

## EXECUTIVE NOTE

### THE TOWN AND COUNTRY PLANNING (TREE PRESERVATION ORDER AND TREES IN CONSERVATION AREAS) (SCOTLAND) REGULATIONS 2010

SSI 2010/434

Part 5 of the Planning etc. (Scotland) Act 2006 (the 2006 Act) amends the Town and Country Planning (Scotland) Act 1997 (the 1997 Act). The 1997 Act as amended sets the framework for Tree Preservation Orders (TPOs). The purpose of this instrument is to update the procedures for making, varying, and revoking TPOs under the Act. The Instrument replaces the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 1975. The Instrument is subject to negative resolution procedures.

#### Background

In Scotland the legislation relating to Tree Preservation Orders has changed little since 1975. In 2002 research was commissioned to examine whether the TPO procedures in Scotland are still effective. The Research Report *The Effectiveness of Tree Preservation Orders in Scotland* published in December that year found that the TPO system is basically sound, and that a series of fine tunings would provide an up-to-date structure for protecting trees across Scotland.

Proposals for legislative change based on the research report and subsequent discussions with stakeholders were brought forward through the *Tree Preservation Orders Consultation Paper* (2004) and subsequent *Overview of Responses* (2005).

The Proposed changes with regards to primary legislation have been taken forward through the 2006 Act. The proposed changes to secondary legislation were consulted upon earlier this year.

#### Policy Objectives

Set within the framework of the 1997 Act as amended, the instrument aims to improve the effectiveness of TPOs and simplify a sometimes complicated system.

#### Current System

Tree Preservation Orders are made by a planning authority under Section 160 of the 1997 Act. TPOs can be served where it is expedient in the interest of amenity. TPOs are used to protect trees or woodlands if their removal would have a significant detrimental impact on the environment and its enjoyment by the public. Where protection is given by a TPO prior consent is required from the planning authority to carry out any work on the trees. It is an offence to cut down, lop, top, uproot or wilfully damage or destroy a protected tree without permission from the planning authority. TPOs form a legal constraint permanently attached to the title of the land where the trees are located.

A TPO does not take effect until it is confirmed by the planning authority unless a provisional TPO has been included within the Order which will last for a period of 6 months.

There is no right of appeal against the designation of a TPO, there is however a right of appeal against the refusal of consent to carry out works to trees protected by a TPO which is determined by Scottish Ministers.

A TPO is required to be in a form (or substantially in the form) set out in the regulations and defines the position of the tree, groups of trees, or woodlands to which it relates by means of a map. The form of the Order (Model Order) is contained within the Schedules to the regulations.

A copy of the Order is required to be served on the owners, occupiers and lessees of the land, and a copy of the order is required to be sent to the Conservator of Forests and the Keeper of the Registers of Scotland. The planning authority are also required to serve a copy of the order on any other person then known to them to be entitled to work by surface workings any mineral in that land or to fell any trees affected by the order.

A planning authority must after making the TPO: make a copy available for public inspection at a convenient place to the locality in which the trees are situated; give notice by advertisement of the making of the order including a statement of the grounds for making the order, where and at what hours the order can be inspected, and how to make objections and representations.

At least 28 days must be given for representations to be made to the planning authority after the publication of the notice. Representations must be made in writing and specify the particular trees to which the representation is made. The planning authority are required to consider any representations before the TPO is confirmed.

Where a TPO is confirmed the planning authority are required to inform the owners, occupiers, lessees of the land and serve a revised order where the order has been approved subject to modifications. The planning authority are required to also notify the Conservator of Forests and the Keeper of Registers of Scotland and give notice by advertisement of the decision including where and what hours a certified copy of the order can be inspected.

Section 275 (8) of the 1997 Act confers a general power on planning authorities to vary and revoke orders. The power to vary a TPO allows orders to be updated. The revoking power is usually used were a TPO becomes obsolete because of changes to trees or woodlands or because they are no longer under threat.

Before carrying out any tree work within a Conservation Area, the owner of the tree must give written notice to the planning authority detailing the proposed works. The work may commence if the planning authority grant consent or after the expiry of 6 weeks from the date of notice. The 6 weeks period allows an opportunity for the planning authority to consider whether or not to serve a TPO on the trees concerned or discuss the proposal with the applicant.

### **Changes to the Current System**

The 2006 Act section 28 (2) expands the powers of planning authorities to serve TPOs to include trees, groups of trees, or woodlands of cultural or historical significance.

