

Item No: 6.5	Classification: Open	Date: May 20 2009	Meeting name: Council Assembly
Report Title:		Constitutional change on tree preservation orders	
Wards or groups effected:		All wards and owners of trees potentially liable to be subject to preservation	
From:		Head of Planning and Transport	

RECOMMENDATION

1. That council assembly agree the recommendation of the constitution steering panel regarding the following amendment to the Council's constitution.

In respect of Part 3(H): under the heading, "Matters Reserved for Decision Planning functions (non-executive) Decision making," insert a Paragraph 2 to read as follows;

"To consider the confirmation of Tree Preservation Orders:"

In addition a sub-paragraph a will be added to read as follows;

- (a) Those which are the subject of a sustained objection, (a "sustained objection" is defined as an objection that is maintained, despite an attempt by officers to resolve it, or which officers consider incapable of resolution by negotiation).

BACKGROUND INFORMATION

2. The purpose of the proposed constitutional amendment is to give clear authority for community council planning meetings to deal with objections to Tree Preservation Orders (TPO).
3. On May 5 2009 the constitutional steering panel (CSP) considered a report from the head of planning and transport regarding a change to Part 3(H) of the constitution. CSP agreed the recommendation outlined in paragraph 1.

Tree Preservation Orders

4. The power to make Tree Preservation Orders (TPOs) is contained in Part VIII of the Town and Country Planning Act 1990. Prior to a TPO being confirmed 28 days notice of the intention to make such an order has to be given by the local planning authority to the owner and adjoining owners of the tree or trees. The person who is the registered proprietor of the land on which the tree is situated and doesn't want a tree to be preserved can upon receipt of the notice fell the tree. To avoid this eventuality, the Act provides for a provisional order, which can be made prior to giving notice to the landowner and will protect the tree for a maximum period of 6 months, whilst notification of the landowner and adjoining owners takes place. To have any lasting effect the provisional order needs to be confirmed. Most TPOs in Southwark are made on a provisional basis

first, before confirmation is considered. The decision as to whether or not to make a provisional Tree Preservation Order is made by the head of development management under delegated powers (see Part 3(P) of the Constitution).

5. All adjoining landowners are also served with a provisional TPO. It is possible for anyone notified of the intention to preserve a tree to object to the order and either request that it is modified, not made or not confirmed. Central government guidance (namely Tree Preservation Orders: A Guide to Law and Good Practice, 2000 issued by the Department for Communities and Local Government) recommends that objections to TPOs should in the first instance be considered by officers to see if they are capable of resolution. Examples of resolution might include, allowing some branches to be removed from a tree, so that the owner or adjoining landowner is more comfortable with its size and/or the water it extracts from the ground. Alternatively where a group of trees are proposed to be preserved, officers may accept a request that a smaller group of trees is preserved, if it is agreed that some trees in the group are of poor quality.
6. If objections are not capable of resolution, the objection is sustained. The local planning authority has the power to decide whether or not the order should be confirmed despite the existence of an objection. Central government guidance recommends that in such an instance the issue should be considered in an open forum, where the officer gives a report of the issues, including an assessment of the amenity of the trees subject to the proposed TPO and the objections received. The objectors and any supporters must also be given a fair opportunity to make representations. The final decision whether or not to confirm a TPO is not subject to an appeal to the planning Inspectorate. If any affected party believes that the TPO has not been properly made, anyone affected may appeal to the High Court within six weeks of its confirmation.
7. TPOs differ from planning applications, in that they are only pursued if considered appropriate by the Local Planning Authority. They are a *restriction* as to the use of land (in terms of what can be done to the trees on it) and a protected tree can have an impact on the development potential of a site. The process of confirmation of a TPO is unusual in that the original decision to make a provisional tree preservation order lies with the local planning authority, as well as the final decision about whether or not to confirm the TPO as permanent).

KEY ISSUES FOR CONSIDERATION

8. The fact the Council determines both whether or not a TPO should be made as well as making the decision about whether or not should succeed or fail adds importance to the need for a division of decision-making within the council. Essentially the council is both the decision maker and the judge as to the appropriateness of the order. This raises issues with regard to the right to have a fair and impartial hearing. An aggrieved party only has the option of a High Court challenge to the TPO, which is in essence limited, to a challenge as to how reasonably the council carried out its functions, not the merits of the TPO itself. Clarity as to who the decision maker is at and adherence to that procedure will limit potential avenues of legal challenge to TPOs.
9. Where a sustained objection is received, the TPO can only be considered in an open forum. No such forum currently exists at officer level. In order to maintain a level of separation of decision making, it is therefore recommended that the decision making is separated within the council. At first instance it is the officer who decides whether it would

be prudent to pursue a provisional TPO and at second level, the most appropriate part of the council to deal with whether or not it ought to be confirmed is at community council level, as invariably TPOs relate to trees or groups of trees that make a specific contribution to visual amenity in a particular local area.

