

# LEGAL PROTECTION FOR TREES IN BRITAIN AND IRELAND

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The United Kingdom of England, Scotland, Wales and Northern Ireland is among the countries of the western world with the least percentage of the land mass covered with trees. Currently it is less than 10% and only the Republic of Ireland is lower at about 7% or so. Forestry planting is increasing every year and more and more land is being covered with trees. However, since its foundation in 1919, the Forestry Commission has planted and harvested many hectares of trees. Nowadays, the older plantations are being harvested.

In the UK much of the tree cover is located in the countryside with some of the larger cities having a good tree cover. It has been said that the three best urban tree populations are to be found in Cardiff, Wales; Liverpool, England; and Edinburgh, Scotland. Quite recently, Belfast in Northern Ireland has started a large urban forestry project that involves the planting of tens of thousands of trees with an investment of some £20 million over 5 years. The Republic of Ireland is currently expanding its forestry planting with a projected budget of some £160 million being spent between 1989 and 1993.

However, we have been losing trees steadily over the years. Losses are due to old age, disease (Dutch elm disease, fireblight, anthracnose), and declines such as ash decline. Occasionally natural disasters such as the Hurricane of October 16/17, 1987 take a large toll. Dutch elm disease (DED) was a natural disaster of global proportions (the UK lost upwards of 30 million trees) that went largely unnoticed on anything other than a local, or at best national scale. There were many reasons for this, not the least of which was the slow buildup of the disease, and the comparative lack of environmental awareness during the late 1960's and early 1970's. By contrast, however, the '87 Hurricane focussed attention upon trees, probably

more because of where it occurred (London and the affluent south east) rather than that it actually happened. In any event some millions of trees were lost.

## Trees Under Threat

In Britain and Ireland, our trees are threatened by many forces and from a number of different sources.

*Arboriphobes or NIMBY types.* These are people who like trees as long as they are not within their property and cause them no immediate problems. The phrase NIMBY was coined by a Secretary of State for the Environment and is an acronym for Not In My Back Yard. They love trees but not in their back, or front, yard.

*Neglect and Old Age.* This is a very real problem on these islands. We have a legacy of plant collecting and tree planting that came to an end in the 1920's. The first and second world wars affected planting greatly and over the period 1914 to 1950 the scale of planting was only a small fraction of that of the Victorian Period and the "Belle epoch" and before. We have therefore populations of very old and young trees with little between (13,14).

*Danger, Perceived and/or Real.* Most big trees in any proximal position with relation to residential building are perceived to be dangerous. In some instances, they are. However, much of the danger is exaggerated and fuelled by the increase in windthrow associated with abnormally strong winds, and a major growth in litigation associated with tree problems. The long term effect is that consulting arborists must practice defensive consultancy and this does not auger well for retention of trees.

*Changes in Land Use.* This is by far the major threat to older established trees. Development proceeds apace and has done right well through-

out the 1980's. There is a demand for housing and many municipalities have difficulty in meeting their housing quota. With development comes the ancillary pressure from the automobile for parking space, visibility splays onto roads, etc. In the UK, there is currently a general presumption against development in the countryside and in greenbelts, i.e. fields and parks, etc. There is a concomitant presumption in favour of "infill" sites. This means building within built up areas on older sites following demolition, etc. More frequently, however, this involves development in the extensive grounds of Georgian/Victorian town houses or larger properties dating from the 30's to the 50's with large gardens containing mature trees and space for building.

Whatever the reason, trees in Britain and the Republic of Ireland are under threat. However, the Irish Planning Law differs in emphasis and application (15). Under British (and Irish) law, trees are the property of the owner of the land upon which they are growing (10). However, because trees may be said to have an amenity value that benefits the whole community, it has been thought prudent to control the removal and/or alteration of the shape of such trees for the benefit of the community. This has stemmed from the relative lack of trees such that any that can be retained should be. Herein lies the basis for the legal protection of trees in Britain.

