

THE HIGHLAND COUNCIL
SOUTH PLANNING APPLICATIONS COMMITTEE

Agenda Item	9.1
Report No	PLS 036/15

19 MAY 2015

TREE PRESERVATION ORDER NO. 127, 2015
CROY ROADSIDE, CROY

Summary

Following the identification of procedural deficiencies in the publication and confirmation of Tree Preservation Order No. 117, the Council has raised a new Tree Preservation Order (No. 127), including the revocation of the original Order No.117. The Committee is invited to consider confirmation of Order No.127 including the revocation of the previous Order No.117.

1. Background

- 1.1 Tree Preservation Order (TPO) No. 117 was served on 4 July 2012 covering an area of mixed woodland belts located either side of the B9006 road, to the south west of Croy village. The woodland belts contain a number of properties. A map showing the location and extent of TPO 117 (Appendix 1) and an aerial photograph taken in 2009 (Appendix 2) are attached.
- 1.2 The serving of TPO 117 followed tree felling in relation to the property 'Carrickholm' and within the adjacent margin of the property 'Westerlea' and now within the ownership of 'Carrickholm'. The Croy Community Council and colleagues in the local planning office reported the tree felling
- 1.3 The 'Carrickholm' property holds a planning condition for the retention of trees "in order to reduce the overall impact of the dwelling in open countryside" – planning reference 02/00361/REMIN.
- 1.4 The TPO was referred to SPAC on 11 December 2012. Objections had been received from the owners of 'Carrickholm' and 'Westerlea'. A letter of support had been received from the Croy and Culloden Community Council.
- 1.5 The Committee unanimously agreed to confirm TPO 117.
- 1.6 Since that time the owner of "Carrickholm' has applied on two occasions for consent to remove trees under TPO 117, firstly, in May 2013 and then in October 2014. In the first application the removal of eight trees was sought. Consent was given for the removal of six trees on the grounds of condition of which three were as a result of past ground works/disturbance. The second application was for the removal of eleven trees and on the grounds, as per the first application, that the trees were in conflict with the property's solar panels and the construction of a boundary wall. The second application was refused. No appeal was lodged in relation to the decisions on

either application.

- 1.7 Following the refusal of the second application the agent acting on behalf of the owners of 'Carrickholm' made enquiries as to the procedures undertaken by the Council in serving TPO 117. That highlighted that the TPO Notice had not, as required, been advertised in the local press. It was subsequently found that the TPO had not been registered in the Land Register as required following the confirmation of a TPO. These deficiencies are regretted for all parties concerned.
- 1.8 In view of the above, for clarity and on the basis that TPO 117 was otherwise open to challenge, the Council raised a new TPO (No. 127) on 26 February 2015.
- 1.9 The extent of the new TPO is as before (Appendix 1). All necessary procedures have been followed including the TPO being advertised in the local paper and being made available in the Croy Post Office. All interested persons have been notified directly.
- 1.10 TPO 127 incorporates the relevant provision for revocation of TPO 117.
- 1.11 Since the making of TPO 127 felling of trees which were the subject of the Order has taken place, as a result of which the Council have become involved in Court proceedings.

2. Representations

- 2.1 Four letters of objection have been received. It is normal to summarise representations but given the extensive nature of the comments received from the owner of 'Carrickholm' and his agents they have been appended in full to this report (Appendix 3). For completeness, the other three objections have also been appended (Appendix 4).
- 2.2 A letter in support of the TPO has been received from the Croy Community Council.

3. Appraisal

- 3.1 The woodland belts are considered to be important in local amenity terms. They are a strong feature to the public road, a busy commuter and tourist route, as well as to the setting of a number of properties. The woodland is, as part of a wider coverage, identified in the Ancient Woodland Inventory as woodland of 'Long Established Plantation Origin' (LEPO1860). That is a site with continuity as woodland for at least 140 years. The woodland was established as policy/shelter wood planting related to the local estate (Holme Rose/Dalcross Castle). The Highland wide Local Development Plan recognises such woodland cover as being of local regional importance.
- 3.2 The Planning Act does not define 'amenity' nor does it prescribe the circumstances in which it is in the interests to make a TPO. TPOs should be used to protect selected trees or woodland, if their removal would have a significant impact on the local environment and its enjoyment by the public. In assessment of 'amenity value' the following criteria have been considered:

- **visibility** – roadside and properties;
- **individual impact** – long standing and strong overall form/potential to

continue as an amenity feature/high contribution to character of road and individual properties;

- **wider impact** – integral element of the wider mature and structured woodland adding to the setting and character of the wider surroundings; and
- **expediency** – risk of trees being removed to detriment of the area.

3.3 Under the ‘Tree Evaluation Method for Preservation Orders’ (TEMPO) the woodland has been scored as “Definitely merits TPO”. The Council uses TEMPO as an independent method of assessing the need for TPOs. This tool is well recognised and used by a wide number of local authorities.

3.4 In conclusion, it is considered that the woodland belts covered by the Order are an important amenity feature of the area. Active management is certainly a key consideration given the overall lack of management. The Council would wish to work with all owners in securing management works.

4. Response to objections

4.1 ‘**Carrickholm**’ (Appendix 3) – Over a period of time there has been considerable correspondence with the owner and his planning and arboricultural advisors. A large number of the points raised in the objection have already been responded to. In that regard, the following correspondence is attached for the Committee’s reference:

- letter of 14 January 2015 from Chief Executive to Mr Byers (Appendix 5); and
- letter of 22 April 2015 from Chief Executive to Mr Paterson (Appendix 6)

4.2 The letter of objection of 30 April 2015 submitted Mr Byers, and the supporting letters of 28 April 2015 from Mr Paterson and the representation drafted by Mr Twist, both on behalf of Mr Byers, with the respective enclosures, reflect two main aspects. Firstly, these express views on the competence of the revocation procedure implemented by the Council; secondly, these address amenity issues in the context of justification for TPO 127.

4.3 **Revocation Procedures** – Both Agents for the Objector maintain that the Council may only address revocation of Order 117 by promoting a separate Revocation Order, which they argue as a separate TPO, the sole function of which revokes an existing Order. They argue that, in the absence of a “competent” Revocation Order, TPO 117 continues in existence, and that TPO 127 could not be competently promoted, since two TPOs cannot exist over the same trees/woodland at the same time.

4.4 As noted at Para 1.10 of this Report TPO 127 contains the relevant provision revoking TPO 117. There is no legal requirement that such a revocation must be implemented by a stand-alone Revocation Order. Indeed, it is normal practice where an Order of the current type replaces a prior Order, for the replacement Order to implement the revocation. Aside from any other consideration, the timing of confirmation of the new Order including the revocation of the old Order must necessarily coincide. Indeed, on that basis, the process excludes the possibility of duplicate provision.

- 4.5 **Amenity Justification** - The comments on the definition of ‘amenity’ and its assessment are addressed in Paragraph 3.2 above. The assessment of the amenity value of these woodland strips was re-assessed as part of the process in making Order TPO 127 and it was found that there remained clear justification of the Order.
- 4.6 The map used in TPO127 is based on the current Ordnance Survey data. It is acknowledged that not all properties are shown. For Committee’s reference a ‘marked-up’ map showing the approximate position of the other housing is attached (Appendix 7). The OS map clearly shows the extent of TPO 127 as well as being read in conjunction with the written description as per Schedule 1 of the TPO document.
- 4.7 The use of the ‘Woodland’ classification is seen as appropriate in this particular case. The on-going loss of trees at Carrickholm has created a break in the continuity of the woodland cover but for the remaining and greater extent of the TPO it is a woodland belt, albeit with a number of properties placed within.
- 4.8 **Taigh Nam Moireach’/’Cromdale View’/’Creagan’** (Appendix 4) – All three objections cite the same grounds for objection: that the TPO will have “serious legal implications for their properties”. The standard letters do not expand on what those legal implications are. Under the terms of the Order, tree works will require consent and likely to be subject to a replacement planting obligation in the event of tree removal. The Council would wish to encourage appropriate tree management and would be available to offer practical advice.
- 4.9 **Croy and Culloden Community Council** – The Community Council is in support of TPO 127. As “a rural area the trees add to the general approach to the village and there is the likelihood that they will help with drainage in what appears to be a rather wet area”.
5. **Conclusion**
- 5.1 The issue before Members is whether they are minded to confirm TPO 127 (with any such modifications as Members consider) or to refuse to confirm TPO 127. If the TPO is not confirmed it will fall. Confirmation of the TPO will necessarily include the revocation of TPO 117.
- 5.2 In relation to the ‘Carrickholm’ objection the two primary considerations are, firstly, the justification for the TPO and secondly, that TPO 127 has been properly executed including the steps being taken to revoke TPO 117. On both counts the advice is that both considerations have been met.

Recommendation

The Committee is asked to confirm the Order as it stands.

Designation: Director of Development and Infrastructure
Date: 8 May 2015
Author: Robert Patton, Principal Officer, Land



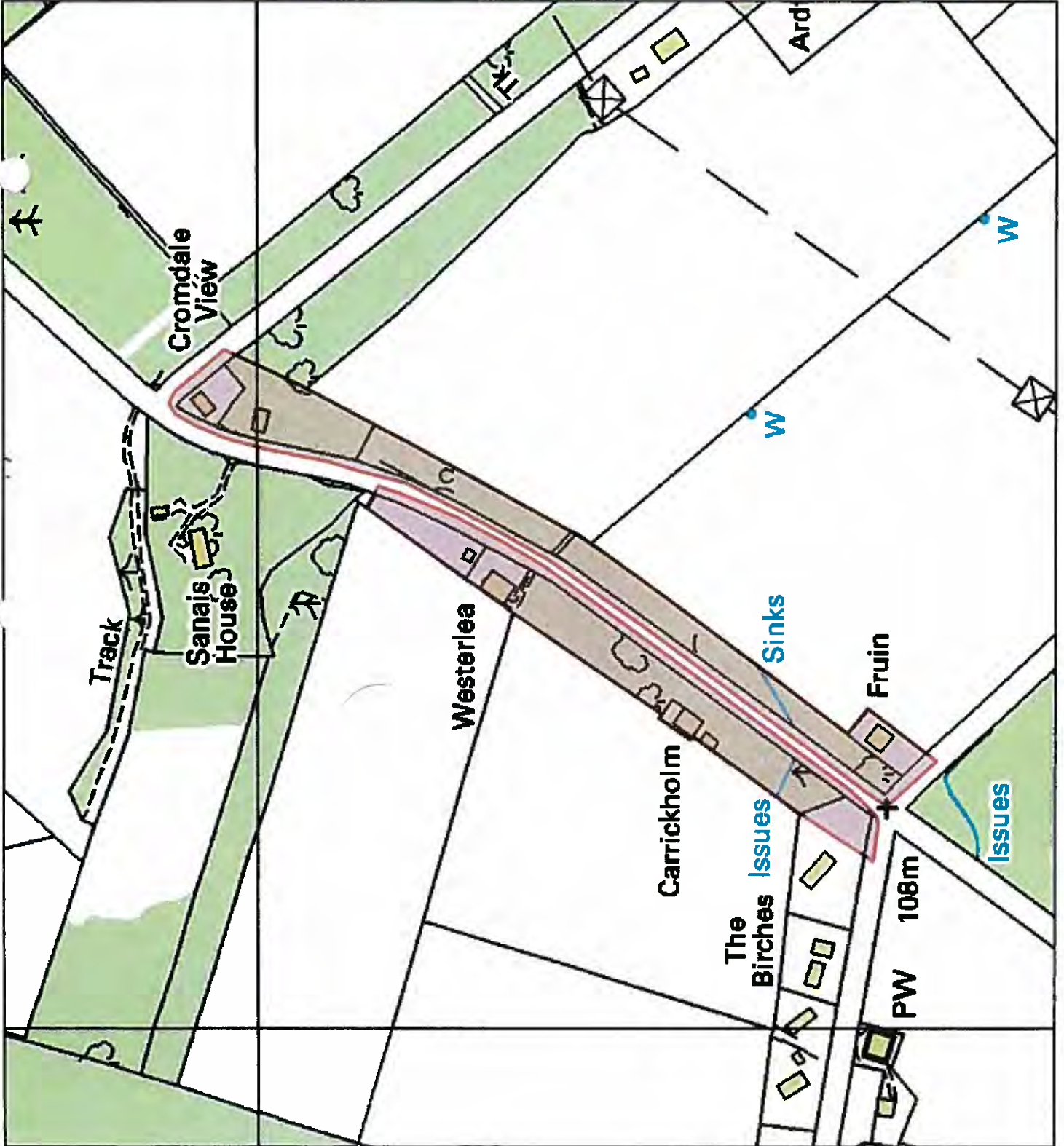
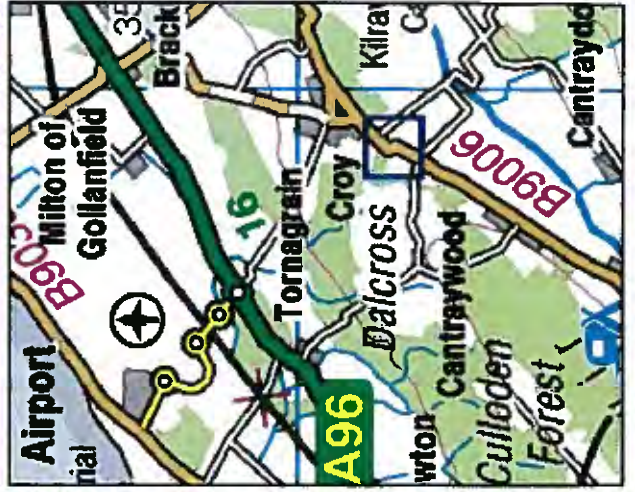
THE HIGHLAND COUNCIL
Planning & Development Service
TREE PRESERVATION ORDER No.HC117