The 2006 Act section 28 (3) ensures that all TPOs are made with immediate effect and gives planning authorities six months in which to confirm a TPO.

Regulation 3 removes the Model Order from the regulations to guidance. Section 160 (1) of the 1997 Act gives planning authorities powers to make TPOs and Section 160 (3) sets out what provisions a TPO may include, this will allow the planning authority to determine the provisions of the TPO within the restrictions of primary legislation contributing to local innovation.

A Model Order that makes the content and language of TPOs clearer, easier to understand and use has been consulted upon and will be included in the accompanying Circular as guidance.

As the Model Order is no longer in regulations, regulation 8 has been expanded to include exemptions that were previously contained within the Schedules.

Regulation 3 also inserts a new provision requiring that the map as part of the Order must be to a scale sufficient to give a clear indication of the position of the trees.

Regulation 6 introduces a requirement to send decision notices to those who made representations. This reflects the wider aims of planning modernisation in which decision notices are given to every person who has made representations in respect of a planning application. As a consequence the requirement to advertise the decision has been removed from the regulations.

Regulation 7 introduces a new procedure where a TPO is not confirmed. There are currently no regulations that deal with this circumstance. To ensure consistency planning authorities must endorse the TPO to that effect, with the date of the decision and give notice of its decision to the Forestry Commissioners, interested persons and any person who made a representation.

The Planning etc. (Scotland) Act 2006 Section 28 (1) introduces a duty for planning authorities to review existing TPOs and consider whether it is requisite to vary or revoke TPOs. Individual trees and woodlands are under continuous change, and accurate information is required to ensure enforcement can be carried out. To assist with this duty:

- Regulation 3 (3) introduces provisions that a TPO is not required to include a map in revocation order or a variation order which does not amend the original order to include new trees.
- Regulation 6 (6) requires that where a planning authority confirm a variation or revocation, the original order must be endorsed with a statement that the order has been varied or revoked, specifying the date and title of the variation or revocation order.
- Regulation 6(7) requires that where a revocation order is confirmed the planning authority are to withdraw a copy of the original order made available for inspection.

The 2006 Act introduces powers for Scottish Ministers to make regulations as to the form and manner in which the application for consent under the order must be made. Regulation 9 requires that an application must specify the operation for which consent is sought, give reasons for carrying out the operations and identify the protected trees that would be affected. A map of sufficient size and scale may be used to identify the trees.

### **Consultation**

A public consultation was carried out earlier this year. The draft regulations and supporting consultation paper were published in April 2010 with responses sought by July. 46 responses to the consultation paper were received. The main respondent group was planning authorities. An analysis of the Consultation Responses was published in September this year and is available at <http://www.scotland.gov.uk/Publications/2010/09/10103253/0>

### **Financial Effects**

A full Business and Regulatory Impact Assessment accompanies the draft SSI and is attached.

# TREE PRESERVATION ORDERS: FINAL BUSINESS AND REGULATORY IMPACT ASSESSMENT.

## 1. Title of proposal

1.1 The Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 2010

## Purpose and intended effect

## 2. Objective

2.1 The Scottish Government is seeking to improve the effectiveness of TPOs and simplify a sometimes complicated system.

## Background

2.2 In Scotland the legislation relating to TPOs has changed little since 1975. (The Town and Country Planning Tree Preservation order and Trees in Conservation Areas) (Scotland) Regulations 1975) In 2002 research was commissioned to examine whether the TPO procedures in Scotland are still effective. The research report *the Effectiveness of Tree Preservation Orders in Scotland* published in December that year found that the TPO system is basically sound, and that a series of fine tunings would provide an up-to-date structure for protecting trees across Scotland.

2.3 The *Tree Preservation Orders Consultation Paper 2005* set out a number of specific proposals for changes to the Town and Country Planning (Scotland) Act 1997 and the Town and Country Planning (Tree Preservation Orders and Trees in Conservation Areas) (Scotland) Regulations 1975.

2.4 The *Tree Preservation Orders – Overview of Consultation Responses* (2005) summarised the key issues raised in response to the consultation paper and set out the Government's proposed actions with regards to the specific proposals.

2.5 The White Paper *Modernising the Planning System* (2005) identified that proposals to enhance the effectiveness of TPOs would be taken forward through the Planning Bill.

