

**Tree Preservation Order 2007 Number 492 (42 Middleton Avenue, Littleover)**

**RECOMMENDATION**

1. To approve confirmation, without modification, Tree Preservation Order 2007 number 492 (42 Middleton Avenue).

**SUPPORTING INFORMATION**

- 2.1 On 8 August 2007 Derby City Council, in exercise of the powers conferred by sections 198, 201 and 203 of the Town and Country Planning Act 1990, made the above Tree Preservation Order (TPO) at 42 Middleton Avenue, as shown on the plan attached as Appendix 2.
- 2.2 The reason why the TPO was made is cited as: "The tree indicated in this Order is proposed for protection in the interests of visual public amenity. The tree is situated in a very prominent position and can be appreciated from the immediate vicinity as well as from further afield. The tree contributes materially to the amenities of the locality by playing an important part in providing a sense of scale and maturity and by contributing to a general greening effect on the immediate and surrounding area."
- 2.3 Letters objecting to the TPO were received from Dr and Mrs Edworthy (44 Middleton Avenue), P Young (Middleton Avenue Developments) and John and Elaine Forkin (42 Middleton Avenue). Copies of the objection letters are attached as Appendix 3.
- 2.4 Letters in support of the TPO were received from Mr and Ms Donoghue (40 Middleton Avenue), A Whiting (Middleton Drive), Justin Norman (14 Middleton Avenue), Mrs Junokas (119 Bretton Avenue), Mr P J Kidd (Middleton Drive). Copies of the letters of support are attached as Appendix 4.
- 2.5 The main points of Dr and Mrs Edworthy's objections are listed below followed by the Directors response. These comments have been prepared after consultation with the Assistant Arboricultural Officer.
- 2.6 This revised report has been prepared following the deferment of this item on 17 January, to enable a response to be made to further written comments made Dr Edworthy. This further letter is also attached at Appendix 4 and commented on at paragraph 2.14- 2.19.

- 2.7 **Dr and Mrs Edworthy's objection point one:** The stated grounds of visual public amenity are not of a sufficient degree to warrant the making of a TPO. They make reference to 'Tree Preservation Orders: A Guide to the Law and Good Practice' which states that 'the mere fact that a tree is publicly visible will not itself be sufficient to warrant a TPO'
- 2.8 **Director's response to point one:** In making Tree Preservation Orders we and other local authorities refer to 'Tree Preservation Orders: A Guide to the Law and Good Practice' and in doing so we have demonstrably considered the above point by also assessing the tree's present size, visual amenity, form and its future potential for increased visual amenity whilst taking into account its rarity and the expediency for making the order.
- 2.9 **Dr and Mrs Edworthy's objection point two:** The Eucalyptus tree is dangerous and has on occasions shed large and heavy branches without warning in weather conditions that one might not consider extreme. They believe this to be a characteristic of certain Eucalyptus trees and resulted in many deaths and serious injuries in its native Australia. This point was expanded by Dr Edworthy in a letter dated 16 November 2007.
- 2.10 **Director's response to point two and to the letter dated 16 November 2007:** Whilst not doubting what Dr. Edworthy has said, there is no evidence of the tree having shed large and heavy branches in the past. There are no splits, broken branches or broken stubs visible from the ground. The tree is free from defects such as poor branch/stem unions, large unbalanced branches or other defects visible from a ground inspection. It is not possible to compare the growth of Eucalypts in their native habitat where they can attain several hundred feet in height with relatively young specimens growing in this country.
- 2.11 As there is no evidence (e.g. photographic) that the tree has shed large branches in the past, and no evidence in the tree of broken stubs it is not possible to state the likelihood of this happening again.
- 2.12 **Dr and Mrs Edworthy's objection point four:** The falling branches constitute a nuisance in the legal sense. This point was expanded in the further letter from Dr Edworthy dated 16 November 2007.
- 2.13 **Director's response to point four and to the letter of 16 November 2007:** A 'nuisance' can only be caused to a third party. For the tree to be seen as a nuisance to a third party it would have to be 'actionable', i.e. causing an actual danger or damage such as branches touching a building or growing low and hitting people as they walk past, not just a potential nuisance. This is not the case with this tree.
- 2.14 **Dr and Mrs Edworthy's objection point five:** That the making of the TPO has been an abuse of the TPO system and was initiated from objectors wishing to block a planning application. They say: "A planning application should be decided on its own merits and where a planning application involves removal of trees there is the opportunity for the effects of this to be considered before any application is granted."