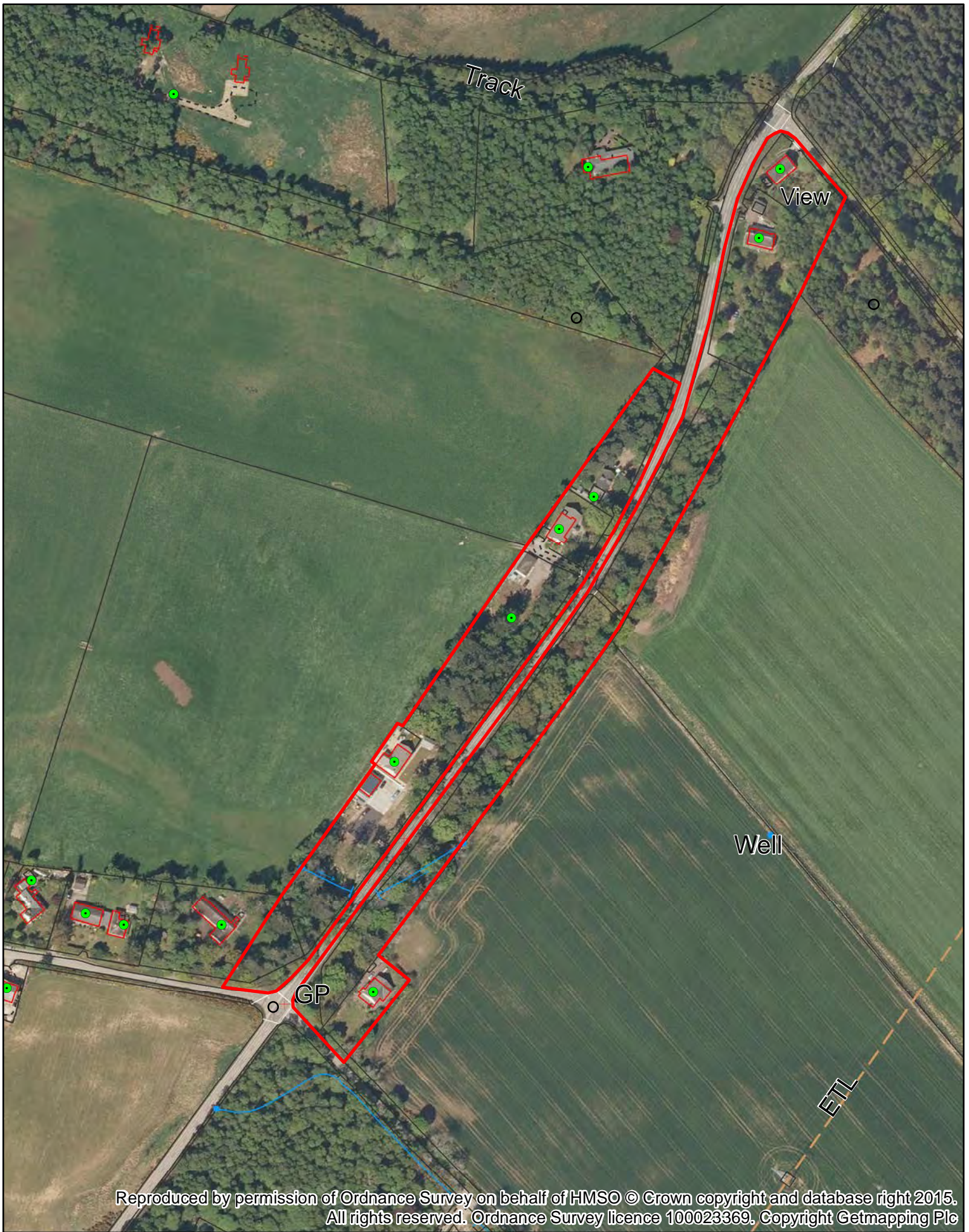
Croy Roadside
Croy

July 2012

APPENDIX 1

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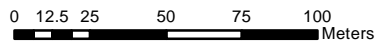


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Croy Roadside TPO

Aerial Photograph

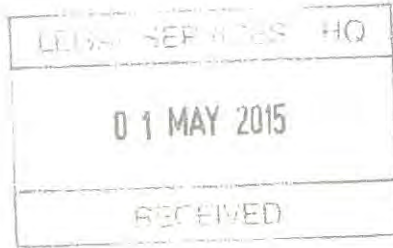


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Date:



APPENDIX 3



Mr & Mrs G. Byers
Carrickholm
Cantray Crossroads,
Croy
IV2 5PN

FAO: Forbes Rennie
Steve Barron
Chief Executive
Highland Council
Glenurquhart Road
Inverness
IV3 5NX

29 April, 2015

Dear Sir,

**Representation in respect of Tree Preservation Order No. HC127/2015,
Croy Roadside, Croy**

I refer to your letter of 22 April, 2015, addressed to my arboricultural agent Derek Paterson.

Following on from the previous intimation from my solicitor Mr Swarbrick of a representation in respect of the above TPO, and your kind invitation to submit same in more detail, I duly make such representation.

Thank you for confirming in your letter that you shall ensure this representation is placed before Members for consideration at the forthcoming meeting of the South Planning Applications Committee on 19 May, 2015.

Yours faithfully,

George Byers.

**Carrickholm
Cantray
Croy
IV2 5PN**

30/04/2015

FOR THE ATTENTION OF THE SOUTH PLANNING APPLICATIONS COMMITTEE

OBJECTION TO TPO127 RAISED AGAINST CARRICKHOLM, CANTRAY, CROY

Dear Sirs/Madams.

I am forwarding this directly to all of the Committee Members myself to ensure all of my submission can be read.

The attached documentation associated with this representation is information given by qualified persons who are recognised experts in their field.

My points are given in the hope that reason will at last prevail. I have attached a copy of the initial outline planning consent granted for my property, (IN/1999/193). It can be clearly seen that Cllr. Balfour, to get the application approved, stated that the 'trees affected by the proposal were not worthy of retention and were actually in need of a management plan'. That was in 1999. The deterioration of the trees has continued.

I have never at any time given any indication that I was not prepared to re-plant where practicable, and about 6 years ago, planted 40 trees, but due to my inexperience in forestry methods, my efforts were unsuccessful. I have subsequently planted another 22 trees to date, most of which are thriving, and where failures exist, will replant them, and indeed intend to plant more when conditions are right. I have also planted 198 privet hedge plants, all of which are thriving.

I have to highlight the Highland Council's failure, which was admitted, to make available the information that this site was originally an agricultural shelterbelt, and since the completion of a further 3 houses since 2003, is now designated as individual property garden ground. This completely negates the Highland Council's argument that this area is woodland.

I recently had to answer a summons to the Inverness Sheriff Court, and part of the Writ included a site map of this area, dated 2009, which didn't include the new house immediately east of my property, or indicate the large area cleared to accommodate that development.

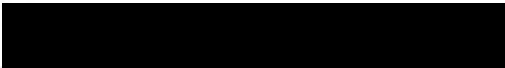
In 2012 when TPO117 was initiated, the Highland Council refused me the courtesy of a site visit, even though it recommends in the 'Tree Preservation Orders: A guide to the law and good practice', that where controversy exists, a site visit would be prudent.

Recently I felled 3 large trees which were a recognised risk to the public and my property, and a small oak to allow clearance for one of the big trees. The Council Forestry Dept. of course did not recognise there was any risk involved, although my reasons were as a result of advice given by a qualified Arboriculturist and 3 highly respected local Forestry Contractors. The Highland Council have admitted they do not have anyone in their Forestry Dept. who is qualified in Arboriculture.

The Committee are respectfully invited to undertake a site visit should they consider it appropriate, and they will be made welcome.

And finally, the application of a TPO on this property will effectively halt the continuation of the improvements already in progress at Carrickholm. Improvements which incidentally have been complimented on by all my known neighbours with the exception of one person.

Signed Respectfully


George Byers

THE HIGHLAND COUNCIL

INVERNESS AREA PLANNING COMMITTEE

Council Chamber, Town House, Inverness,
Monday, 7th June, 1999 at 10.00 a.m.

PRESENT:

Mr C L Goodman
Mr S J Shiels
Mr J C Cole
Mrs M C Davidson
Provost W J Smith
Mrs M A MacLennan
Mr R B Simpson
Mrs E MacRae
Mrs J N Home
Mrs G McCreath

Mr G J Coutts
Mrs C M Cumming
Mr R A C Balfour
Mr R J Lyon
Mr J W A Thomson
Mr A J Dick
Mr D R Munro
Mr N A Donald
Mrs K G Metheson

Officials in attendance:

Mr G Boyd, Area Planning & Building Control Manager
Mr W A MacInnes, Area Roads & Transport Manager
Miss J Macleannan, Clerk

Mr C L Goodman in the Chair

1. INTRODUCTION

The Chairman welcomed newly elected Members to the first meeting of the Inverness Area Planning Committee. He outlined the procedure adopted for consideration of applications by the Committee and stressed the need for a sensitive approach to be taken. Applications had to be considered having regard to planning legislation and to the terms of the Local Plan and to national and local policies. He pointed out that the Highland Council made strenuous efforts to consult with the public when formulating its Structure Plans and Local Plans and it was therefore important that cognisance was taken of these in the Committee's deliberations.

2. APOLOGIES

Apologies for absence were intimated on behalf of Mr B M Salmon, Mr P Corbett, Ms E MacDonald and Mr R Wynd.

3. PLANNING APPLICATIONS TO BE DETERMINED

There had been circulated Reports Nos. PL56/99 - PL85/99 by the Area Planning & Building Control Manager on individual planning applications which the Committee disposed of as undernoted:-

- 3.1 Erection (in outline) of 15 house at Cantray Crossroads beside the B9006 for Mr & Mrs MacKenzie (IN/1999/193) – As the objector had indicated that he did not wish to attend the meeting this application was no longer the subject of a formal hearing procedure.

Mr R A C Balfour the local Member spoke in support of the application. While he acknowledged the concerns which had been expressed in relation to the badger set and to the ornithology of the area he pointed out that the proposed site was situated some distance from the set and that there was currently a problem with crows in the surrounding area. The applicant was willing to landscape the site and to undertake a programme of tree management and it was hoped that this would help alleviate any problems. Houses already existed in the vicinity and he was of the view that an additional house would not have any significant detrimental impact. The need to support local communities was emphasised and as the applicant was already employed in the area it was hoped that the Committee would permit the development. However some Members were of the view that if the application was approved it would be to the detriment of the area. The B9006 was a particularly busy road with heavy traffic and while site lines could be achieved in accordance with the requirements of the Area Roads & Transport Service this would necessitate the removal of a number of trees. In addition, the existing woodland was considered be particularly attractive and its retention was sought.