The law of England and Wales has developed continuously over the past 700 years since *Magna Carta*, and is derived from two sources. First, there are the decisions of judges in the Law Courts and this is known as *Common Law*. It is still changing as new judgements are made, some of which overrule and/or clarify earlier decisions. The decisions of the Courts and the Law Lords set the constitutionality of legal issues.

Parliament enacts laws or Acts that go into the statute books and this is known as *Statute Law*. This can also be changed and altered as new Acts are passed and as interpretation of the meaning of these Acts in case law set the precedents and so forth (10).

In addition, the Local Authorities (Municipalities or Counties) may pass and enforce *By-Laws* similar to City Ordinances in the United States.

These have force only within the boundary of the Authority and should not conflict with Statute Law.

### Tree Protection Legislation

The original legislation that provided protection for trees was laid down in the Town & Country Planning Acts of 1942/43. These Acts sought to regulate development through Local Planning Departments of the Borough, City and District Councils. Development is very relevant to trees and the Acts sought to impose some control upon tree removals. However, it was the Town & Country Planning Act of 1947 that created the basis for *Tree Preservation Orders* (TOPs) as they are known today.

At that time also, an additional Act was passed that sought to control free felling. This was the 1947 Forestry Act that has been amended since that time, most notably by the Forestry Act of 1979 and subsequent Statutory Instruments. This Act set out to control large scale felling of forests and woodlands, for whatever reason, by the introduction of a system of Licensing.

A felling License is required if, subject to listed exceptions, it is intended to fell more than 5 cubic metres of timber in any calendar quarter, or more than 2 cubic meters if the timber is to be offered sale. This has generally worked well and has regulated felling to that approved under agreed forestry plans or that for which a license has been granted. However, these laws are primarily concerned with commercial forestry and timber production. A similar system was introduced in Ireland in 1946 by their Forestry Act (15).

With regard to amenity trees, the Town & Country Planning Act of 1971 has been the major source of power for local planning authorities in respect of tree protection. This has been amended over the years by Statutory Instrument and the whole lot has been encompassed by the Town & Country Planning Act of 1990.

To supplement the legislation documents such as the Memorandum on the Preservation of Trees & Woodlands (1949 & 1966); the Tree Preservation Order Regulations of 1967; and the Department of the Environment, (DoE), Circular 36/78 Trees & Forestry (7) have been produced.

However well intentioned, the Order always

had the wrong name, i.e. Tree PRESERVATION Order. The very word Preservation suggests that trees can be Preserved, when what is actually intended is Conservation and Management. A tree Management Order would probably have been a better term, but the name has now taken root and we are stuck with the term TPO!

### Rational Behind the TPO

The concept is simply that trees confer amenity beyond their immediate location. A tree in a person's garden conveys an amenity to the whole neighbourhood. The *AMENITY VALUE* is the important criterion. To be eligible to be protected by the TPO, a tree should be of clear & substantial amenity value and a reasonable degree of public benefit should accrue. The tree(s) must be visible in whole or in part from a public place such as a roadway or footpath, etc., although other exceptional trees can be included within an order.

The creation of Tree Preservation Order effectively means that trees thus protected, cannot have ANY work undertaken on them without the prior written consent of the Local Planning Authority.

This is a unique concept in law. A person owns a tree or trees, but the local authority protects them by application of a TPO, effectively regulating one's right to work on one's own trees. Yet the onus of management still remains with the owner. He/she is still responsible for them and liable for any damage they might cause. I suspect this could be constitutionally difficult in the USA

### The Intent of a TPO

TPOs are created under the Town & Country Planning Act 1990, Section 198 making provisions for:

*Prohibiting (subject to any exemptions for which provision may be made by the order), the cutting down, topping, lopping, uprooting, willful damage or willful destruction of trees except with the consent of the local planning authority and for enabling that authority to give their consent subject to conditions.*

Planning Authorities are empowered to make orders where they perceive that significant trees are under threat. The order is made as a Provisional Order from a specified date and it runs for

six months or until it is confirmed, whichever first occurs.