- 2.15 **Director's response to point five:** The TPO was made as a direct result of an amended planning application. The original application was granted and the tree survey submitted as part of that application drew attention to the fact the Eucalyptus was a significant tree. The amended application detailed the removal of the tree and subsequently the tree was made the subject of a TPO through the normal internal consultation and planning application process. It was not made to "block" any development but to protect a visually important tree that was under threat. As such the planning application was indeed decided on its own merits and the effect of the removal of trees was considered. The amended planning application has since been withdrawn.
- 2.16 **Dr Edworthy's objection in letter dated 15 January 2008, point one:** It is considered that the report of the Director does not accurately address the objections and is misleading and in some cases inaccurate.
- 2.17 **Director's response to point 1:** It is unclear which parts of the report are considered to be at fault but great care has been taken in fully and accurately summarising the points made and giving a full response to each one. I am satisfied that his comment is incorrect.
- 2.18 **Dr Edworthy's objection in letter dated 15 January 2008, point two:** A site visit is requested and it is considered, that this would confirm that the "visual public amenity" of the tree is limited and confirm that there are missing branches, to correct what are considered to be misleading comments about this matter made at paragraph 2.9 of this report.
- 2.19 **Director's response to point two:** The matter of visual amenity is responded to in my comments at paragraph 2.22 below. In relation to the point about the missing branches, I feel that this is simply a misunderstanding of paragraph 2.9. It is not suggested here that branches have not been lost off the tree, simply that there was no evidence, such as broken branch stubs, of branches having been shed and as such it is not possible to state the likelihood of this happening again.
- 2.20 **Dr Edworthy's objection in letter dated 15 January 2008, point three:** The tree does not meet the criteria for being suitable to be made the subject of a TPO set out in the Government advice on this matter and the report does not suitably address this matter.
- 2.21 **Director's response to point three:** This matter has been dealt with in paragraph 2.7 above, which summarises the grounds LPAs are advised to consider in deciding whether a tree is suitable to be made the subject of an Order. To assist Members I reproduce the relevant paragraphs of the Government advice in an Appendix to this report. As noted at paragraph 2.7 of this report it is considered that the advice this guidance has been fully followed in this case.
- 2.22 The main points of John and Elaine Forkin's objections are listed below followed by the Directors response, which again have been prepared after consultation with the Assistant Arboricultural Officer.

- 2.23 **John and Elaine Forkin's objection point one:** The tree is not a visual public amenity and that the tree cannot be appreciated from further field as stated in the grounds for making the order. The view from Middleton Avenue is a partial one limited to one point at the end of Number 44's driveway. The view from Bretton Avenue is limited to only the very top of the hill.
- 2.24 **Director's response to point one:** We have visited the site since the making of the order to reconsider the public amenity value of the tree. This is of particular relevance with regard to the fact that the amount of the tree visible will be reduced from the Bretton Avenue aspect as the construction of the new dwellings takes place on site. However, we are satisfied that the tree offers enough public amenity value to warrant making it the subject of a tree preservation order. Furthermore, at the time of making the visit other deciduous trees in the immediate area had shed their leaves enhancing the public amenity value of the Eucalyptus.
- 2.25 **John and Elaine Forkin's objection point two:** The Eucalyptus tree is not a native species and is suited to tropical and sub-tropical areas. It is an extremely fast growing tree and currently stands at some 70ft in height and will ultimately attain a height of 200ft. The view of the Tree Preservation Order Officer is that the tree is still young.
- 2.26 **Director's response to point two:** It is true that eucalyptuses are not native trees but then neither are the vast majority of trees grown in gardens. As an evergreen it has visual amenity and in many parts of Britain eucalypts are providing a welcome addition to the urban landscape. They are popular garden trees and as winters become warmer are thriving in the British climate. Size of the tree in itself does not constitute a danger, but should it become so an application to abate any danger can be made.
- 2.27 **John and Elaine Forkin's objection point three:** The roots of the tree are 6ft deep and lateral roots will extend to 100 ft in all directions. It is generally considered as a problem when situated near to buildings and can crack cisterns, clog water pipes and damage services.
- 2.28 **Director's response to point three:** Eucalypts are no different to most trees in that the roots spread out beyond the canopy and are predominantly found in the top 60cms of soil. They are only able to penetrate water pipes, etc if there is an existing defect in the pipe.
- 2.29 **John and Elaine Forkin's objection point four:** The tree has been causing problems, dropping branches and bark, leaves burning the lawn and suffocating other species.
- 2.30 **Director's response to point four:** The issue of dropping branches has been covered in 2.9 above. There is current research that suggests eucalyptus leaves can suppress the growth of other plants (allelopathy) but this is true of a number of garden plants such as laurel, rhododendron, walnut, etc. as long as the leaves are cleared in the usual way this should not cause a problem.