Thereafter Mr R A C Balfour seconded by Mr N Donald moved that the application be approved on the grounds that the applicant came from a local family who wished to remain in the area, that the trees affected by the proposal were not worthy of retention and were actually in need of a management plan and that the proposal would not set a precedent. Mr C L Goodman seconded by Mr D R Munro moved as an amendment that the application be refused. On a division the MOTION was CARRIED by 13 votes to 5 and accordingly the Committee APPROVED the application subject to the following conditions:-

1. That as the application is in outline only detailed plans of the proposed development be submitted to the Planning Authority within three years of the date of this approval.
2. That in the interests of visual amenity and to reduce the prominence of the house a plan be submitted for the approval of the Planning Authority which illustrates trees to be removed, new planting proposals and subsequent tree management proposals.
3. That in the interests of visual amenity and to reduce the prominence of the house it be single storey or one-and-a-half storeys, with black roofing tiles and white walls, set down into the site with minimum underbuilding.
4. That in the interests of visual amenity and to reduce the prominence of the house it be set as far back from the B9006 road as is practicable to the satisfaction of the Planning Authority.
5. That in the interests of traffic safety the access shall be laid out in accordance with the schedule.

**NOTE: Mr. R.A.C.Balfour (Councillor) seconded BY Mr. N. Donald moved that the application be approved on the grounds -----
-----"that the trees affected by the proposal were not worthy of retention and were actually in need of a management plan"**

Derek Paterson

TREE CARE : LANDSCAPE DESIGN & BUILD : ADVISORY SERVICES

2 Bruce Street, Bannockburn, Stirling. FK7 8LF

24-hour Tel. & Fax. 01786 489612

e-mail: derek.paterson@hotmail.co.uk

Tree Preservation Order No. HC127/2015, Croy Roadside, Croy

Representation on behalf of

**Mr & Mrs George Byers, Carrickholm, Cantray Crossroads,
Croy IV2 5PN**

28 April, 2015

- 1) This representation is made under Regulation 5 of the 2010 Regulations (*being The Town & Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 2010 - SSI 2010/434*).
- 2) The grounds of this representation are that:-
 - a) This TPO HC127 cannot be lawfully made to replace the previous TPO No. HC117/2012 unless and until the previous TPO is legally revoked.
 - b) Section 275(8) of the 1997 Act (*being the Town & Country Planning (Scotland) Act 1997, as amended by the 2006 Act*) empowers a planning authority to vary or revoke a TPO by making another TPO.
 - c) A “revocation order” is defined in Regulation 2 as a TPO which revokes another TPO.
 - d) The procedures for making and confirming a revocation TPO are almost the identical procedures to those used for making and confirming a basic TPO.
 - e) These procedures are specified according to the prescription laid down in the 2010 Regulations and in the supporting guidance by the Scottish Government, (*being the Scottish Planning Series, Planning Circular 1/2011, Tree Preservation Orders*).
 - f) It should be noted that statements in the guidance (*Planning Circular 1/2011*) “*may be material considerations ... in development management decisions*”.
 - g) In a letter sent by Mrs K Lyons, Principal Solicitor, dated

26.2.15 (see Production 1 annexed.) a statement is made that Highland Council has "*revoked the original Order HC117/2012*". This statement is not sufficient to comply with the Act, the Regulations, and the Guidance which prescribe the procedures for making and confirming a revocation TPO.

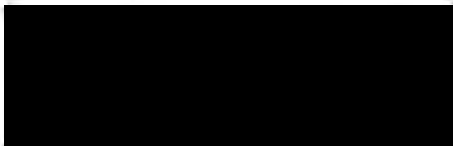
- h) Despite the making of the above statement, no revocation TPO has been made by the Council in respect of the first TPO HC117/2012 and it follows logically that no such revocation TPO has been confirmed by the Planning Committee.
- i) In Scottish Law there is no legal construct which allows two or more TPOs to exist concurrently upon the same trees.
- j) It follows that the second TPO HC127/2015 as it stands, cannot be confirmed by the Planning Committee and I respectfully request that the Committee declare that, for the legal reasons explained above, it is not confirmed.

- 3) In regard to the first TPO HC117/2012, the agents acting on my behalf, and after a thorough investigation, have determined that there have been multiple faults in its making and administration. All of the faults have been advised to the Chief Executive and other officials, (see Production 2 annexed).

The Council's officials have concurred that the first TPO is so fundamentally flawed that it would not survive a challenge in the Scottish courts, and this has contributed to their decision to revoke.

However that decision has not been properly followed up by the making of a revocation TPO in accordance with the prescribed procedures.

I therefore request with respect that the Planning Committee order that a revocation order is duly made, giving full effect to that decision already made by the Council's officials.



Derek Paterson, Hons.Dip.Hort.Edin.; N.D.Arbor.
On behalf of Mr & Mrs G. Byers

Encl. Annex 1 and Annex 2

**FIRST CLASS RECORDED DELIVERY**

Mr & Mrs Byers
Carrickholm
Croy
By Inverness
IV2 5PN

Please ask for: Mrs K Lyons
Direct Dial: [REDACTED]
Our Ref: L/PLIN254:KL
Your Ref:
Date: 26 February 2015
Fax: [REDACTED]
Legal Post No: LP- 9, Inverness 1
**Please reply to Legal Services, The Highland Council
Glenurquhart Road, Inverness IV3 5NX**

Dear Sir & Madam,

THE HIGHLAND COUNCIL TREE PRESERVATION ORDER NO HC127, 2015, CROY ROADSIDE, CROY

It has been brought to the Council's attention that, unfortunately, the tree preservation order for Croy Roadside (No. HC117, 2012) made in July 2012 and confirmed in December 2012 was not advertised in the local press. Although the appropriate notification of land owners was undertaken, the Council acknowledges that other members of the public may have wished to lodge representations (either in support of or in opposition to) the Order. To ensure that this opportunity is available the Council has made the above Order and revoked the original Order, HC117, 2012.

I understand that you are the owner or lessee or occupier of land affected by the above Order.

In terms of Regulation 4 of the Town and Country Planning (Tree Preservation Order and Trees in Conservation Area) (Scotland) Regulations 2010, I am required to serve notice upon you of the enclosed Order. Please see the enclosed notice for details of how to make a representation in respect of the Order. All representations will be taken into account before a decision is made on whether or not the Order is confirmed.

Should you wish to discuss the terms of the Order, please contact Grant Stuart, Forestry Officer on Tel: 01463 702403.

You will note that the Order has immediate effect.

Yours faithfully,

[REDACTED]
PRINCIPAL SOLICITOR

Note: Area(s) or tree(s) in which it is understood you have an interest: W1
Enc TPO
Notice

Derek Paterson

TREE CARE : LANDSCAPE DESIGN & BUILD : ADVISORY SERVICES

2 Bruce Street, Bannockburn, Stirling. FK7 8LF

24-hour Tel. & Fax. 01786 489612

e-mail: derek.paterson@hotmail.co.uk

NEXT DAY GUARANTEED

Steven Barron, Esq.
Chief Executive
Highland Council HQ
Glenurquhart Road
Inverness
IV3 5NX

11 April, 2015

Dear Sir,

**Mr & Mrs George Byers, Carrickholm, Cantray Crossroads, Croy IV2 5PN
Tree Preservation Orders Nos. 117/ 2012 and 127/ 2015, Croy Roadside, Croy**

Thank you for your letter of 15 March and I note your responses.

I wrote further on 25 March 2015 asking that the points in my letter of 8th March, which were not addressed by Mr Hamilton, should be addressed, and raising some further matters for your consideration. I am not yet in receipt of any responses to that third letter.

With regard to your above letter of 15 March 2015, I cannot recall, in any of my previous correspondence to you, having suggested or claimed that the Byers were prejudiced by the failure of HC to advertise TPO117 in the press. I do wonder why you find it necessary to make such a statement since it completely ignores the very valid point I put to you originally (my letter of 13 February 2015) that "*...the TPO has been invalidly promulgated, in that the procedures as laid down in the Act, and the Regulations made thereunder, have not been followed as prescribed ...*"

As I have made you aware, an in-depth investigation into the making and administration of TPO117 was commenced by myself and the Byers' agent Mr Tony Twist, and that investigation is ongoing as I write. I am getting a sense from your responses that the only fault that has been conveyed to you is the lack of newspaper advert. I regret informing you that the faults so far uncovered are considerably deeper & wider and taken together add up to a fairly monumental case of maladministration.

Consider the following:-

The **Primary** Legislation defines the powers of the Scottish Ministers, *Section 164*, or a planning authority, *Section 160(1)* to make Tree Preservation Orders. The provisions included in a TPO are set out in *Section 160(3)*.

The **Secondary** Legislation provides for the **form** of a TPO and the procedures for **making** and then **confirming** a TPO; thereafter instructs the recording by deed of the TPO in the Register of Sasines or registering in the Land Register of Scotland, *Section 161(2)*.

NB - the previous Regulations of 1975 contained the procedures for **amending** or **revoking** a TPO but these are now removed to Guidance.

The **Guidance** contained in **Planning Circular 1/2011** sets out the Scottish Government **policy and procedures** for the implementation of the Act & Regulations and is “material consideration”. It gives an overview of TPO **procedures** & explains how the Act and Regulations fit together. The Model Order preferred by the Scottish Government is set out in *Annex A*.

Of note are:-

- Para.7 - Making the TPO
- Para. 12 - Procedures and Representations
- Para. 14 - Confirming the TPO
- Para 23 - Varying and Revoking Orders
- Annex A - Model form of Tree Preservation Order

TPO HC117/2012 - the first TPO

- 1) The premise of TPO 117 I believe to be a construct to give it justification “... *an important and long standing amenity feature of the area.*”. Planning authorities do not have licence to create TPOs on a whim but must be able to substantiate their justification to a court. The trees are located in a rural area which is a veritable ocean of trees in which they are a rather insignificant part. The loss of some or even all (unlikely) of the trees subject to the TPO, in my considered view, would have little or no impact on the amenity of the heavily treed and wooded surrounding countryside. You will not be able to justify in a court that these trees are “important”.
- 2) At the Planning Committee meeting on 7.6.99 when outline planning permission was granted for the site (now Carrickholm) councillor Balfour, whom we suspect was the prime mover for the TPO in 2012, stated that “... *the trees affected by the proposal were not worthy of retention* ...” and this was accepted by the committee in granting OPP.
- 3) Please consult HC’s own Supplementary Planning Guidance, Trees, Woodlands & Development, para 4.3.2 ; “Safety” where you state “... *it is paramount that a safe distance is established between new buildings and existing trees necessary to maintain a separation of 20 metres or more*” There is nothing new about that advice, it is simply re-stating long-advocated advice from some very prominent & august bodies who have long experience in dealing with such matters.
- 4) After the development of Carrickholm the Planning Authority normally has 2 years from date of the completion certificate of 29.8.03 during which, if they decide that further protection of the trees is required (following on from conditions attached to the consent), they can continue the protection by making a TPO. No such TPO was made at the time, nor for any of the proceeding nor following house-building within the area of the TPO. Clearly the planning authority did not consider the trees to be worthy of further protection.
- 5) The planning **conditions** applying to tree matters, attached to the consent, fall after the 2-year period following completion certificate. However the Byers continued to be subject to intervention by your Forestry Officer in relation to their trees, in my view unlawfully and by him exceeding his authority. Mr Byers can and will provide full details of all of the instances.
- 6) The use of the “woodland” category for this TPO is completely wrong. The trees are located within the garden grounds of 8 houses and a group along the edge of a farmer’s fields. HC have completely ignored the very substantial change to the status of the land from former agricultural shelterbelt to housing development. Reference the English Guidance - “*It is unlikely to be appropriate to use the woodland classification in gardens.*” Large gaps in the shelterbelt have been

opened up over the years to accommodate the successive house building so that the shelterbelt is no longer a contiguous whole but is composed of the remnants of the shelterbelt in disconnected groups. An "area" classification would have been more appropriate, or a combination of several "groups".

7) The Keeper of the Registers is tasked by the Scottish executive to provide a free service to consider draft TPOs prior to registration, *Circular para 16*. HC **failed** to avail of this service and had they done so may have been able to establish all of the "interested persons" to whom they were required to serve Notice of the TPO etc.