2.6 The proposals that affect primary legislation have been implemented through the Planning etc. (Scotland) Act 2006. The Town and Country Planning (Tree Preservation Orders and Trees in Conservation Areas (Scotland) Regulations 2010 will address the proposed changes for secondary legislation.

2.7 The regulations were consulted upon between April and July 2010. A total of 42 responses were received. Planning authorities were the main respondent group, whilst two business replied to the consultation paper.

## **Rationale for Government intervention**

2.8 Given the age of the current regulations and the need to improve the effectiveness of TPOs the do nothing approach is not considered viable. If there was no government intervention then stakeholders would struggle with a legislative framework that is complicated and difficult to use.

## **3. Consultation**

### **Within Government**

3.1 The Scottish Government Directorate for the Built Environment has consulted with colleagues in:

- The Directorate for Planning and Environmental Appeals
- The Forestry Commission Scotland
- The Registers of Scotland
- The Department of Communities and Local Government

### **Public Consultation**

3.2 Approximately 1000 copies of the Consultation Paper Tree Preservation Orders 2005 were issued to a wide range of stakeholders including tree professionals, arboriculture organisations and utilities companies. 61 Responses to the consultation paper were received from a broad range on interests although local authorities and community interests were particularly well represented. The consultation paper revealed considerable support for the proposals to improve the effectiveness of TPOs.

3.3 A presentation was given to local authority tree officers at a tree and landscape forum event in May 2009. There was an opportunity for questions and debate following the presentation.

3.4 The Tree Preservation Orders (TPOs) consultation Paper (April 2010) provided the formal consultation on the draft Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas (Scotland) Regulations 2010. Overall respondents were generally supportive of the proposals. No changes are proposed to the regulations following the public consultation.

3.5 Informal consultation took place with the Registers of Scotland following the public consultation. As a result references to the Registers of Scotland within the regulations have been omitted.

## **4. Options**

Option 1 – Do nothing and maintain the status quo

4.1 The legal framework for TPOs has not been significantly updated since 1975. The current legislative framework can seem complicated and difficult to use. Tree Preservation Orders themselves run to several pages, are difficult to draft and use language that is hard to understand. This does not contribute to the effectiveness of TPOs.

#### Option 2 – proposals as drafted

4.2 The proposals as drafted update and simplify the legislation in order to improve the effectiveness of TPOs and stakeholder's understanding of the process.

#### Option 3 – proposals as drafted with a model order included in the regulations

4.3 There is an argument that as the proposals as drafted do not include a Model Order in the regulations, TPOs may vary in consistency between planning authorities. Including the model order in regulations has been ruled out on legal grounds. A model order has however been prepared for guidance and will be included within the consultation paper.

## **5. Costs and benefits**

### **Sectors and Groups affected**

5.1 There are three groups most likely to be affected by the proposals. Group 1 is landowners with a TPO designated on trees on their land or developers undertaking development on that land. Group 2 is the planning authorities who administer the TPO system. Group 3 is those persons with an interest in the amenity of an area, for example a community council who make representations regarding a TPO.

### **Option 1 – Do nothing and maintain the status quo**

#### **Benefits**

5.2 It is considered that there are no benefits to this option as stakeholders currently struggle with a legislative framework that is complicated and difficult to use.

#### **Costs**

5.3 Although existing procedures would be maintained it is difficult to argue that this would be a benefit as existing procedures are unclear and require stakeholders to use legislation that uses references to the Town and Country Planning (Scotland) Act 1972. Lack of clarity of procedures among stakeholders leads to inefficiency, the generation of questions and possible challenges in the courts.

5.4 There would be no clarification with regards to varying and revoking orders. It would be difficult for planning authorities to comply with their statutory duty introduced by the Planning etc. (Scotland) Act 2006 to review existing TPOs and consider whether to vary or revoke the Order.

## **Option 2 – Proposals as drafted**

### **Benefits**

5.5 The proposed regulations introduce clarity into the regulations on varying and revoking TPOs enabling the planning authority to undertake the duty introduced under the Planning etc. (Scotland) Act 2006 to review existing TPOs.

5.6 The proposed regulations introduce new provisions that require planning authorities to notify those persons who make a representation on a TPO of the outcome. This provides feedback to those persons interested in the amenity of the area who have made a representation.