- 2.31 **John and Elaine Forkin's objection point five:** There is a consensus that the planting of Eucalyptus in domestic gardens is not advisable. In cities it is best suited to large expansive areas such as parks and commons. The Eucalyptus has no place and is out of scale in a domestic garden.
- 2.32 **Director's response to point five:** As has already been stated in 2.26 above these trees are very common in domestic gardens and although they are not suited to a very small garden in this situation (medium to large garden) they have the space to grow without being confined.
- 2.33 **John and Elaine Forkin's objection point six:** The Eucalyptus tree is recognized as a dangerous tree, especially in an unsuitable environment such as a domestic garden. Its natural growth cycle involves the dropping of entire branches (which can be extremely dense and dangerous) splitting of bases, cupping, twisting or collapsing. In Australia it is actually known as the 'widow maker' due to the number of people killed by falling branches.
- 2.34 **Director's response to point six:** I am not aware that there is any research that states eucalyptus trees are dangerous per se, and in this country are not renowned for dropping large branches as could be said to be the case with willows and poplar.
- 2.35 **John and Elaine Forkin's objection point seven:** The Eucalyptus has high levels of phenolics and toxic terpenoids as well as weak mutagenics and carcinogenics. World health company Merck, states that the Eucalyptus has been implicated in the deaths of small animals and the oils contained in the leaves is poisonous if ingested (as little as 4 to 5ml can be fatal for humans. The toxic nature of the Eucalyptus means birds and other wildlife avoid it. Consideration should also be given to another of the eucalyptus tree's features: its tendency to burn rapidly due to its flammable aromatic oils.
- 2.36 **Director's response to point seven:** The toxicity of the tree is not a relevant consideration in terms of the condition of the tree or its amenity. The native yew is highly toxic but can still be protected for its amenity. Most conifer trees are flammable but can still be protected.
- 2.37 **John and Elaine Forkin's objection point eight:** Branches on the tree have been reduced on the North side leaving a serious imbalance in its remaining branch distribution and splits have recently appeared at the trees' base and root system. We are seriously concerned that if left, the stability of the tree is a danger to 42 and to the house currently being constructed at 44, one of which is immediately adjacent to the tree.
- 2.38 **Director's response to point eight:** The removal of branches although unfortunate, will not unbalance the tree and the cracks in the bark are caused by the bark splitting as the tree expands its girth and is totally natural.

- 2.39 **John and Elaine Forkin's objection point nine:** The proposal to consider a Tree Preservation Order for the Eucalyptus has been initiated by small resident opposition to a planning application for plot 5 at the base of 42 Middleton Avenue. It is our understanding that regulations state that a TPO cannot be used as a tactic to block a bona fide planning application.
- 2.40 **Director's response to point nine:** Please see my response to Dr Edworthy's point five.
- 2.41 **John and Elaine Forkin's objection point ten:** The issue of a TPO had not been raised at any point by Derby City Council officers in all discussions relating to either the original planning application (consented for development at 44 Middleton Avenue) or during extensive consultations in preparing the amended planning application for land at 42 Middleton Avenue. We understand that the planning officer had understood that the position was 'OK' and gave a clear indication to that effect. We were advised that as the Eucalyptus is alien it could be replaced by a British specimen. We could have taken action to remove the tree in advance of planning but chose not to and the TPO appears to have punished that goodwill.
- 2.42 **Director's response to point ten:** The issue of a TPO was not raised when considering the original planning application because there was no expediency at any time. The original planning application didn't compromise the Eucalyptus. I am not aware that any advice was given by Council Officers that the removal of the tree was acceptable. However, any pre application discussion on the amended planning application has no relevance to the decision as to confirm this Tree Preservation Order.
- 2.43 **John and Elaine Forkin's objection point eleven:** The decision to make the TPO was not overwhelming and indeed was a 50/50 decision with the TPO officer stating that there were far more deserving trees in Derby.
- 2.44 **Director's response to point eleven:** The decision taken to make the Eucalyptus tree the subject of a TPO was not a hasty one and indeed there may be trees in Derby that are more deserving of a TPO. However, we have revisited the site and are satisfied that the tree provides enough public amenity value to warrant its inclusion in a tree preservation order.
- 2.45 **John and Elaine Forkin's objection point twelve:** This process has been inconsistent and unsatisfactory and we have a legitimate expectation for this to be considered in due course We reserve the right to consider the use of the DCC Complaints Procedure and subsequent referrals to assess the level and standard of service.
- 2.46 **Director's response to point twelve:** The TPO has been served in its usual manner and periods for objections have been extended in order to allow time for residents to supply other information relevant to the objection. In all other respects the making, serving and notification of the TPO has been in accordance with any statutory obligations and duties we have as a Local Authority. Mr and Mrs Forkin has of course the right to use the formal Complaints Procedure if he feels the proper procedures have not been followed.