8) The Regulations *4(d) & 2(a)* require that every "owner, lessee and occupier" must be notified of the making of a TPO. This is an inclusive must, not an optional must.. **Only 8** of the 9 owners were properly notified of TPO 117 in July 2012, the exception being the owner of "Fruin", Mr Farquhar - only his tenant at the time received notification. Mr. Farquhar resides in Edinburgh.

9) *Reg 4(d)* requires Notice to be given to "interested persons" which includes those having an interest in the "materials in, on or under such land" *Reg 2(b)(ii)*. HC have **failed** to notify any such persons and have provided no evidence that they made any attempt to trace anyone holding the mineral rights in any of the 9 properties.

10) HC **failed** to advertise Notice of the TPO in a local newspaper *Reg. 4(b)*, thereby preventing "any person" *Reg 5(b)* the proper opportunity to make representation. This fault you already know about because it is the only fault about which your staff have briefed you.

11) By implication, there being no newspaper advertisement, a copy of the advertisement could **not have been** included in the Notice to the owners, lessees and occupiers. (*Circular para. 12*).

12) HC **failed** to make available locally copies of the TPO Notice and documentation *Reg 4(a)*.

13) 8 of the 9 owners have attested to Tony Twist that they were **never in receipt** of the **confirmed** Order in December 2012. The owner of "Silverglade" has yet to confirm either receipt or non-receipt. We suspect that the same applies to the mineral rights owners.

14) HC **failed** to make a confirmed copy of the TPO available locally *Reg 4(a) & Circular para 21*.

15) A confirmed TPO **must** be registered in the Land Register of Scotland and becomes a burden on each property. We have established that no such burden has been recorded on the title to "Carrickholm", and suspect that on further investigation the same will be true of the other 8 properties.

16) HC has consistently **failed** to maintain a public Register of Applications etc in respect of this or any other TPO made by them - *Act S.36 & Circular - Model Form of Order, Schedule 2, Parts I & II*. I have previously brought this to your attention.

17) HC have carried out a TEMPO assessment of the "woodland" but this only serves to provide an assessment of a "woodland's" fitness for TPO protection. There would normally be a full arboricultural tree survey to follow which identifies the tree species, examines their health, assess their fitness for retention & their worthiness for protection. It would normally identify those trees which are **excepted** from the TPO controls. HC have **failed** to carry out this more thorough survey. Without it, enforcing any contraventions in a court are near impossible.

REVOCATION of TPO HC117/2012

Following my letter of 13 February 2015 you made a statement that TPO 117 had been revoked, and immediately produced a replacement TPO HC127/2015.

In the same way that the making of a TPO is prescribed by the Scottish Executive, so is the revocation of a TPO similarly prescribed. The *Act S.275(8)* and the *Circular para 23* together set out the revocation procedure. It requires the making of a **TPO Revocation Order** using virtually all the same procedures as for the making of a TPO.

HC have completely and comprehensively **failed** to make a Revocation Order for TPO 117; **failed** to give Notification to “interested persons”; **failed** to advertise; etc etc and **failed** to have it approved and confirmed in the usual manner by the planning committee.

It is **not a lawful process** for a replacement TPO to be made before and until the original TPO has been properly and lawfully revoked. Notwithstanding that HC have acknowledged and agreed that TPO 117 was not lawfully made in the first place it does mean that effectively you have two unlawful TPOs covering the same trees. I cannot think of any instance in the UK where such a situation has ever existed. HC, by act of maladministration, are making TPO history.

REPLACEMENT TPO HC127.2015

Replacement TPO 127 was made in a rush on 26 February 2015. I have made previous comment on this. Since TPO 117 has not been lawfully revoked, the replacement TPO cannot have any validity in law.

The “woodland” classification has persisted. Significantly the same owner at “Fruin” has not been notified, and none of the Mineral Rights owners. Once again HC have **failed** to avail of the Keeper’s service for draft TPOs.

I note that several paragraphs contained within the Model form of Order (*Circular - Annex A*) are missing from the TPO 127 documentation. These cover important exceptions to the protections afforded by a TPO and therefore adversely affect my clients’ rights. Is HC seeking to re-write TPO law?

THE RECENT TREE FELLING

Following the revelations detailed above, it was of my considered opinion that there were no restrictions lawfully in force to prevent Mr & Mrs Byers from removing from their property any trees which they desired to remove. Of particular worry were those trees which were a safety concern and were growing within the safety zone, thereby putting the house (15m distant) and chalet (3m distant) at risk and at the same time were a possible future risk to the public highway because they leaned in that direction. I so advised them in my letter of advice dated 22 March 2015. **Copy attached.** Mr Byers heeded my advice and took those at-risk trees down, thereby safeguarding both his occupier’s and civil liabilities. He did what a “prudent” owner should have done.

LEGAL ACTION BY HC

The writ and legal action initiated by HC in respect of TPO 127 cannot possibly be competent, given that 127 cannot exist as a legal entity for the reasons given above. Effectively it amounts to a false -

prosecution of the Byers.

SUMMARY

The entire process of the making and administration of this TPO is blighted by a level of maladministration which amounts to a serious failing by HC in their **duty of care** in the exercising of their public duties and to George & Deirdre Byers in particular, and to the numerous other owners and "interested person". I have not come across anything quite like it in my entire career. Our legal advices are that HC has put themselves in a position which they will not be able to defend in court.

The Byers have been subjected to an immense amount of interference to the ordinary enjoyment of their property and to their normal civil rights as property owners. Over a period of two and a half years they have suffered a degree of worry, annoyance, frustration, anger and expense, such as to cause a level of stress sufficient to adversely affect both of their health, and for which redress and compensation will be sought.

There must needs be a proper investigation and enquiry into the *modus operandi* of HC and their officials, officers and members. HC are deemed by the courts to have access, either in-house or externally, to the knowledge, advice and expertise which they require in order to execute their duties and functions and there can be no excuse for their appallingly poor administration of this TPO. There is cause for considerable concern over the public expenditures squandered in their pursuit of this TPO enterprise undertaken from very suspect motives and which, ultimately I believe, they will not be able to sustain.

I cannot comment on the legal action which you have now enjoined except to say that it is rash and precipitate. Much more sensible and proportionate would have been a continued dialogue, which, if approached in a spirit which seeks resolution, might have been a surer bet.

I trust that you and your staff will take on board all of the above and will reconsider your present position. It is no function of mine, nor of the Byers, to be coaching your staff in the niceties of TPOs, however, to assist you in the above process I enclose herewith copy flowcharts for (a) making a TPO and (b) revoking a TPO, which is information your officials should have had at their fingertips right from the start.

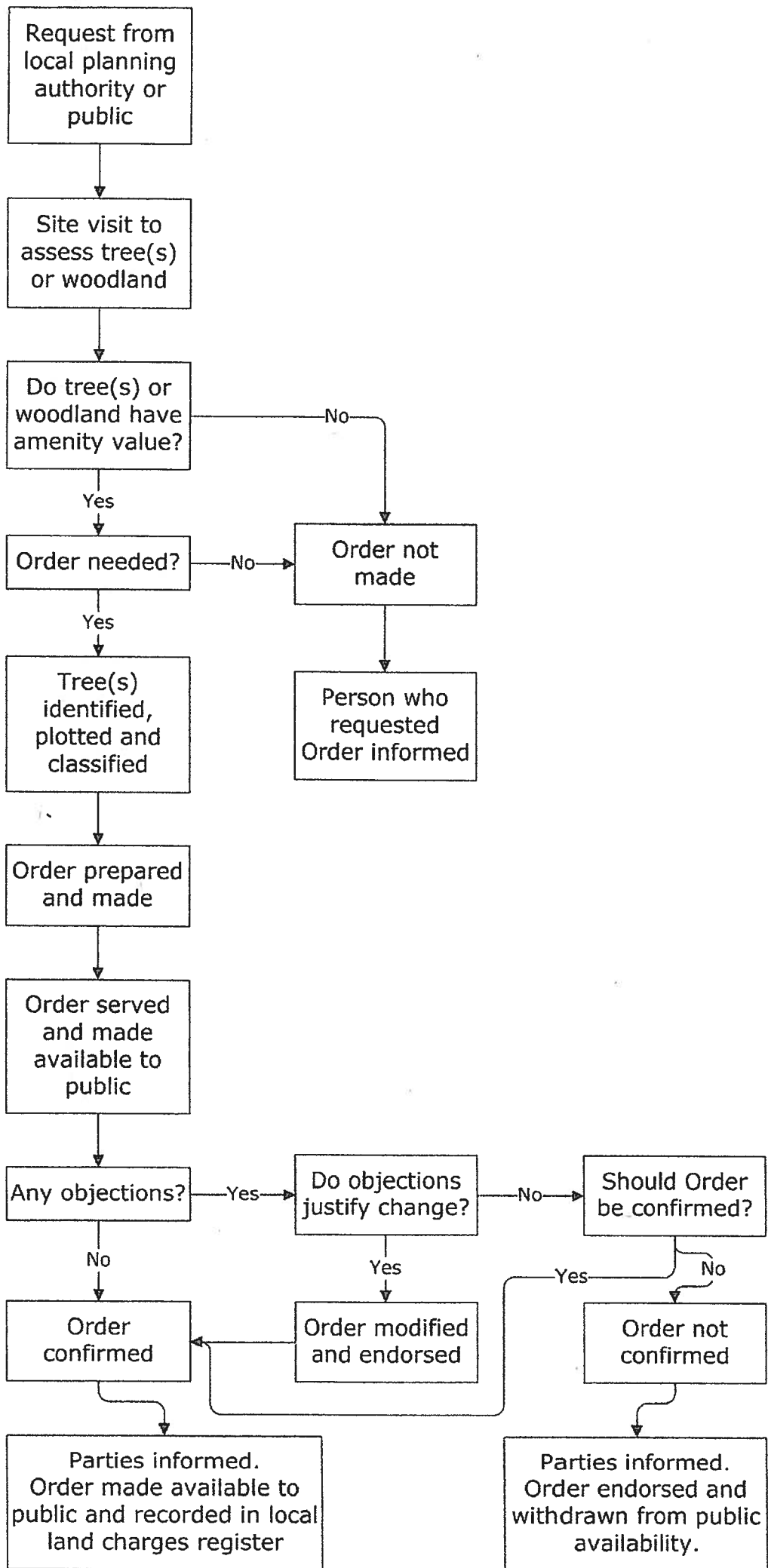
I await hearing.

Yours faithfully

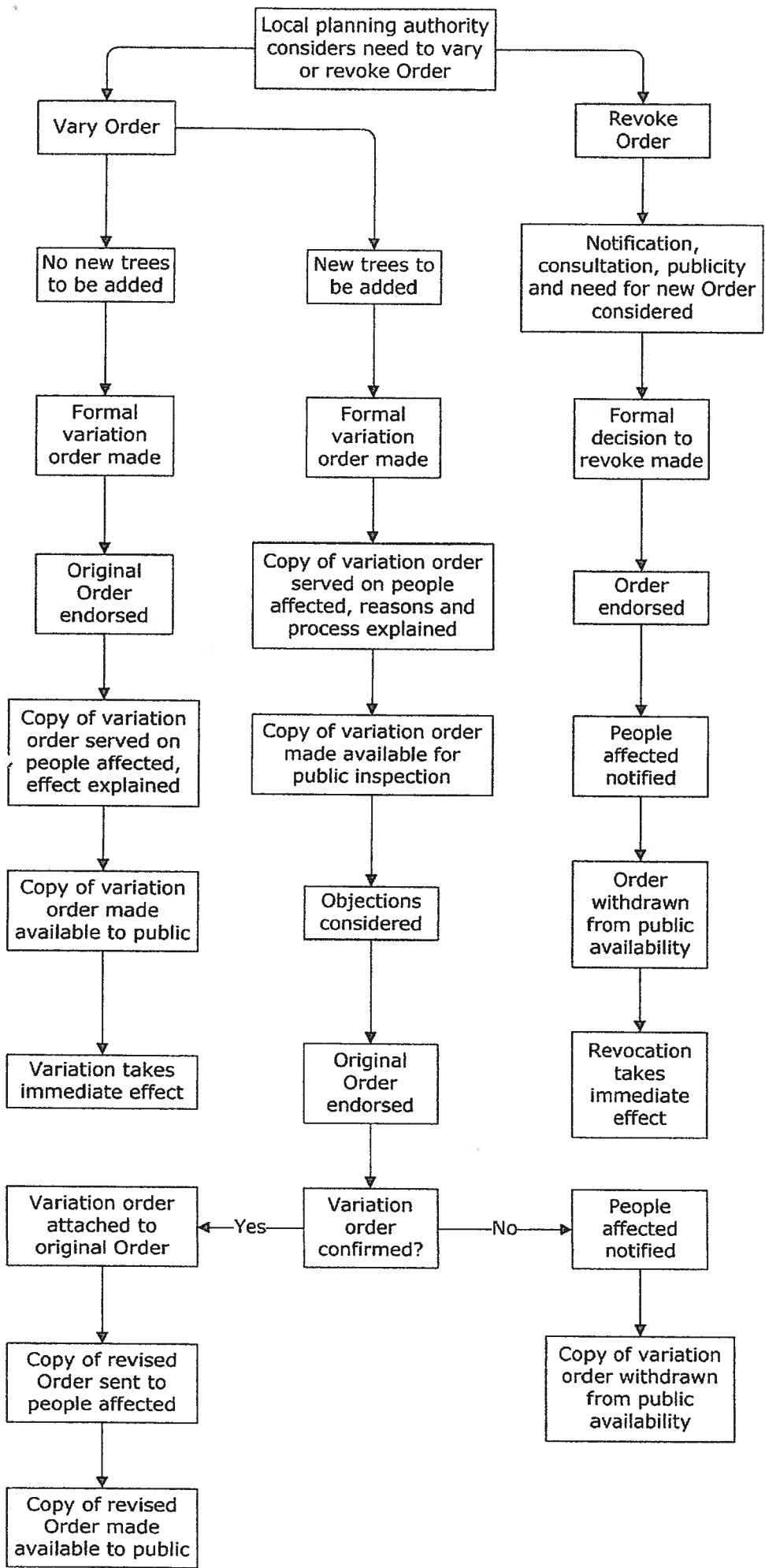
Derek Paterson.
On behalf of Mr & Mrs G Byers.

