

**LICHFIELD DIOCESE**  
**GUIDANCE NOTE RELATING TO TREES IN CHURCHYARDS**

- 1) This note is for internal use because the responsibility for preparing formal guidance rests with the Chancellor. Trees in churchyards are subject to secular control through the planning systems as well as being within the Faculty Jurisdiction. This note does not deal in detail with other issues as to trespass and nuisance affecting neighbouring land owners or the implications as to liability on the part of owners and occupiers. There is statutory guidance from the Church Buildings Council (CBC) issues under the 1991 Measure, which should be read carefully.
- 2) **The secular system** includes protection through a Council making a Tree Preservation Order, but, in addition trees in a Conservation Area are also protected. The 'ecclesiastical exemption' does not provide any exemption from the effects of either TPO or CA protections.
- 3) The most basic level of protection is that Councils have a duty to make provision for the protection of trees, or for the planting of new trees, through planning conditions, whenever planning permission is given for development which might affect them. Making an application is a specific trigger for them to consider whether to make a Tree Preservation Order in respect of existing trees, or (prospectively) trees which are to be planted under a planning condition, but TPOs may be imposed at any time. (If a TPO is known about a copy should be placed in the PCC records and should be supplied to the Registry, but we do not keep a register of such matters).
- 4) Within conservation areas, it is a criminal offence to lop, top, uproot, wilfully damage or destroy a tree any tree without giving the council 6 weeks' notice<sup>1</sup> of the work. The council can then permit the work or can make a Tree Preservation Order. For the purpose of this part of the regime a tree is defined as one having a diameter of more than 75mm measured 1.5m from the ground (importantly, this definition does not apply in relation to TPOs, on which please see below).
- 5) A Tree Preservation Order can be made on an interim basis, that is to say, it can be (and usually is) brought into immediate effect. However, it is possible to make objections to TPOs within a time period specified in the TPO; objections need to be carefully presented and argued, and may result in the TPO not being confirmed. The Council must consider objections before deciding whether to confirm the Order : it is possible to challenge a decision to confirm a TPO in the High Court if it is legally or procedurally erroneous. A TPO can protect either a single tree, or several individual trees, or group(s) of trees, or trees within an area, or a woodland.

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<sup>1</sup> Notice does not have to be given if the work is 'necessary to implement a planning permission'; the burden of showing that necessity rests with the land owner, and the exclusion is not available with a mere outline permission, nor with a development order permission.

- 6) It is a criminal offence to lop, top, uproot, wilfully damage or destroy a tree protected under a TPO without securing formal consent. Case law has established for the purpose of TPOs (as distinct from Conservation Areas) that an organism is a tree from the moment a seed germinates : the protection afforded by eg a woodland or area order is thus much wider than that which exists solely by reference to a Conservation Area.
- 7) It should be noted that damage can be caused to a tree without physically touching the tree, for example by compressing ground to the point that the root system is compromised in any way (for example by using land close to trees for parking, or as an accessway for cars, or by pollution from leakage or spillage of pollutants). A tree's root system might, typically, extend at least as far as the radius of the crown of the tree but potentially much further depending on the species involved. Specifically, damage could be caused in a churchyard by cutting through root systems of protected trees.
- 8) Consent for works to a protected tree is almost always required, but there are some exclusions to this (for example where the tree is dead, or poses an immediate risk of serious harm, provided advance notice is given; urgent advice should be sought before attempting to rely on the exclusion). Consent is not needed if the work is '*necessary to implement a planning permission*'; the burden of showing that necessity rests with the land owner, and the exclusion is not available with a mere outline permission.
- 9) The penalties for breach of the regime are severe: fines are unlimited in amount. In addition to fines, confiscation orders may be made.
- 10) In addition, replanting directions may be made.
- 11) As a result anyone seeking to deal with trees within a churchyard should firstly check with the local council as to whether the tree is protected by a TPO or is within a Conservation Area. The normal approach under the Faculty Jurisdiction is that if work requires authorisation under both the secular system and the ecclesiastical system, the authorisation of the secular authority should be secured first.
- 12) Protection is given to hedges which border commons, agricultural or forestry land, or land used for keeping horses ponies or donkeys (except for those that are within or demark the curtilage of dwelling houses). Care needs to be exercised because a hedge which borders a churchyard will also border other land, and might thus be protected under hedgerow legislation. Council advice ought to be sought, especially if the hedgerow is more than 30 years old.
- 13) Other protections may exist. For example if a tree is a habitat for bats, damaging the habitat may be an offence under ecological legislation. If any bats are roosting in the tree advice is essential. It may not be immediately apparent whether bats are roosting. In any event, great care should be taken to avoid prejudicing bird life by any work to trees or hedges during the nesting season. Damage to bat roost or habitats or nesting birds are criminal offences
- 14) All the criminal offences referred to above are *absolute* offences, that is to say doing causing or permitting the unlawful act is enough to render the conduct criminal, and the prosecution do not

have to show any blame on the part of the defendant. So, cutting down a tree protected by a TPO is an offence even if the person concerned was completely unaware of the TPO; similarly, compromising a bat roost is an offence even if the person concerned had no knowledge of the bats using the tree. A PCC or an incumbent giving instruction to a person to carry out work would cause or permit the work and any consequential offence. Penalties are significant, and, of course, being convicted of a criminal offence can have disciplinary consequences for clergy.