- 2.47 **John and Elaine Forkin's objection point thirteen:** The only way for the tree to be appreciated with a high degree of public amenity value in the future is if it is allowed to grow out of control to its ultimate height. This would not be allowed as the tree would be an even greater danger than it currently is. Reasonable maintenance would result in a reduction in its size and so would never be able to be seen from the immediate vicinity.
- 2.48 **Director's response to point thirteen:** As has already been stated the tree currently provides a visual amenity, this will increase as it grows. Crown reduction is not usually acceptable on trees of this type and so it should be left to grow in its natural state for as long as the tree remains healthy and safe.
- 2.49 **John and Elaine Forkin's objection point fourteen:** If the TPO is confirmed then we will be requiring confirmation in writing that DCC accepts full liability for any consequences, damage or accidents as a result of the risks outlined above as they are documented and predictable.
- 2.50 **Director's response to point fourteen:** The Council could only be seen as responsible for the safety of the tree if it prevented its felling or pruning after an application was made, (and would be only be relevant for a limited period perhaps two year maximum) not after the confirmation of a TPO.
- 2.51 The main points of Mr P Young's objections are listed below followed by the Directors response.
- 2.52 **Mr P Young's objection point one:** The existing planning consent was granted after the consideration of the impact on any adjoining trees. Whilst this tree was taken into account in terms of design layout, this was done to mitigate the effect of the tree on the new dwellings and not just because of its perceived amenity value as we were not in control of its treatment as it fell outside the property boundary, the Council obviously did not consider that the tree had any special amenity value and surely it would have been incumbent upon them to ensure its protection at that time with a TPO.
- 2.53 **Director's response to point one:** The original planning application and consequent consent did not relate to the land at the rear of 42 Middleton Avenue where the Eucalyptus tree is situated. It was not expedient to make the tree at that time the subject of a tree preservation order as it wasn't compromised by the proposals in the application.
- 2.54 **Mr P Young's objection point two:** The issue of the TPO at this stage can clearly be seen as a blocking tactic to prevent the construction of an additional dwelling on brownfield land. It was our understanding that all necessary criteria to satisfy planning requirements had been met and consent would have been granted save for this intervention. It can therefore be demonstrated that the issue of this order is more in response to neighbour antipathy than reflecting the merits of the tree and is not enforceable on these grounds.
- 2.55 **Director's response to point two:** Letters of support demonstrate that there is indeed support for the order but the TPO was made as a direct result of an amended planning application. Also I refer to my response to Dr Edworthy's point five, paragraph 2.14.

- 2.56 **Mr P Young's objection point three:** The tree in question is a non native species. The Eucalyptus originates from Australasia and occurs in the mountain regions of Tasmania and southern Australia. It is clearly not suitable for a British domestic garden setting and will probably increase in height by a further 50% if left unchecked. This would become hazardous for the dwelling currently under construction. Further more this species of tree has a very high water intake and a very fast rate of growth. It has reached its present size in 20 years and the hazards referred to would become apparent during the next years. Indeed evidence of this has already been experienced by the shedding of large branches without warning.
- 2.57 **Director's response to point three:** These points have all been answered previously. It is unlikely that this tree is 20 years old; it is probably a good deal older. It is a cider gum (Eucalyptus gunii) and although they do grow vigorously the tallest one in Britain is 33metres tall and was planted in 1912.

### 3. SUMMARY

This TPO was made in light of an amended planning application to one previously given consent. The amended application detailed removal of a Eucalyptus tree which was not implicated in the original application.