### The Form of the Order

The Order itself comprises a detail of the legislation and runs to several, closely typed pages. The essence of the Order is the Scale Map, (1:1250) and the schedule describing the trees covered. Within the order there can be defined individual trees, groups of trees, woodlands and sometimes all the trees within an area. The individual trees and those in groups must be identified and named.

There are exceptions to the necessity for obtaining planning permission in order to undertake works on protected trees, and these are reflected in the Act at Section 198 (6): i.e.

- (i) Trees that are dead, dying or have become dangerous.
- (ii) Trees that are causing a nuisance (actionable in law).
- (iii) Trees interfering with the duties of statutory undertakers electricity, gas, telephone, water, airports, etc.
- (iv) Acts of Parliament and Government Orders.
- (v) Trees grown for their fruit.
- (vi) Trees on site for which (detailed) planning permission has already been granted.

However, in all the above instances the Planning Authority must be informed, so that replacement trees can be specified. In the case of (i) above, i.e. dying, dead or dangerous, the onus is upon the landowner to prove that the danger exists and will be expected to produce evidence, i.e. sections of wood, photographs, etc. Normally, the planning authority should be given 5 days notice of the intentions, although it is acknowledged that this is not always possible.

The placing of a TPO is designed to ensure the continuity of tree cover in a particular place, because, if trees protected by a TPO become dangerous and have to be removed, the Planning Authority can insist upon a replacement, even to requiring.....

*the owner of the land to plant a tree of an appropriate size and species at the same place as soon as he reasonable can....*

In Ireland, replacement is not compulsory under

their law (15).

A TPO does not prevent land being developed, but rather it safeguards the tree cover in light of development. It should ensure that any developer will include the trees in his plans and to demonstrate the impact of development upon trees. Trees that have to be removed for development must be replaced (in different places as agreed) and trees remaining on site have to be protected properly. Planning authorities can, and often do, insist upon this.

### Violation

Where trees are protected by a TPO, any work, including pruning and/or felling, undertaken without permission, makes the perpetrator liable to a prosecution. It is a criminal offence and upon conviction in Magistrate's Court, he/she is liable to a fine not exceeding £2000 (\$3,700) or twice the value of the tree, whichever the Court deems to be the greater. In the Crown Court, upon summary indictment, the fine is unlimited. Any gain in land values can be taken into account and a custodial sentence can also be applied. This has happened!

*Value of Trees.* A system devised by Rodney Helliwell and published by the Arboricultural Association is used (1,11). This allows the calculation of a monetary or cash value based upon the amenity of the tree. This has been accepted in court and is widely used as it is seen to work effectively. Large values can be obtained and I have personally valued a tree at £26,000 (\$48,000). A fine of twice the value would mean a fine of £52,000 (\$96,000).

The main difficulty has been in getting local magistrates to apply the fines but this is becoming easier. Another difficulty is in getting the city attorneys to actually bring a prosecution. The burden of proof can be onerous and the exercise can be costly.

*Land Gain.* Often land is bought as potential development land, but development permission is not automatic and the land may be purchased at a relatively low price. A speculative developer will invest the time and money necessary to obtain planning permission. At which point they have a choice, (A) to develop the land themselves or (B)

to sell it at a profit and allow another person to undertake the development.

This is a time of maximum danger for trees. If there is no TPO, a ruthless speculator will proceed to fell before he applies for planning consent because as soon as the application is lodged, the trees become subject to planning control.

The value of development land can increase by anything from a factor of 2 to a factor of 10 depending upon location, etc. The temptation to remove trees to extract the maximum potential is immense. Illegal fellings have been known to occur as a current maximum fine of £2,000 (\$3,700) per tree is paltry compared to the immense profits to be obtained from subsequent land sales and another developer is left to deal with the aftermath.

Fines equal to the gain in land value have been applied, but probably not often enough because currently, this can only occur in Crown Court and the costs are large. The costs of going to Crown Court are high and this inhibits many city attorneys. However, a new bill before Parliament addresses this. It is known as the Planning & Compensation Bill of 1991. If passed, the maximum fine for violation goes up to £20,000 (\$37,000) per tree and allows magistrates to apply this level of fine and to calculate land gain and apply this also. The costs of Magistrates Court are comparatively low. The Government is getting tough with developers and starting to protect trees in earnest. Perhaps there are now votes in trees!

