cm to 200cm (Tree 202)*

- The replanting of the trees set out above is required to be carried out in accordance with BS standards and good forestry practice as set out at Schedule 2 of the TRN. This includes the selection of robust and healthy trees, their proper handling, site preparation/clearance works, ground preparation and the use of industry standard planting methodology. All works are required to be carried out by a competent contractor with relevant experience of tree replanting works. The TRN requires that works should not commence before 1 October 2013 and should be completed before 15 November 2013. This is the next available planting season. Officers will monitor the site to ensure that required standards set out in Schedule 2 are met.
- Members should note that a substantial number of the Larch trees which were authorised for felling on 18.5.12 due to disease, were located on this lower area as a dense standing crop and the planting and re-establishment of 28 mixed species trees on this area will, over time, and in conjunction with natural regeneration, secure an

attractive wooded site which will contribute positively to the amenity of the area and the enjoyment of residents meeting the objectives of the TRN. The spacing between the trees, which was previously limited, will also allow a larger variety of flora and fauna to establish due to improved sunlight penetration.

- In summary, the Reporter has upheld the Council's case that both unauthorised felling has taken place, and that the serving of a Tree Replacement Notice requiring tree replanting was correct and reasonable. Although he has formed his own view on not requiring the replanting of the 67 trees on the 20m slope plus a further 20% reduction, the Council has won the substantive argument that an actionable breach of control has taken place and that a TRN could and should have been served on the site owners.
- Members should also note that, as part of the appeal, the Appellant made a further claim for a full award of expenses against the Council on the basis that it acted in an unreasonable manner. In assessing this matter the Reporter noted "the considerable amount of information accumulated by the Council in relation to the woodland since the time when the tree preservation order was first made. A tree survey was carried out in 2005. The Council also had records, both written and photographic, of various site inspections in 2011. Legal advice from an outside source was obtained." He found that the Council did in fact undertake a reasonable amount of investigation and that it was justifiable for it to decide that enforcement action be taken. The Appellant's claim did not show in what way case law or precedent demonstrated that the Council's actions had been unreasonable. As such the claim for expenses was duly dismissed by the Reporter as being unfounded.

## **D) IMPLICATIONS**

Policy: The appeal decision has confirmed that despite the wording of historic woodland TPO's not allowing a TRN to be served to require replanting in a woodland for any unauthorised felling, the Reporter has agreed with the Council's legal argument that a TRN can be served under a breach of the 1997 Act. This decision therefore ensures that there is no need to immediately redraft the wording of historic TPO's in order to ensure a TRN can be served should any unauthorised works to trees take place on other sites covered by a historic TPO.

Financial: None   Personnel: None   Equal Opportunities: None

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