- 3.1 The tree has been deemed to have public amenity value sufficient enough to make it the subject of a TPO. Had the tree been detailed for removal in the original application then because of the processes in place it would have been made the subject of a TPO then.
- 3.2 The original application did not contain the land occupied by the Eucalyptus tree, the site boundary of the amended application has been extended to include the land where the Eucalyptus is situated.
- 3.3 The tree has been the subject of site visits by Officers of the Council in order to assess its public amenity value and the health and safety of the tree, as a result I am satisfied that it meets the criteria for both of these factors.
- 3.4 It is because of these factors that the recommendation is made to confirm the Tree Preservation Order in its current state without modification.

<b>For more information contact:</b> <b>Background papers:</b> <b>List of appendices:</b>	Jason Humphreys Tel; 01332 256031 E-mail: jason.humphreys@derby.gov.uk Tree Preservation Orders, A Guide to the Law and Good Practice Appendix 1: Implications Appendix 2: Plan Appendix 3: Letters of objection Appendix 4: Letters of support Appendix 5 Extract from Tree Preservation Orders, A Guide to the Law and Good Practice
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<b>IMPLICATIONS</b>
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**Financial**

1. None

**Legal**

- 2.1 The Local Planning Authority must, before deciding whether to confirm the Tree Preservation Order, consider any duly made objections.
- 2.2 The Local Planning Authority may modify the Tree Preservation Order when confirming it.

**Personnel**

3. None directly arising.

**Supporting the Council's vision and priorities**

4. The confirmation of Tree Preservation Order 2007 Number 492 will support the Council's vision and priorities by contributing to the "Leading Derby towards a better environment".