### Applications for Permission

The planning Acts place a duty upon local planning authorities to regulate development and to examine applications to ensure that they conform to planning policy. They function to regulate permissions to build, to produce forward or Structure Plans and to create Conservative Areas. All of this to ensure that buildings harmonize with the environment.

Where trees are concerned, there are two distinct types of application for permission to undertake works, as follows:

first, the private citizen who wishes to prune their trees for light, etc., secondly, the builder/property developer who wishes to build on a plot of land that

contains trees.

*The Private Application.* In this instance the citizen applies to the planning authority by completing an application form or writing a detailed letter explaining what is required and the reasons for doing the work. This is examined by the planners and, if necessary, referred to the Arboricultural Officer for a decision. Permission may be granted by the Planning Committee or the Planning Officer under "delegated powers" and this may be subject to conditions, i.e., a replanting proposal in the case of a felling.

Permission may be refused, and if this occurs the applicant has the right of appeal. In this instance they must appeal to the Secretary of State for the Environment within 28 days of the refusal. An appeals procedure is set in motion and the decision of the Secretary of State is final.

*The Development Application.* Any developer who does not include a Tree Survey or Arboricultural Implication study as part of his application for planning permission is foolish. It is likely that the planners will refuse to consider the application until such is provided. Such a study must show the following: (i) existing trees, (ii) trees scheduled to go, (iii) trees scheduled to be retained on site and (iv) replanting proposals. This must detail the species, size, dimensions, condition, recommended remedial works, etc.

Permission will usually be the result of intense negotiation between the developer, his architects, arborist and the officers of the council. Even if permission is granted there will usually be many conditions attached, not the least of which will concern the trees. The planners will have to be satisfied that the trees to be retained will (i) be protected during development, (ii) be protected within a defined type of fencing placed at a specified distance from the trees, and (iii) have the roots protected during development of the service runs, trenches and hard surfaces. The techniques for achieving all the above are detailed in the British Standards Institute, (BSI), B.S. 5837: Trees in Relation to Construction (2,12).

*Conditions of Consent.* Developers will agree to anything to obtain permission to build. The big question is, when permission is granted will they stick to the agreements. It is up to the planning

authority to police and enforce the conditions. This is often not successful because of lack of manpower, costs, etc. It is ironic that authorities will enforce all aspects of design and building control but will often forget about the trees.

The Planning Act makes provision for this. Section 106 allows for a legally binding contract to be drawn up that binds the developer to the conditions. This is effective and in the Republic of Ireland they have taken this a stage further. There, planners can, and do, demand a cash bond, returnable upon completion if the trees have survived and been protected, etc. throughout. These bonds can be high, with figures of £50,000 (\$92,000) being mentioned.

It is a sad fact of life that only money talks and money can be made to control the behaviour of developers.

### **Conservation Areas**

Within the Planning Acts, it is possible for areas of particular architectural or historic interest to be protected and designated as Conservation Areas. This essentially means that the character of the area must be protected and, although not originally designed for this, the trees are also protected. This means that any person that cuts, lops, up-roots or willfully damages or destroys a tree in a Conservation Area, but in respect of which no TPO is for the time being in force, is similarly guilty of an offence. The offence is similar in nature to a breach of a TPO and the act must be done willfully and not negligently.

Basically, all trees within the Conservation Area are protected and permission must be sought for any works. However, unlike the TPO, trees below a diameter of 150 mm are exempt and the application rules are slightly different. If upon application to work upon a tree in a Conservation Area, you hear nothing for six working weeks, you can assume that the planning authority have no objections to the work and you may proceed, although it is always advisable to obtain a written statement. Where TPOs are concerned, if you hear nothing for eight working weeks, then you must assume that your application is refused. You can appeal to the DoE within 28 days on the grounds, not of actual refusal, but for non-determi-

nation.