15) **The Faculty Jurisdiction:** Neglect in the duty to obtain authorisation is an ecclesiastical disciplinary matter.

16) As noted above, the Faculty Jurisdiction is in addition to secular control and does not include any exemption from secular control. Some works can be authorised under Lists A or B, other works require a full faculty. Some of the provisions require consideration as to whether a tree is dying dead or dangerous; *this is a specialised conclusion which requires expert knowledge. Reliance on a qualified and experienced arboriculturalist is essential. Please note that a 'tree surgeon' or contractor is not necessarily an arboriculturalist and that care needs to be taken to ensure that the advice obtained is from a properly qualified person, rather than a mere contractor.*

a) List A allows work to be carried out without Archdeacon approval:

i) for the felling lopping or topping of a tree the diameter of which does not exceed 75mm (measure at 1.5m above ground level). This provision can only be relied on if the tree is neither subject to a TPO nor in a Conservation Area; if it is, then a full faculty is required.

ii) For the *lopping or topping* of any tree that is dying or dead or has become dangerous;

iii) For the removal of dead branches from a living tree

Regard must be had in each case to the CBC guidance

b) List B allows the Archdeacon to approve:

i) the *felling* of any tree that is dying or dead or has become dangerous, but where the tree is subject to a TPO or is in a Conservation Area, provided that the requirements as to replacement planting are complied with;

ii) any other works to trees except for felling, provided TPO and CA laws are complied with where relevant

Regard must be had in each case to the CBC guidance

c) List B also allows the Archdeacon to approve the *planting* of trees. Tree planting may well be an attractive proposition and is often suggested by families but as the tree grows to maturity it can present problems of overshadowing, or damage to memorials (and one must remember that the memorials in a churchyard do not belong to the incumbent), or to buildings, or walls, or to the setting of the church or other historical asset such as archaeological remains or nearby properties. The CBC guidance on this is useful

d) If work is not specifically authorised by List A or B then a full faculty is required

17) **Emergency situations:** it is well recognised that trees can pose a real danger to life and property, not only in high winds but also from dropping deadwood and from encroachment from the root system into neighbouring land or buildings. It is also well known that there is a good deal of misinformation and unqualified fear and defensiveness around. If good advice is sought, it is unlikely that risks will mature into injury; they will be properly managed, and if an unfortunate event occurs then insurance will ensure that any financial cost is picked up. Having advice before problems arise is important and is the duty of the minister, PCC and churchwardens. The CBC guidance sensibly suggests that if a sudden hazard is presented posing 'an immediate and substantial risk of harm to people or property' then evidence should be collected, including photos as well as independent arboricultural advice; the works to be done should be the minimum to make the place safe (*and it may be that roping off an area is the minimum response*); the resultant felled wood should be retained for examination.

- a) If the tree is protected the council tree officer should be consulted 5 days *before* work is commissioned. Remember that the protection for emergency work is limited to cases where the work is *urgently necessary to remove an immediate risk of serious harm* - if fencing off the tree is sufficient, then the work is not necessary. In any event, even if urgent work is required and there is no time to give the prior notice, written confirmation should always then be given to the Council so as to comply with the Regulations.
- b) Advice should also be sought from the Archdeacon who may be able to approve the work under List B if it is not capable of being carried out under List A. But if it is not covered by either provision, or if the Archdeacon is unwilling to give the authority, then an Interim Faculty should be sought.

18) **Additional Points of Good Practice:** A minister who has a churchyard with any trees in it ought to think about a series of points:

- a) to check with his local authority as to whether there are any TPOs in force, or whether the churchyard is within a Conservation Area, and as to whether any hedgerow is protected. Generally, each local authority will have a specialist officer dealing with trees, and they are usually very helpful in giving advice. It is also possible that a tree has significance as being part of the setting of a registered park or garden and (very likely) as part of the setting of a listed building (such as the church, or a nearby property); there is also a Gazetteer of yew trees, in view of their special historical associations. (There are understood to be 5 ancient (out of 205 in the country as a whole) 16 veteran and 9 notable yew trees in the Diocese of Lichfield<sup>2</sup>).