Encl. (3)

53



55



(<http://planningguidance.planningportal.gov.uk/wp-content/uploads/2014/02/tpo2.jpg>)

Revision date: 06 03 2014

Appendix 1 provides a brief description on each of these steps and further reference should be made to Figure 1 of BS5837:2012 for full details.

4.3.1 Arboricultural Implications Assessment

In order to establish the number, size and position of buildings, the proposed layout (including any changes in levels, roads and underground services) is to be superimposed onto the Tree Constraints Plan to identify any discrepancies or areas of conflict which need to be resolved prior to submission.

4.3.2 Separation Distance between Trees and New Development

A combination of factors influence the position and orientation of buildings in relation to trees and this assessment can only be carried out on a site by site basis. The key factors are:

Safety

Health and safety is the most important consideration and it is therefore paramount that a safe distance is established between new buildings and existing trees. This will vary greatly depending on species, the potential size of the tree, the prevailing wind and the exposure of the site. For smaller, compact trees, it may be possible to build right up to the Root Protection Area. For larger trees, including commercial conifers, it may be necessary to maintain a separation of 20 metres or more.



Sunlight

Restricted sunlight due to shading by trees is increasingly a cause for complaint, particularly during the summer months when trees are in leaf. Again, the larger the tree the greater the separation, particularly when located to the south of a building. Computer software is available to demonstrate the effects of shading from trees and the Planning Authority may ask an applicant to undertake this exercise where they consider there to be potential conflict. This information will help inform the Arboricultural Implications Assessment discussed in Section 3.3.1.

Leaf fall

Leaf fall and needle drop can cause blocked gutters and drains, slippery surfaces and additional work clearing leaves in the garden which can often result in pressure to remove trees.

Views



● Trees Felled for Reason of Safety

To The Highland Council

**REPRESENTATION AGAINST THE PLACING OF
TREE PRESERVATION ORDER No. HC127 2015
BY HIGHLAND COUNCIL 26 February 2015**

George Byers, Carrickholm, Cantray Crossroad, Croy, Inverness, IV2 5PN

Tree Preservation Order No. HC127/2015, Croy Roadside, Croy

Representation by

**Mr & Mrs George Byers, Carrickholm, Cantray Crossroads,
Croy IV2 5PN**

- 1) This representation is made under Regulation 5 of the 2010 Regulations (*being The Town & Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 2010 - SSI 2010/434*).
- 2) The grounds of this representation are that:-
 - a) This TPO HC127 cannot be lawfully made to replace the previous TPO No. HC117/2012 unless and until the previous TPO is legally revoked.
 - b) Section 275(8) of the 1997 Act (*being the Town & Country Planning (Scotland) Act 1997, as amended by the 2006 Act*) empowers a planning authority to vary or revoke a TPO by making another TPO.
 - c) A “revocation order” is defined in Regulation 2 as a TPO which revokes another TPO.
 - d) The procedures for making and confirming a revocation TPO are almost the identical procedures to those used for making and confirming a basic TPO.
 - e) These procedures are specified according to the prescription laid down in the 2010 Regulations and in the supporting guidance by the Scottish Government, (*being the Scottish Planning Series, Planning Circular 1/2011, Tree Preservation Orders*).
 - f) It should be noted that statements in the guidance (*Planning Circular 1/2011*) “*may be material considerations ... in development management decisions*”.
 - g) In a letter sent by Mrs K Lyons, Principal Solicitor, dated 26.2.15 (see Production 1 annexed.) a statement is made that Highland Council has “*revoked the original Order HC117/2012*”. This statement is not sufficient to comply with the Act, the Regulations, and the Guidance which prescribe the procedures for making and confirming a revocation TPO.

- h) Despite the making of the above statement, no revocation TPO has been made by the Council in respect of the first TPO HC117/2012 and it follows logically that no such revocation TPO has been confirmed by the Planning Committee.
 - i) In Scottish Law there is no legal construct which allows two or more TPOs to exist concurrently upon the same trees.
 - j) It follows that the second TPO HC127/2015 as it stands, cannot be confirmed by the Planning Committee and I respectfully request that the Committee declare that, for the legal reasons explained above, it is not confirmed.
- 3) In regard to the first TPO HC117/2012, the agents acting on my behalf, and after a thorough investigation, have determined that there have been multiple faults in its making and administration. All of the faults have been advised to the Chief Executive and other officials, (see Production 2 annexed).

The Council's officials have concurred that the first TPO is so fundamentally flawed that it would not survive a challenge in the Scottish courts, and this has contributed to their decision to revoke.

However that decision has not been properly followed up by the making of a revocation TPO in accordance with the prescribed procedures.

I therefore request with respect that the Planning Committee order that a revocation order is duly made, giving full effect to that decision already made by the Council's officials.

Signed



* N.B THIS LETTER WAS DRAFTED BY MR. A. TWIST,
ACTING AS AGENT FOR ME.

George Byers



Encl. Annex 1 and Annex 2

Carrickholm Representation

Cantray Crossroad, Croy, Inverness, IV2 5PN

Extract

THE HIGHLAND COUNCIL

THE HIGHLAND COUNCIL TREE PRESERVATION ORDER

No. HC127, 2015, CROY ROADSIDE ,CROY

NOTICE IS HEREBY GIVEN in terms of Regulation 4 of the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas (Scotland) Regulations 2010 of the following particulars in relation to The Highland Council Tree Preservation Order No. HC127, 2015, Croy Roadside, Croy which was made on 26 February 2015

- 1 The reasons for making this Order are these areas of woodland are an important amenity feature on the sides of the B Classified Road (B9006) between Cantraywood and Croy and in relation to the existing housing. The Order will allow the Council to maintain this feature and to encourage appropriate longer term management.
-

The Notice endorsed by the Head of Corporate Governance makes reference to the areas of woodland as being an important amenity feature on the sides of the B Classified Road (B9006)

Firstly it should be noted the 'Town and Country Planning Act' nowhere defines the meaning of amenity, so if the word amenity is applied to the contribution in which the trees in question make to their general environment, then the assessor has to normally consider many additional factors for their preservation.

In the context of TPO's in the United Kingdom, a narrower view – that amenity trees are only those that are both visually significant and visible to the public as outlined within the categorising of the Tree Evaluation Method for Preservation Orders (TEMPO) so, amenity trees simply provide non-product benefits or values of any type.(see Putting A Value on Trees – CTLA Guidance and Methods)

Arboriculturists and urban foresters – including local authority tree officers – frequently need to put amenity values on trees, to inform their own management decisions or decisions by others. Currently available methods in the United Kingdom and Ireland have been seen as lacking for at least some valuation problems.

I refer to the Chief Executive Officer's letter dated 22 April 2015 addressed to Derek Paterson, Specialist Arboriculturist to George Byers where the writer states fourth paragraph, page 2, '*I remain firmly of the view that there is need for a tree preservation order at this location, in that such an order preserves areas of existing woodland which are regarded as having amenity value in that area*'.

However, Helliwell (2003) notes that 'there is no simple or completely satisfactory method of attaching a monetary value to amenity'. While the observation was narrowly related to visual amenity it is equally applicable to the entire range of amenity tree values. Price (2003, 2004) describes various flaws and limitations of various amenity tree evaluation methods. The point is not to search for a flawless or even a precise method, but it is not likely that there is one.

Without asking the authority officials for their explanation as to the reason why they consider the trees in question are regarded as *having amenity value* in that area, it appears from the planning authority having approved housing development within the tree shelterbelt, eg Carrickholm, Taigh Nam Moireach, Westerlea, Westerlea Cottage, Creagan, Fruin, they in fact disregarded their present reasoning as a material consideration when approving the individual planning applications, even as late as 2012. It is interesting to note in 1999 when outline planning consent was sought for the development of the Carrickholm site, the local member who resides within several hundred metres of the site was recorded within the planning committee minutes as stating in his opinion '*the trees were not worthy of retention*'. On a point of correctness it is interesting to note the authority failed within their intimation papers of TPO No. HC 127 2015 to provide a comprehensive plan in accordance with the Town and Country Planning (Tree Preservation Orders Trees in Conservation Areas)(Scotland)Regulations 2010, for the dwellings of Taigh Nam Moireach, Westerlea Cottage and Creagan are omitted. Yet again the Objector identifies omissions by the authority in administering required Tree Preservation Order procedures which surely can only be considered as maladministration or lack of duty of care.

Highland Council Chief Executive Officer within his letter dated 22 April 2015 confirms there have been various procedural deficiencies on the Council's part in the implementation of TPO HC 117. The C.E.O. further states '*I have to observe that the Council have taken proper steps to address any issues arising from these procedural failures by the promotion of the new TPO fully in accordance with the legal requirements for such an Order.*' However the fact remains that the authority failed to register the TPO 117 with the Register of Scotland (confirmed by Highland Council Freedom of Information and Data Protection Manager), thus meaning that none of the residential properties will have recorded within their Land Titles Section D Burdens, the TPO as a burden. Failure to action this requirement could result in far reaching serious legal implications for future residential title holders.

Applying sound reasoning supported by the evidence provided, it is the general opinion there is no justification for the Tree Preservation Order, either 117, or 127, and the writer in presenting this representation to the South Area Planning Committee for their consideration, respectfully requests that Members do not confirm the Tree Preservation Order laid before them.

Anthony J. Twist F.Inst.PRA.,Dip., DHE. Principal Agent for George Byers



ANNEX 1

FIRST CLASS RECORDED DELIVERY

Mr & Mrs Byers
Carrickholm
Croy
By Inverness
IV2 5PN

Please ask for: Mrs K Lyons
Direct Dial: [REDACTED]
Our Ref: L/PLIN254:KL
Your Ref:
Date: 26 February 2015
Fax: [REDACTED]
Legal Post No: LP- 9, Inverness 1
**Please reply to Legal Services, The Highland Council
Glenurquhart Road, Inverness IV3 5NX**

Dear Sir & Madam,

**THE HIGHLAND COUNCIL TREE PRESERVATION ORDER NO HC127, 2015, CROY ROADSIDE,
CROY**

It has been brought to the Council's attention that, unfortunately, the tree preservation order for Croy Roadside (No. HC117, 2012) made in July 2012 and confirmed in December 2012 was not advertised in the local press. Although the appropriate notification of land owners was undertaken, the Council acknowledges that other members of the public may have wished to lodge representations (either in support of or in opposition to) the Order. To ensure that this opportunity is available the Council has made the above Order and revoked the original Order, HC117, 2012.