### Revisions of the TPO

From time to time the Government reviews legislation such as this in order to ascertain its efficacy. Such a review was commissioned in 1988/89 by the Secretary of State for the Environment. The review was undertaken by Mr. James Batho and his report, known as the Batho Report was published in 1990 (2). In his report, Mr. Batho makes a number of recommendations to change and improve the existing legislation. The government considered this report and their conclusions on it are included in their recent White Paper, *This Common Inheritance*. The main points to emerge were as follows: (i) TPOs have proved their worth over the years and should be retained, clarified and strengthened. (ii) The proposal by Mr. Batho to transfer TPO Woodlands to Forestry Commission jurisdiction, would not be pursued. (iii) Hedgerow management orders should be created to protect and provide financial assistance for maintaining important hedges. The Department of the Environment subsequently produced a Consultative Document: *A Review of Tree Preservation Policies & Legislation* which included the above points among many others.

A disappointing aspect of the Review and Consultative Document is that the Government still clings to the term Tree Preservation Order, with management emphasis placed upon the hedgerow. However, the Government acknowledge that trees need to be managed in so far as they propose to introduce a 'deferred consent to fell', whereby a planning authority could grant permission for big, old trees to be felled, but only after the designated replacements have been planted and become established. If, in the interim, the tree becomes imminently dangerous, it can be felled.

Many other changes are proposed, including a redesignation of the term "willful damage" to "reckless damage," which should allow more violations to be prosecuted. In addition, the Government seeks to impose a 28 day consultative period upon statutory undertakers and a 5 day period for dangerous trees. The abuse of the "dying or have become dangerous" clause of the Section 198

(6)(a) of the 1990 Act has led the government to limit this type of exclusion to "imminent danger" only; and it is necessary to demonstrate that the works undertaken were the minimum necessary to make the tree safe; the dying tree exclusion is to be eliminated (consultation required before felling).

The proposals also call for the form of the Order to be considerably simplified and for all property owners within 15 meters of the tree to be notified of the intention to serve an order. In addition, it is proposed that the six month provisional period is eliminated and that an Order once served, be a final Order. However, there would be a grounds for appeal that an order was improperly made.

In general the proposals are good and welcomed. The teeth that the new Planning & Compensation Bill will give in the form of a tenfold increase in the level of fine available, coupled with the increased grounds for prosecution, should offer our amenity trees a considerably enhanced degree of protection. The Government have acted well, thought not well enough for some, at a time when people are becoming more and more aware of trees and their importance. I am optimistic that we will continue to protect our trees well into the next century.

### Tree Management

There is disappointment that the government have not grasped the chance to introduce the term *Management* to the orders. The future of our trees lies in getting people to understand that they need to be managed, not preserved like a petrified forest. A renaming of the orders to *Tree Management Orders* would have been very welcome indeed. Perhaps the next review will bring this about.

The importance of management of our trees cannot be overstated. The lessons of bad planning and aftercare are well documented on both sides of the Atlantic (4,5,8,9), but unlearned it seems. The necessity of understanding tree systems and tree biology in designing management for the older, mature trees is also documented (6,13,14). It is a pity the proposed revisions have not taken this up.

What is encouraging, though, is the fact that the tighter control proposed resulted from long consultation with the arboricultural industry and all interested parties and organizations. It is likely that a good number will be implemented. I am encouraged that the legislative controls, designed to protect trees are coming closer to the recommendations for the protection of trees during development and other works. The new recommendations in the British Standards (2) are based upon research and development and understanding of trees as biological systems. It is encouraging to see this beginning to be reflected in protective legislation.

In the great scheme of things trees are important, very important indeed, to our well being. They need protection. We hear the world wide cry to halt felling in the tropical rain forests and this is good. In Britain we protect our trees with laws that are being strengthened and enforced. Only by this type of example can we presume to dictate to other countries how they should protect their trees. It is my belief that all trees should be legally protected. They are the oldest living beings on the planet and essential to its survival. Like whales, they need international agreements to protect them. I would propose that all trees be given protected status and all felling, development involving tree removals, etc. should be subject to control and licensing. We need to draw up a World Charter for Trees before it is too late.

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