10. It is helpful for members to have clarification from the constitution that they are determining a planning matter and that their decision must be for reasons within the planning framework. Historically arboricultural officers who are based in the environment and housing department not within the regeneration and neighbourhoods department have presented TPO items to the community council exercising planning functions.
11. Clarity as to the function of community council's in respect of the TPO process is desirable for both officers and members, so that each is sure of their role in the process and there is less ambiguity as to when a matter should be referred to a community council and the constitutional basis upon which the community council can determine objections to a TPO. This may enable TPO items to more easily and speedily referred to community council, creating a more efficient decision making process. It also will eliminate any possibility of challenges to the High Court that there is no constitutional basis for referring the decision about whether a TPO should be confirmed or not where there has been a sustained objection.

Reasons for seeking to amend the Constitution at this juncture

12. Tree preservation has been the subject of an investigation of the scrutiny committee and an internal audit. Those investigations have sought to improve, consultation, information and record keeping in connection with tree preservation. They have also looked at the decision making process at officer level. The proposed constitutional amendment seeks to clarify the decision making process and is a natural extension of that work.
13. The need to resolve objections to TPOs arises sporadically and mainly in those areas of the borough with the greater number of trees in private ownership. Unlike planning applications TPO items do not routinely come before community council planning meetings. When these items do come before a community council it is considered that it would be helpful for there to be clear constitutional authority for this to take place. Members have been critical of the delay in bringing TPO items before them and the lack of information as to precisely what their function is in the decision making process.

Consultation

14. The chairs and vice-chairs of community council's meeting received a report on this issue on February 19 2009 and broadly welcomed the proposal to introduce constitutional clarity around TPOs subject to further information and training being made available.

Conclusion

15. In respect of the decision whether or not to confirm a TPO that is the subject of a sustained objection, a review body is required to consider the original officer decision to make a provisional TPO. That body should meet in an open forum the most appropriate body would appear to be the community council of the area in which the preserved trees lie. It is for this reason that it is suggested that the constitution is amended to clearly reflect the fact that a community council should determine this planning function.

Community Impact Statement

16. The issues concerned are deemed to affect all community councils, although private ownership of mature trees (likely to be the subject of a TPO) tends to be greater in the south of the borough. The chairs of community councils are aware that this matter is being considered. Members are due to be consulted on a wider range of issues effecting tree preservation. This item is considered neutral in terms of its impact on local people in respect of their age, disability, faith/religion, gender, race and ethnicity and sexual orientation.

Legal Implications

17. The European Convention of Human Rights has been incorporated in domestic law by the Human Rights Act 1998 requiring public bodies to consider human rights implications in all aspects of their decision making to avoid unlawful interference with individuals' human rights. Article 6 of the Convention entitles individuals to a fair hearing of their objections or case. Consideration of objections to a TPO, potentially engage this right and affording a proper forum for consideration of objections will ensure any unlawful interference is minimised or avoided altogether. In circumstances where trees on private property are subject to proposed TPOs, there is also potential for interference with Article 1, Protocol 1 (Protection of Property) – this provides that individuals have the right to peaceful enjoyment of property without interference. Therefore any potential restrictions on the manner in which that property is used must be subject to proper scrutiny in an open forum. Decisions by community councils being public bodies are capable of judicial review. A decision to confirm a TPO with objections can also be appealed to the High Court under section 288 Town & Country Planning Act 1990 on certain specified grounds. It is considered that in addition to these rights, consideration of such cases in an open forum which affords all parties a fair hearing provide sufficient safeguards to ensure that individuals can receive a fair hearing of their objections so as to ensure no unlawful interference with human rights takes place.

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
Report to the chairs of community councils	Community council team, Southwark Town Hall	Tim Murtagh 020 7525 7187 (Ext 57187)
Report to the constitutional steering panel	Constitutional team, Southwark Town Hall	Lesley John 020 7525 7228 (Ext 57228)

AUDIT TRAIL

Lead Officer	Simon Bevan – Head of Planning and Transport	
Report Author	Gavin Blackburn - Planning Lawyer Lesley John - Constitutional Team	
Version	Final	
Dated	May 6 2009	
Key Decision?	No	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / EXECUTIVE MEMBER		
Officer Title	Comments Sought	Comments included
Strategic Director of Legal and Democratic Services	Yes	Yes
Finance Director	No	No
Executive Member	No	No
Date final report sent to Constitutional/Community Council/Scrutiny Team	May 7 2009	