I understand that you are the owner or lessee or occupier of land affected by the above Order.

In terms of Regulation 4 of the Town and Country Planning (Tree Preservation Order and Trees in Conservation Area) (Scotland) Regulations 2010, I am required to serve notice upon you of the enclosed Order. Please see the enclosed notice for details of how to make a representation in respect of the Order. All representations will be taken into account before a decision is made on whether or not the Order is confirmed.

Should you wish to discuss the terms of the Order, please contact Grant Stuart, Forestry Officer on Tel: 01463 702403.

You will note that the Order has immediate effect.

Yours faithfully,

[REDACTED]
PRINCIPAL SOLICITOR

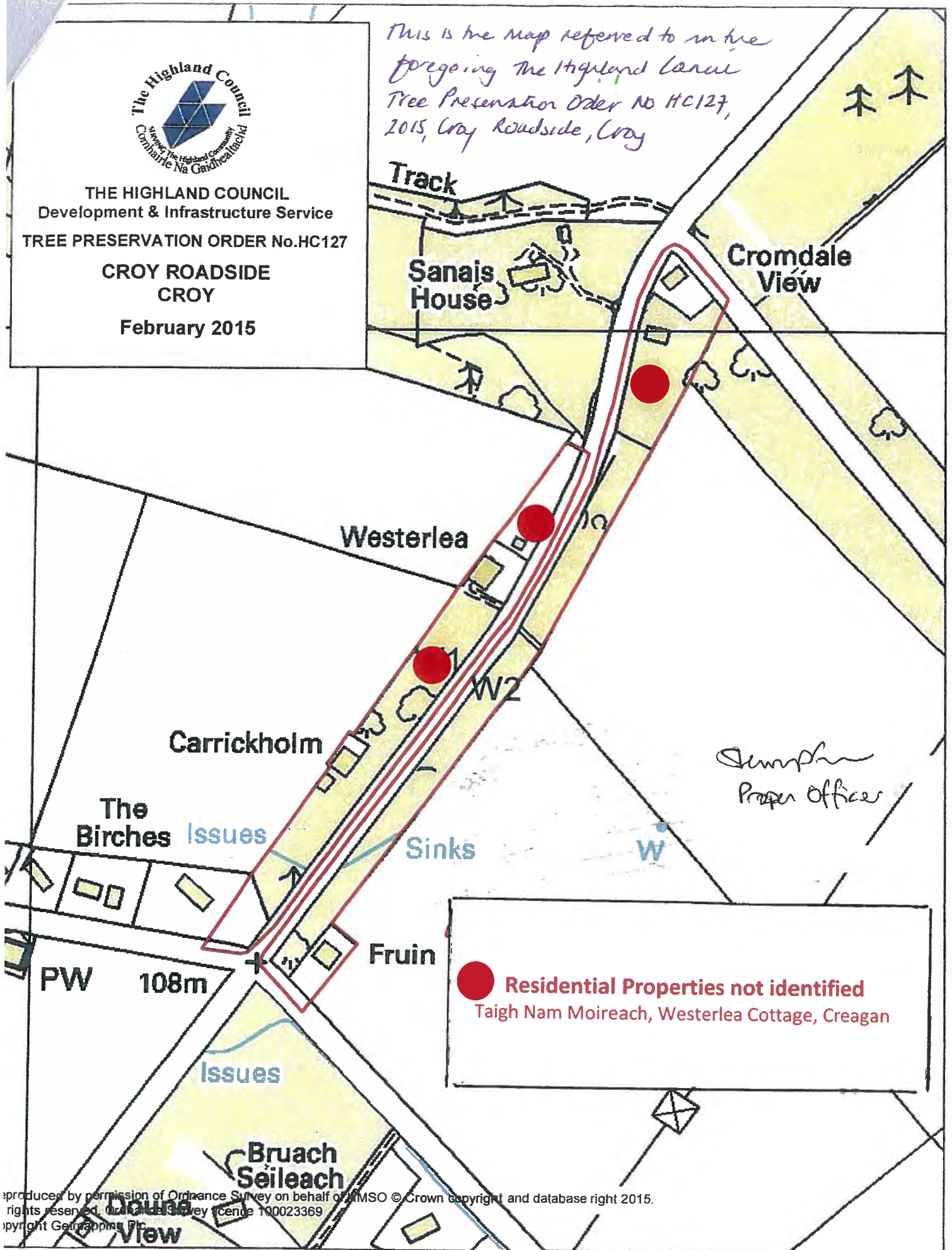
Note: Area(s) or tree(s) in which it is understood you have an interest: W1

Enc TPO
Notice



THE HIGHLAND COUNCIL
 Development & Infrastructure Service
 TREE PRESERVATION ORDER No.HC127
 CROY ROADSIDE
 CROY
 February 2015

This is the map referred to in the foregoing the Highland Council Tree Preservation Order No HC127, 2015, Croy Roadside, Croy



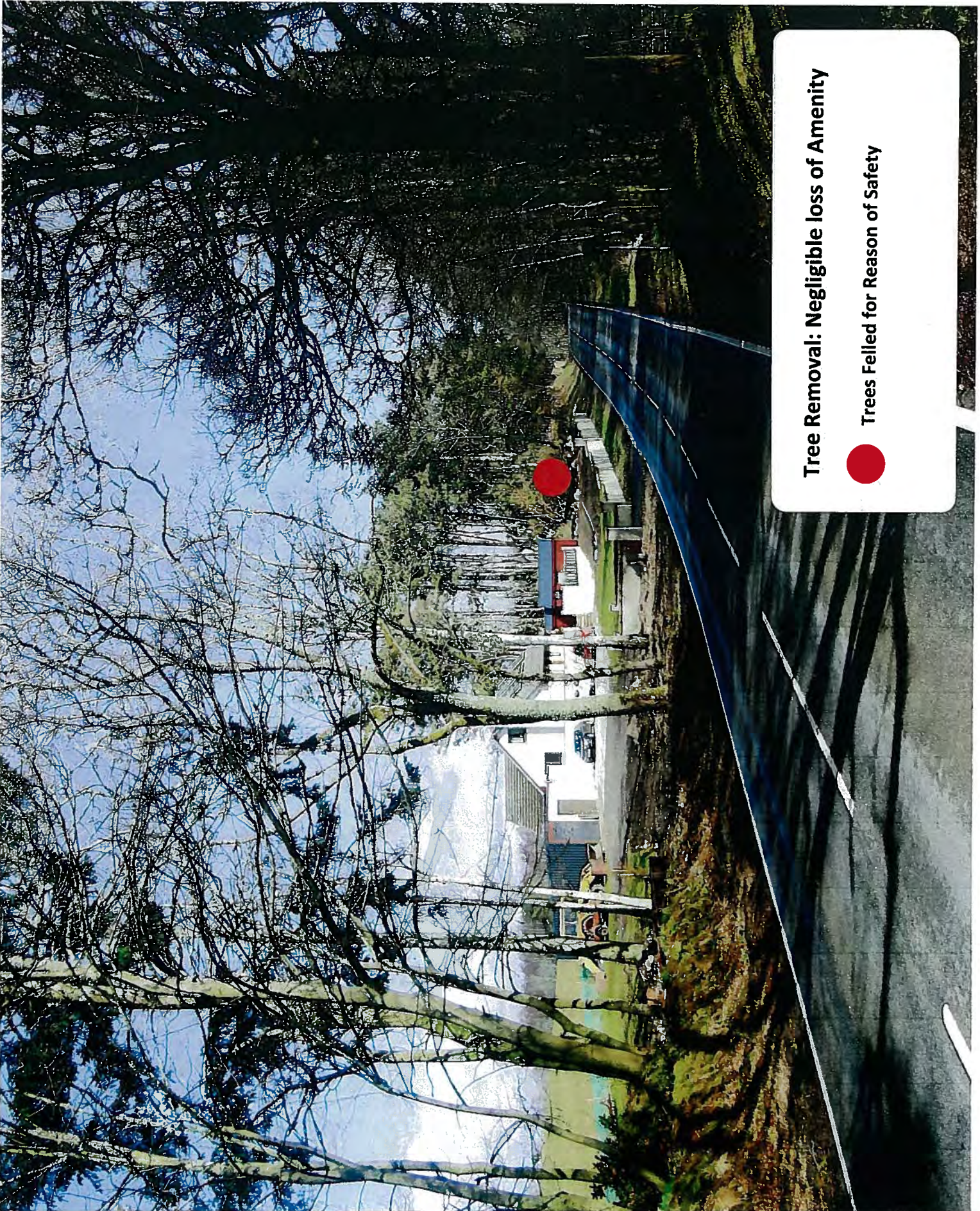
Residential Properties not identified
 Taigh Nam Moireach, Westerlea Cottage, Creagan

Produced by permission of Ordnance Survey on behalf of HMSO © Crown copyright and database right 2015. All rights reserved. Ordnance Survey Licence No: 100023369. Copyright Geographical Press Ltd.



Scale @ A4 1:3,000

0 10 20 40 60 80 metres



Tree Removal: Negligible loss of Amenity



Trees Felled for Reason of Safety



From: [REDACTED]
Sent date: 16/04/2015 - 12:51
To: [REDACTED]
Subject: RE: RE: Request for Information

Dear Mr Twist,
I apologise for the lack of clarity in my previous email.

The Council did not present TPO 117 for registration.

Yours sincerely,

Miles Watters
Freedom of Information & Data Protection Manager

From: ANTHONY TWIST [REDACTED]
Sent: 16 April 2015 11:11
To: Miles Watters
Subject: Re: RE: Request for Information

Dear Mr. Watters

Thank you for your e-mail 15/04/2015.

Upon a point for clarity you state '*did not present the Agreement for registration*'. As my question referred to the TPO No. 117 2012 (TPO) within my e-mail dated 14 April 2015 as attached, please will you confirm within your reply your word *Agreement* refers to the TPO

Your reply will be much appreciated

Yours sincerely

Anthony Twist

-----Original message-----

From : [REDACTED]

Date : 15/04/2015 - 16:56 (GMTDT)

To [REDACTED]

Subject : RE: Request for Information

Dear Mr Twist,

I have been advised by our legal team that the Council did not present the Agreement for registration.

I hope that this information suffices.

Yours sincerely,

Miles Watters

Freedom of Information & Data Protection Manager

From: ANTHONY TWIST [REDACTED]

Sent: 14 April 2015 10:13

To: Miles Watters; Karen Lyons; Elaine Ball; Steve Barron; [REDACTED]

Subject: Request for Information

Dear Ms. Lyons

You are no doubt aware my client George Byers faces legal action brought about by his felling of trees within his garden ground at *Carrickholm*, subjects within his ownership. Whether there was justification for his action now rests within the judicial system to evaluate what is fast becoming a complex situation with an absence of sound reasoning from the Highland Council as to why prescribed procedures in accordance with the Town and Country Planning (Scotland) Regulations 2010 appear not to have been adhered to.

You are aware that during the past months I have been meticulously investigating why certain aspects appear not to have been properly administered with regards to the Byers Land Titles - Title number INV32212 and Title number INV15813 provided by the Register of Scotland, copies of which I have recently forwarded to you.

Firstly there is the unexplained reason why the Section 75 Agreement does not appear as a burden upon Title number INV32212. Thereon I am awaiting from you document proof that Tree Preservation Order No. 117 2012 (TPO) was properly administered by Highland Council in so far as presenting notice of the TPO to the Register of Scotland in order for the TPO to be registered within my client's title as a full and proper burden. Obviously from reviewing the recent titles no such burden is evident.

This now leads me onto the question did Highland Council in fact notify Register of Scotland of the TPO, or is it another case of maladministration similar to the authority not publicly advertising the TPO in the first instance. With the pending visitation of the Directorate Planning Environmental Appeals appointed Reporter two weeks today Tuesday 28 April 2015, I need to advise the DPEA of the now assumed omission of TPO No. 117 2012 of not being registered with the Register of Scotland, unless you can provide me with documentary proof that Highland Council properly dealt with the registration.

Your prompt reply will be much appreciated

Kind regards

Anthony Twist Agent for George Byers

MAIL FILTERING NOTIFICATION

This incoming email has been processed by the GCSx filtering service, operated by Vodafone and administered in part by Highland Council, ICT Services.