5.7 Procedures have been clarified where a TPO is not confirmed assisting the planning authorities, and the Forestry Commission

5.8 The regulations have been updated to reference provisions in the Town and Country Planning (Scotland) Act 1997 and the Planning etc. (Scotland) Act 2006 rather than the Town and Country Planning (Scotland) Act 1972. This removes the need for stakeholders to read between corresponding provisions in the relevant acts which can be a time consuming and complicated process. This should lead to a greater understanding of TPO legislation by stakeholders.

5.9 Option 2 allows the planning authority to determine the provisions of the TPO within the restrictions of the primary legislation. This contributes to local innovation.

### **Costs**

5.10 Research undertaken by ARUP – Planning Reforms and Impact assessment (2005) found that the local authority financial/cost implications of the reform of the legislation on TPOs would be likely to require the additional recruitment of an average of one full time tree officer per local authority.

5.11 Although proposals for neighbour notification and making the Forestry Commission a statutory consultee (on which the estimate was calculated) are not part of the regulations there will be resource implications with the duty to review TPOs arising from the primary legislation.

5.12 The regulations introduce a requirement to notify those persons who made representations on a TPO. Although resources will be required with regards to printing and postage, this requirement simply extends notification of a decision.

5.13 Although the designation of a TPO restricts the use of the land, with regards to development, a TPO would be a material consideration in the determination of a



planning application, it would not prevent development should planning permission be granted. There is potential for the application to be refused on the basis of the proposed developments impact on the trees which have been designated for the amenity, cultural or historical value. Developers should take this into consideration when working up proposals.

5.14 There are no fees for landowners applying for consent to undertake works to protected trees. The regulations clarify that permitted development rights or planning permission in principle will not remove the requirement to undertake consent for work on protected trees. There will be no additional fees, however there could be a delay as result of undertaking the procedure that may result in a cost to the landowner or developer.

5.15 Statutory undertakers will not require to apply for consent for work on protected trees with regards to permitted development rights, therefore we consider that there will be no additional costs to statutory undertakers.

### **Option 3 – Proposals as drafted with a model order included in the regulations**

#### **Benefits**

5.16 In addition to the benefits identified in option 2, option 3 would provide a high degree of consistency between the TPOs served by each local authority. This would mean that TPOs would be relatively uniform across Scotland reducing complexity between planning authority areas.

#### **Costs**

5.17 In addition to the costs identified in option 2, option 3 would remove the opportunity for local innovation. The planning authority would not be able to serve a TPO with provisions best suited to the particular circumstances of the trees or the planning authorities procedures.

## **6. Scottish Firms Impact test**

6.1 We take the view that the impact on all Scottish firms would be minimal therefore we did not carry out a Scottish firms impact test. There were no concerns raised regarding this approach in the formal consultation.

## **7. Legal Aid Impact Test**

7.1 It is not expected that these proposals will have a significant impact on use of the legal aid fund. There were no concerns raised regarding this issue in the formal consultation.

## **8. Test Run of Business Forms**

8.1 No new forms will be introduced as a result of the regulations. There were no concerns raised regarding this issue in the formal consultation.

## **9. Competition Assessment**

9.1 The Regulations are unlikely to impact on competition. No issues regarding competition were raised in the formal consultation.

## **10. Enforcement, Sanctions and Monitoring**

10.1 Sections 167 – 171 of the Town and Country Planning (Scotland) Act 1997 provide planning authorities with powers to enforce TPOs. Section 174 of the Act provide planning authorities with powers to enforce controls as respect to trees in conservation areas. There are no changes to this position proposed through the regulations.

## **11. Implementation and Delivery Plan**

11.1 The Regulations will be laid before Parliament in December 2010 with a coming into force date of 1 February 2011.

## **Guidance for Stakeholders**

11.2 The regulations will be accompanied by a Circular which will provide a statement of Scottish Government Policy and contain guidance on policy implementation through these legislative and procedural changes.

11.3 A draft Circular will be available in advance and this document will be finalised in line with the coming into force of the regulations and is designed for use by stakeholders.

## **12. Post-Implementation Review**

12.1 The intention is to review the policy after its first year of operation to ensure it is delivering the intended benefits, and no administrative or legal barriers are reducing the potential of its impact. This review will take the form of a targeted consultations with those using the policy.

## **13. Summary and Recommendation**

13.1 The proposed Regulations will ensure that there are robust and workable statutory controls for Tree Preservation Orders.

13.2 In view of the above, it is recommended that the Regulations are introduced into Scottish Law.

#### **14. Declaration and Publication**

*I have read the business and regulatory impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of business in Scotland.*

Signed STEWART STEVENSON

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