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<sup>2</sup> The case of Whittington [2017] ECC WOR1 is an interesting example of the value which is attached to trees, even unprotected trees, and the care that is needed in relation to interference with trees eg through special piled foundation arrangements. In that case the Court noted that the Council had considered an arboricultural assessment and was satisfied that the impact from the foundations was minimised and had granted planning permission for a building near to a veteran but unprotected yew tree. An objector to the

- b) The assessment of a tree is multifaceted. A qualified expert arboriculturalist or council tree officer will consider the tree's :
- i) species, size, age and rarity;
  - ii) form, condition, life expectancy and likely future growth;
  - iii) location, amenity value, habitat value;
  - iv) and conflicts and risk presented by it
- before giving an evaluation or advice. The results are sometimes presented on a 'scoring' system of evaluation, or a matrix, which allows different elements to be weighted according to importance.
- c) The minister should
- i) include any trees or hedges of importance within the Statement of Significance for the church.
  - ii) include the location of trees on the churchyard plan.
  - iii) (if the churchyard is in use for burials) consider whether an arboriculturalist's advice is needed about the root protection area of any protected tree, because of the risk of exposure to criminal liability from damage<sup>3</sup>. Similarly if plans are being considered for building or engineering works (such as pathways or service media connections).
  - iv) ensure that advice is sought regularly from an arboriculturalist as to the condition of the trees. Seeking advice is obligatory if the tree is subject to a TPO. It should be noted that being able to demonstrate that the PCC has secured regular advice (perhaps at the same time as the Quinquennial) is likely to be particularly helpful in the event of any accident since it may well negate any assertion of negligence; but it will also enable a sensible works programme to be carried out rather than allowing costly situations to build up.
  - v) Note that the Registry recommend
    - (1) an annual inspection by a PCC member who has read the CBC guidance;
    - (2) Quinquennial inspection by the church architect; and
    - (3) detailed arboricultural advice and inspection every 10 years, or whenever particular concerns are forthcoming.

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faculty petition challenged the impact on the root protection area, and produced a more comprehensive report. The Chancellor looked at the significance of the yew tree and in particular its rarity value and the likelihood of harm to it from the building work proposed and ruled against the grant of the Faculty. There is an interesting discussion as to the significance of the root protection area. He placed little weight on the council's earlier consideration of the impact on the tree, on the ground that the later reports were more thorough.

<sup>3</sup> Previous burials may have compromised the roots, but that would not justify future damage, and indeed might increase the impact from any future damage; but it may of course limit the current spread of the root system.

- d) The PCC should ensure that
  - i) specific inspection by a PCC member is carried out eg both before and after violent storm events.
  - ii) The PCC inspection should look carefully for signs of stress damage or weakness within the tree and if anything untoward is found the area should be roped off and warning signs should be posted.
  - iii) Ensure that regular work is done to ensure sweeping up of autumn leaves, clearance of fallen brushwood, keeping ivy and weed growth in check.
  - iv) Ensure that the PCC member taking responsibility for these matters understands and becomes aware of the characteristics of the tree species involved and takes advice about them. *Where responsibility is passed to a local authority following closure, it is still recommended that this course be adopted but the results of the inspection should be given to the council concerned and it should be asked to confirm receipt and that it will take action.*
- e) The PCC and minister should
  - i) consider the implications of bats and birds carefully; an ecologist may need to be instructed but initially advice should be sought from an arboriculturalist
  - ii) read the CBC guidance
  - iii) consider carefully the CBC note as to possible threats from other possible works

**19) Other legal issues:**

- a) A churchyard is a place in which the duties under Occupier's Liability rules will apply both to persons with a right to be present and to trespassers. People must be protected from dangers.
- b) The PCC is the body responsible for the care and maintenance of the trees in a churchyard, unless and until that responsibility is passed to a local authority by a notice following the closure of the churchyard by Order in Council.
- c) The incumbent of a parish (not a priest in charge or other curate or minister) is the owner of the churchyard and may well have responsibilities as owner under certain legislation, in addition to the PCC.
- d) Trees within a churchyard belong to the incumbent or lay rector if there is one.
- e) Any timber created as a result of work may be sold but the net proceeds of sale must be used for the maintenance of the church or churchyard; it will be the PCC which effects the sale even though the timber is owned by the incumbent; this is under the CCM1991 s6.
- f) It is no longer necessary to have consent under the Forestry Act or from the Diocesan Parsonages Board. The relevant consents are as set out above: TPO; Conservation Area Notice; Licence under Wildlife and Countryside Acts; and Faculty Jurisdiction.
- g) Trees which overhang other peoples' land trespass into their property and similarly root which penetrate beyond the churchyard may amount to a nuisance. It may be that work to a

tree is requested to avoid trespass or to abate a nuisance, but even in such situations, the work needs authorisation under the Faculty regime. And whilst a neighbour may blame a tree for a problem, it cannot be assumed that it is the cause of the problem – or that there is therefore a nuisance – without evidence. Advice should be sought from the Registrar in such situations if List A or B do not cover the work. If the tree is protected by a TPO or is in a Conservation Area, note that

- i) Avoidance of trespass is not an exemption under the 2012 TPO Regulations so that consent is still required.
  - ii) The planning regime authorises works that are *necessary* to abate a nuisance, but to avoid argument over proving necessity (a high threshold), there should always be consultation with the Council concerned as to the extent of work envisaged before agreeing to any works to abate a nuisance because otherwise the act might be criminal.
- h) Any work carried out must be done *after* advice from an arboriculturalist and with the benefit of all necessary consents; those carrying out the work (usually tree surgeons acting on the advice of the arboriculturalist) should be asked to verify that they have appropriate insurance; work to trees is not a task for volunteers.

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