If you believe that this email is SPAM, i.e. the content is inappropriate or the originator is not known to you, then simply delete it without following any hyperlinks to web pages and without opening any attachments.

If you believe that it is a persistent SPAM email or the content is particularly offensive then forward it to spam@highland.gov.uk

Creagan, Cantray Crossroad, Croy, Inverness, IV2 5PN

Attention Mr. Forbes Rennie
Solicitor
Corporate Development Service
The Highland Council
Glenurquhart Road
Inverness IV3 5NX

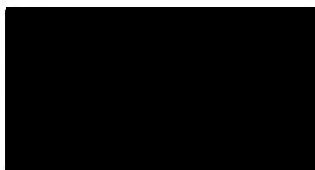
Dear Sir

The Highland Council Tree Preservation Order No. HC127, 2015, Croy Roadside, Croy

Statement

As householder of the above named address, I wish to object in the strongest terms to The Highland Council putting into place yet another Tree Preservation Order (Order No. 127, 2015), in terms of Regulation 4 of the Town and Country Planning (Tree Preservation Order and Trees in Conservation Area)(Scotland) Regulations 2010, which has serious legal implications for my property. It is understood the Order is required to be confirmed by the South Area Planning Committee in due course. Therefore, I respectfully request that my letter be presented to the Committee for their consideration.

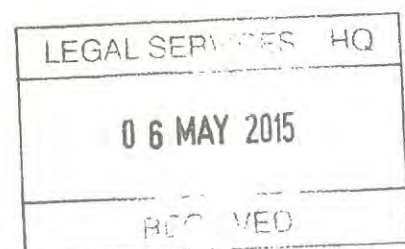
Signed



Date

1/5/15

Owner



Cromdale View, Cantray Crossroad, Croy, Inverness, IV2 5PN

Attention Mr. Forbes Rennie
Solicitor
Corporate Development Service
The Highland Council
Glenurquhart Road
Inverness IV3 5NX

Dear Sir

The Highland Council Tree Preservation Order No. HC127, 2015, Croy Roadside, Croy

Statement

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Signed

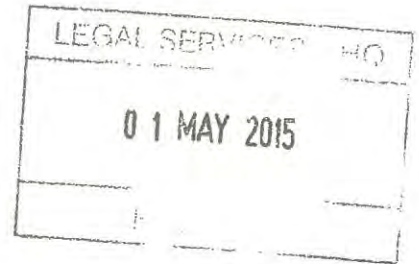


Date

28/4/2015

Taigh Nam Moireach, Cantray Crossroad, Croy, Inverness, IV2 5PN

Attention Mr. Forbes Rennie
Solicitor
Corporate Development Service
The Highland Council
Glenurquhart Road
Inverness IV3 5NX



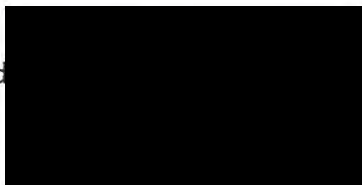
Dear Sir

The Highland Council Tree Preservation Order No. HC127, 2015, Croy Roadside, Croy

Statement

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Signed



Date 28/4/15 .
28/4/15

Owner



Mr G Byers
Carrickholm
Cantray Crossroads
Croy
IV2 5PN

Your Ref:
Our Ref: CRM 1023703
Date: 14 January 2015

Dear Mr Byers,

Stage 2 Complaint

I refer to your complaint received by Highland Council on 5 December 2014. I have investigated the circumstances surrounding your complaint and I am now in a position to respond to you.

Complaint Details

Your complaint relates to on-going issues with a Tree Preservation Order (TPO), at Croy Roadside, Croy (reference HC117), and you have made a number of allegations of victimisation by Council staff.

Our Investigation

In order to come to a conclusion on these matters, I asked colleagues in the Development and Infrastructure and Corporate Development Services to review all previous correspondence and documentation relating to this case and, where necessary, to speak with relevant parties. It is important to note that the Council's complaints procedure will examine complaints made within six months of the event you want to complain about and therefore a number of matters raised within your letter are outwith this timeframe.

Our Findings

Notwithstanding the complaint investigation timeframe, officers have produced the following timeline of activity and history of the site -

- 1999 – Outline planning permission (ref 99/00193/OUTIN) granted for dwellinghouse (Carrickholm)
- 2002 – Reserved matters (ref 02/00361/REMIN) approved for dwellinghouse (Carrickholm)
- 2005 – Planning permission (ref 05/00851/FULIN) granted for relocation of access road for 02/00361/REMIN, including blocking off existing access and planting trees
- 2007 – Report to committee on enforcement issues (breach of conditions regarding access and tree planting/landscaping)

- 2010 – Planning permission in principle (ref 10/00005/PIPIN) granted for dwellinghouse between Westerlea and Carrickholm subject to s75 agreement preventing further dwellinghouses on the subjects and restricting use of existing woodland area in ownership of the applicants (Mr & Mrs Murray) to “amenity or garden ground only”
- 2012 – tree felling within the grounds of Carrickholm led to Tree Preservation Order being made and subsequently confirmed by South Planning Applications Committee following consideration of representations
- 2013 – owners of Carrickholm (Mr & Mrs Byers) acquire part of the land that is subject to the s75 agreement from the Murrays
- 2014 – application to vary s75 agreement (to allow the construction of a wall to enclose the land acquired from the Murrays and allow the land acquired to become curtilage of Carrickholm) and application for works to trees submitted on behalf of Mr & Mrs Byers (to improve the performance of solar panels on Carrickholm and to allow the construction of a boundary wall)

The original 2002 reserved matters approval (02/00361/REMIN) required provision of an access and associated works, including formation of visibility splays. In addition, the permission authorised the removal of some trees but also required submission of a tree management plan and additional tree re-planting works, details of which were to be submitted and approved, and thereafter implemented, within 6 months of the date of the permission.

There has been ongoing communication with you over the outstanding landscaping works. The landscaping has been altered from that originally approved to take account of the requirement for further tree removals and the revised access position. The letter of 9 June 2009 from Robert Patton contains the detail of the amended and approved landscaping scheme. This landscaping scheme has only been partially undertaken. I would also refer to the letter of 5 June 2002 from Geoff Robson and the attached plan showing tree retentions and tree planting following your site meeting with Janet Scott from this office.

An amended planning application to change the location of the access (05/00851/FULIN) was granted in September 2005. This permission included conditions relating to new access works; blocking off the existing access; restrictions on where any front boundary wall could be erected; and detailed requirements for tree planting works in association with an area to the west of the watercourse in an open area where felling had taken place for a caravan site.

At the time of agreeing the above amended landscaping scheme (02/00361/REMIN) you indicated a wish to plant hedging along the front and rear boundaries of the property. This hedging is identified in the approved scheme and you have subsequently planted a hedge along part of the rear boundary.

The tree planting relative to the amended access (05/00851/FULIN) was carried out but subsequently failed in its entirety. The failed trees and tree shelters have recently been removed and you have intimated they are to be replaced. The recent opening up of the culvert has deposited material over the greater part of the area to be replanted which may affect the establishment success of the trees as well as impacting on the root plates of existing trees. There is a need to carefully remove this material to previous and existing ground levels.

The position above was confirmed in emails of 22 August 2014 and 9 October 2014 to your representative Mr Twist from Robert Patton. Alternative boundary treatments were also raised verbally by Robert Patton at the recent site meeting with Mr Twist on 7 November 2014. The existing boundary treatment (a wall) along the frontage of your property followed the removal of a number of roadside trees because of their deteriorating condition as a consequence of ground works affecting their root plates. This led to an approach from you to put in place a wall. This was agreed but only for a certain length (as agreed and complied with onsite) to protect the remaining trees. As regards the present wall proposal (the subject of the tree works application), this was discussed on site with you previously and officers conveyed that it would not be viable to extend the wall using the construction method employed so far without damage to the trees and that alternatives (fence or hedge) could be readily secured as previously agreed with you.

At the site meeting with Mr Twist (7 November 2014) Mr Patton raised the possible option of a 'pile and beam' technique to construct the wall but with the strong caveat this may not be viable because of the ground levels, tree location and cost. This would require arboricultural input in order to assess the feasibility of this option. Mr Twist confirmed that your tree works application would rely on the construction method employed so far and our determination was based on that position.

In consideration of all of the above I therefore do not uphold this part of your complaint.

Tree Preservation Order (TPO)

The former Chief Executive, Alistair Dodds, in his letter to you of 5 June 2013 addressed your concerns that officers were 'pushing through' the TPO and the democratic process was explained to you in this letter. It is normal procedure to make the TPO before notification and you received the appropriate notification and took the opportunity to make representations on the TPO at that time. These representations were reported in full to the South Planning Applications Committee (SPAC) of 11 December 2012 to consider before determining whether the TPO should be confirmed. The SPAC decided to confirm the TPO without modification. In 2014 it was brought to the Council's attention that the TPO had not been advertised in the local press (a requirement of the regulations). However all owners of land directly affected by the TPO were served with notice and 2 representations were received objecting to the TPO.

Ward Business Meeting – 31 October 2012

Mr Patton did attend the Ward Business Meeting held on 31 October 2012 and conveyed that concerns over ongoing tree loss at Carrickholm had been received from Councillor Balfour as well as the Community Council. The Community Council made it clear that their contact was not a complaint and at no time has Mr Patton conveyed that the Community Council lodged a complaint or objection – they are on record as having placed a concern over the loss of trees at Carrickholm and subsequently confirmed that they were in support of the TPO and continue to be so.

Councillor Balfour

I note your correspondence to the Standards Commission for Scotland regarding Councillor Balfour.

Section 75

Once Mr Twist brought the s75 agreement to the Council's attention, a revised position on the requirement for a change of use was intimated to Mr Twist, together with assistance on how to apply for a variation of the s75 agreement. An application for variation has been lodged and is in the process of determination. In the case of both this application, and the application for tree works, there was delay in processing the applications in order to clarify the terms and content of the applications to ensure that the appropriate notification could be carried out, and that the case being made in support of the tree works was comprehensive.

Solar Panels

This has been addressed (reasons for refusal) in the Decision Notice to the tree works application dated 11 December 2014.

Forestry Officer Qualifications

Information has been provided to both you and Mr Twist in relation to the above in response to requests under the Freedom of Information (Scotland) Act. Officers have not been made aware of the separate arboricultural advice you have received.

Victimisation

It is fully accepted that conditions have changed in this case but the Council has responded in a positive manner at all times. Officers have previously agreed the removal of trees because of their condition (some of which were as a result of ground works impacting on tree roots), extending timelines for tree planting and agreeing to a boundary wall subject to tree protection. I would strongly disagree that there has been any victimisation by Council officers in their correspondence with you and I am satisfied that all involved have carried out their duties correctly.

In terms of correspondence, officers have been advised by Mr Twist to correspond directly with him rather than you given your health challenges and officers have accorded with this request except when you have contacted them directly.

In consideration of the above I therefore do not uphold the part of your complaint regarding victimisation.

Our meeting of 8 January 2015

When we met with Mr Twist and Cllr Sinclair on 8 January 2015, to discuss the process and outcome of your application to conduct tree works within the TPO, I undertook to review the process undertaken and the decision notified to you on 11 December 2014. I have discussed these matters with the Head of Environment and Development, George Hamilton, and the Head of Planning & Building Standards, Malcolm MacLeod, and they have assured me that the process undertaken was correct and that the decision notified to you (refusal) was correctly reached.

Your complaint of 9 January 2015

I can confirm that I have received your complaint regarding officer conduct while attending your property to view storm damage on Friday 9 January 2015 and that this will be dealt with separately. A response will be sent to you shortly.

I do hope my reply has addressed your concerns, however if you remain dissatisfied with the Council's response you have the opportunity to refer the matter to the Scottish Public Services Ombudsman. I enclose information on how to contact them directly.

Yours sincerely



Steve Barron
Chief Executive

The Scottish Public Services Ombudsman (SPSO) is the final stage for complaints about public services in Scotland. This includes complaints about Scottish councils. If you remain dissatisfied, you can ask the SPSO to look at your complaint.

The SPSO cannot normally look at complaints:

- where you have not gone all the way through the council's complaints handling procedure
- more than 12 months after you became aware of the matter you want to complain about, or
- that have been or are being considered in court.

The SPSO's contact details are:

SPSO
4 Melville Street
Edinburgh
EH3 7NS

SPSO
Freepost EH641
Edinburgh
EH3 0BR

Freephone: 0800 377 7330
Online contact www.spsso.org.uk/contact-us
Website: www.spsso.org.uk
Mobile site: <http://m.spsso.org.uk>



Derek Paterson
2 Bruce Street
Bannockburn
Stirling
FK7 8LF

Your Ref:
Our Ref: CRM 1113566
Date: 22 April 2015

Dear Mr Paterson,

TPO HC117 and TPO HC 127 - Mr and Mrs Byers - Carrickholm

I thank you for your letters of 25 March 2015 and 11 April 2015 regarding the above.

In the first paragraph of your letter of 25 March you refer to previous letters of 13 February and 18 March 2015. I assume that the second letter was, in fact, that dated 8 March 2015 from you to which I replied by letter of 25 March 2015. Subsequently, in the first paragraph of your letter of 11 April 2015 you thank me for my letter of 15 March. Again, I assume that you had intended to acknowledge my letter of 25 March 2015 to you.

I refer firstly to the terms of your letter of 25 March 2015.

As indicated in my letter of 25 March 2015, I did not consider it appropriate that I meet with you at this time and I urged your clients to make any representations which they wished to place before Members when they come to consider whether or not to confirm TPO HC127.

I would emphasise that there was no reason for the time taken to respond to your letter of 8 March 2015 other than due consideration of the issues raised with the officials concerned. There was no intention on my part to defer further action until the period for representations against TPO HC127 had expired, nor indeed could the absence of a response from me have prevented or otherwise inhibited your clients from lodging such representations as they wished to make.

As of the date of your letter of 25 March 2015, you confirmed that your clients did not intend to submit representations against the confirmation of the TPO HC127. However, I am advised that the solicitor acting for your clients in the Interdict proceedings intimated to the solicitor acting for the Council that Mr and Mrs Byers did wish to make representations.

I, therefore, again invite your clients to make such representations as they wish to make in detail to the Council, and confirm that I shall ensure that these are placed

Steve Barron: Chief Executive, Glenurquhart Road, Inverness, IV3 5NX

before Members when TPO HC127 comes before them for consideration at the forthcoming Meeting of the South Planning Committee on 19 May 2015. Given the time-frame for the preparation of the Agenda and Papers for that meeting I must ask that such representations as your clients wish to make are received no later than 12 May 2015.

I note the various further opinions you have expressed on contesting any tree preservation measures pursued by the Council on your clients' property, as well as your comments concerning costs, audit and review. In these respects I am satisfied that the Council have taken and continue to take proper steps to address procedural shortcomings in making the original TPO HC117, through the process currently in hand for TPO HC127. My detailed comments in this regard follow below.

Within the remainder of your letter of 25 March 2015 you concentrate on criticism of the Council's case in Appeal against the refusal of the Section 75 Application to modify the Planning Obligation affecting part of your clients' property. As you are aware, this matter is now before the Reporter appointed by the Scottish Ministers for consideration and determination. I do not think it is either relevant or necessary to respond to the views expressed by you in that context. The Reporter will reach his decision based on whatever reasons he regards relevant and appropriate.

However, and lastly by reference to the five questions posed at the end of your letter, I remain firmly of the view that there is a need for a tree preservation order at this location, in that such an order preserves areas of existing woodland which are regarded as having amenity value in the area, and, not least, safeguards the woodland against uncontrolled felling and removal.

I turn now to your letter of 11 April 2015, and reference the headings and numbering contained in that letter.

I note your detailed comments concerning the legislative background governing the promotion, variation, and revocation of Tree Preservation Orders and the related Scottish Government Circular and Model Form. As appropriate to the cases in point I shall refer to aspects of the legislation below.

TPO HC117/2012 – the first TPO

- 1) The Council remain of the view that the trees in question are of an amenity quality which merits protection in the context of their location. Both you and your clients dispute that opinion for their own reasons, and the Council accept that your clients are entitled to their opinion in the matter.
- 2) Noted regarding Councillor Balfour's comments during consideration of the Planning Application for Carrickholm. However, that view was not ultimately shared by the members of the Planning Committee who resolved to confirm TPO HC117 in 2012.
- 3) Based on the aspect of policy detailing minimum separation distances between new buildings and trees cited by you, one would conclude that your clients' house should not have received planning permission.
- 4) The Council do not accept that there is any time limit on when they can make a

TPO in respect of any given site. The Council do accept that any such Order must be justified in meeting the relevant statutory criteria.

5) Whether or not planning conditions applicable to any given site continue in force, or are time-limited, is irrelevant when considering the validity and/or merits of a Tree Preservation Order.

6) The Council maintain that reference to the stands of timber concerned in this case as Woodlands is reasonable and proper. In whatever event, the location and extent of the trees involved is clearly denoted on the map annexed to the order.

7) Noted.

8) Noted.

9) No attempt was made to ascertain whether there were separate owners of mineral rights. Given the location of the woodlands, and the nature of the vicinity, it would have been reasonable to assume that no such separate rights existed. Equally, it was known to the planning authority that no permission for the surface extraction of minerals existed at this location.

10) Noted and acknowledged – this as much as any other procedural failure led the Council to promote the new Order in full accordance with the statutory requirements.

11) A copy of the terms of the notice which should have been published in the press was copied to individual owners and occupiers served with the copy of the Order, including your clients, who subsequently lodged objections against the making and confirmation of the Order.

12) There is no record of any deposit of a copy Order or Notice in Croy Village.

13) The Council's file discloses that copies of the Order as confirmed were duly served on all relevant parties on 14 December 2012 in terms of Regulation 6(2)(b) of the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas)(Scotland) Regulations 2010 ("the 2010 Regulations").

14) Regulation 6(4)(a) of the 2010 Regulations require the deposit of a copy of the confirmed Order in the locality. No such deposit took place within Croy Village, but the confirmed Order was held in the Council Offices in Inverness and would have been available for inspection there.

15) I note and agree that the 2010 Regulations require that a confirmed TPO must be registered in the Land Register, and that this was not done in the present case.

16) It is my understanding that such a Register of Applications made under TPOs has now been instituted.

17) The TEMPO assessment has been properly used.

I am concerned to note, in particular, the procedural shortcomings involved in a number of the preceding paragraphs, particularly those relating to publication of the statutory Notice of Making the Order and the Council's failure to register the Order in the Land Register. These alone give justification for the decision to pursue the revocation of TPO HC117 and to replace that with an Order properly promoted and legally sound against challenge. I appreciate that you do not accept the justification for any such Order per se.

Equally, I have been advised that the revocation of TPO HC117 is procedurally necessary since, unless so revoked, or otherwise reduced through successful legal challenge, the Order would remain in force. I conclude, therefore, that the promotion of a new Order, incorporating the revocation of the original Order, is the correct course of action, involving as it will full compliance with all procedural requirements, and due consideration of any issues raised.

Revocation of TPO HC117/2012 and Replacement with TPO HC127/2015

I will deal with both of these sections of your letter together. The opinions you have expressed concerning these aspect of the procedure are noted, but I have to advise that these are not accepted at all by the Council.

In circumstances where the revocation of an Order of this type is contemplated along with the promulgation of a replacement Order, it is procedurally and practically correct and competent to promote the revocation and the new provision in a single Order. This is the approach adopted in the present case.

In practical terms the revocation of the original Order will only be fully effected once the new Order replacing that is confirmed, if that is the decision ultimately taken.

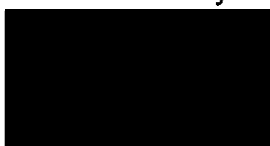
The recent tree felling / legal action by the Council

Again, I note your comments. The tree felling which was carried out by your clients constituted a breach of the provisions of TPO HC127, being a Tree Preservation Order validly in force at the time. However, any issues in that regard will be determined by the Court, and I do not think I need make further comment than that.

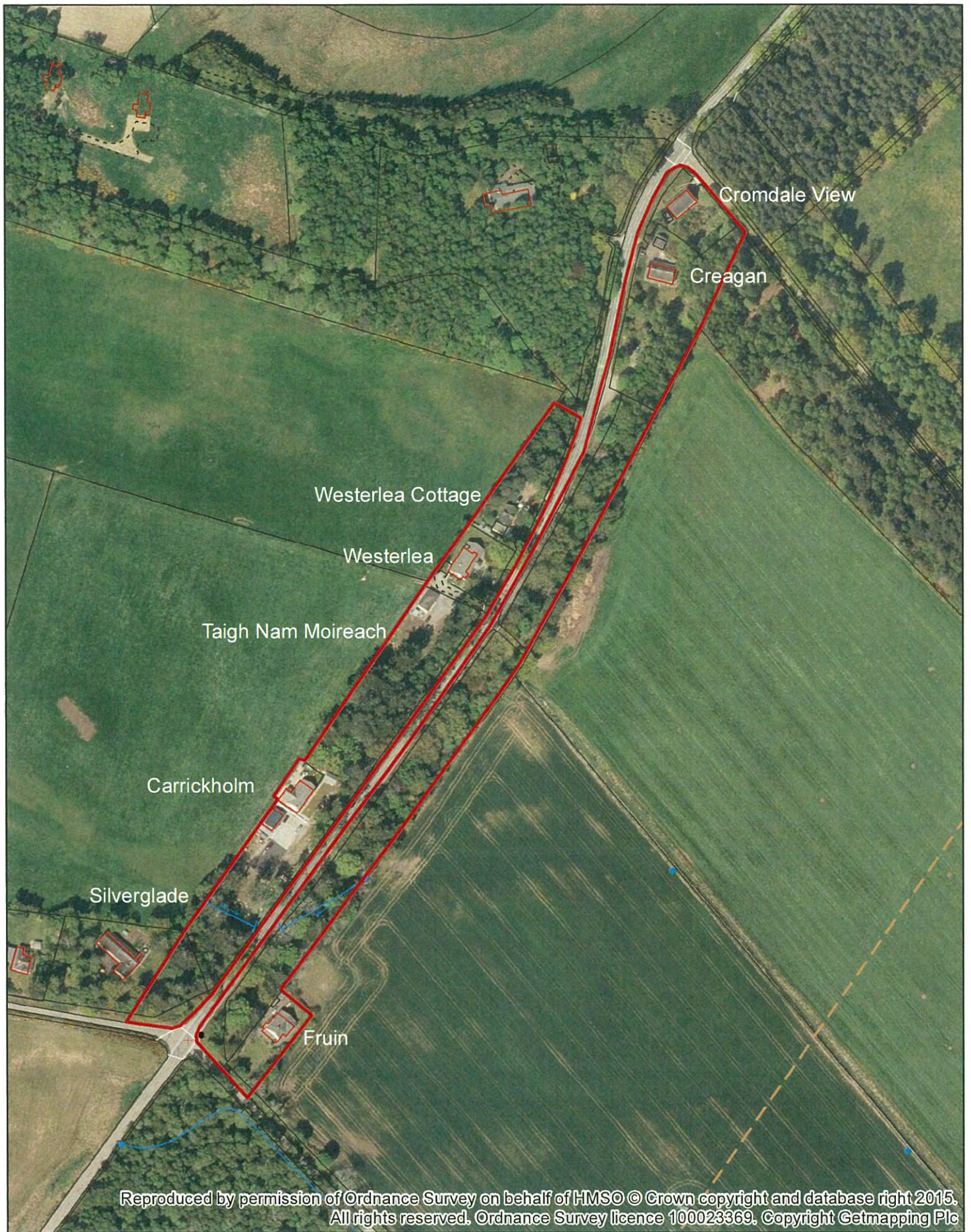
In conclusion, I do appreciate that you may continue to disagree with the position taken by the Council in this matter for all of the reasons you have brought forward in recent correspondence. In turn, I have to acknowledge that there have been various procedural deficiencies on the Council's part in the implementation of TPO HC117. Equally, I have to observe that the Council have taken proper steps to address any issues arising from these procedural failures by the promotion of the new TPO fully in accordance with the legal requirements for such an Order.


I do hope that my response addresses all of the issues that you have raised.

Yours sincerely



Steve Barron
Chief Executive




**Croy Roadside
Tree Preservation Order
No HC127**
 Appendix 7

0 12.5 25 50 75 100 Meters
 1:2,500
 Date: 08/05/15


**The Highland
Council**
 Comhairle na
Gàidhealtachd