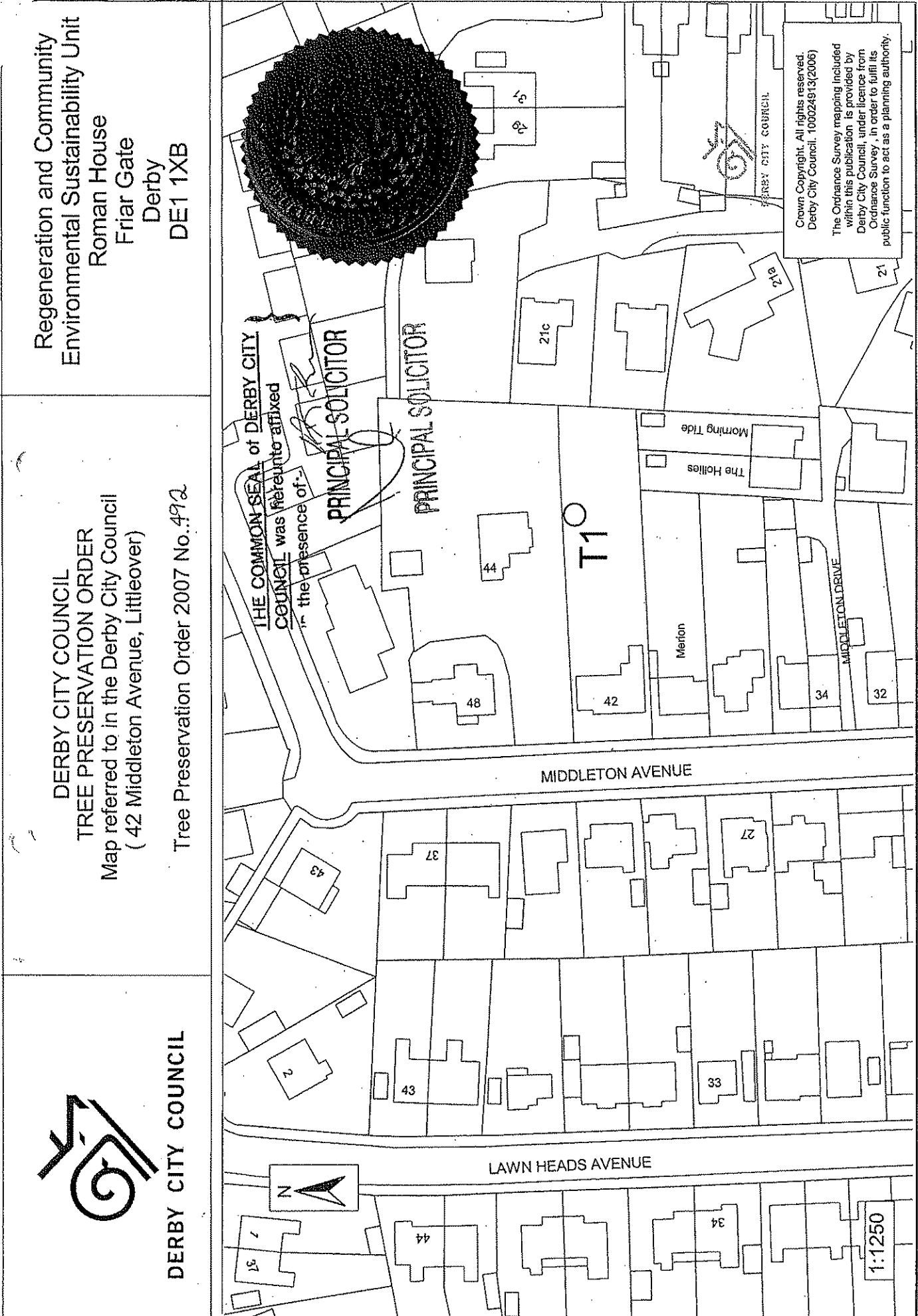
**DERBY CITY COUNCIL**

DERBY CITY COUNCIL  
TREE PRESERVATION ORDER  
Map referred to in the Derby City Council  
( 42 Middleton Avenue, Littleover)  
Tree Preservation Order 2007 No. 492

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( 42 Middleton Avenue, Littleover)  
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Gpy to Isaac  
Humphries  
for info (application  
required as  
921/16PS)

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Assistant Director Regeneration  
Derby City Council  
Regeneration and Community Services Department  
Derby  
DE1 1XB

3<sup>rd</sup> September 2007

Dear Sirs,

**Tree Preservation Order 2007, Number 492  
42 Middleton Avenue, Littleover, Derby**

We refer to the issue of the above order and write to lodge our objection. The grounds for our objection are set out below:

1 The existing planning consent no. DER/08/06/01325/PRI dated 27<sup>th</sup> October 2006 for the erection of four dwellings on the land comprising 44 Middleton Avenue was granted after consideration of the impact on any adjoining trees. Whilst this tree was taken into account in terms of the design layout, this was done to mitigate the effect of the tree on the new dwellings and not because of its perceived amenity value, since we were not in control of its treatment as it fell just outside the property boundary. The Authority obviously did not consider the tree to have any special amenity value at this time as, surely, it would have been incumbent upon them to ensure its survival with a Preservation Order.

2 The issue of the Preservation Order at this stage can clearly be seen as a blocking tactic to prevent the construction of an additional dwelling on brownfield land. It is our understanding that all the necessary criteria to satisfy planning requirements have been met and consent would have been issued save for this intervention. It can therefore be demonstrated that the issue of this Order is more in response to neighbour antipathy than reflecting the merits of the tree and is not enforceable on these grounds.


3 The tree in question is a non-native species. The Eucalyptus originates from Australasia and occurs in the mountain regions of Tasmania and southern Australia. It is clearly not suitable for a British domestic garden setting and the tree in question would probably increase its height by a further 50% if left unchecked. This would become hazardous for the dwellings currently under construction. Furthermore, this species of tree has a high water intake and a very fast rate of growth. It has reached its present size in approximately 20 years and the hazards referred to would become apparent during the next 10 years. Indeed, evidence of this has already been experienced by the shedding of large branches without warning.

4 The previous observations support the principle objection to Tree Preservation Orders in enclosed private gardens in that there are inherent dangers posed by a tree of this type and size in domestic settings.

In the light of the above remarks it has been decided to apply for consent to remove the tree in question and the relevant forms are enclosed for your attention.

Yours faithfully  
For Middleton Avenue Developments Limited

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P C Young  
Director

42 Middleton Avenue  
Littleover  
Derby DE23 6DL

Assistant Director Regeneration  
Regeneration and Community Services  
Derby City Council  
Roman House  
DERBY DE1 1XB

4<sup>th</sup> September 2007

Dear Sir

**Re; Tree Preservation Order 2007, Number 492**

We are writing to object most strongly to the proposed Order dated 8 August 2007 concerning the Eucalyptus tree at the base of 42 Middleton Avenue.

Our objection is on the following grounds:

**1. The tree is not a visual public amenity**

The proposed order states that the tree 'can be appreciated from the immediate vicinity as well as from further a field'. This is NOT the case.

The tree cannot be seen from any part of Middleton Avenue, unless one is standing at the end of the drive of number 44, where there is only a partial view. The tree cannot be seen from Heath Avenue, which backs onto Middleton Avenue. The tree cannot be seen from Burton Road. The tree cannot be seen from Bretton Avenue, unless one is standing at the very top of the street. In terms of views of the tree from immediate gardens on Middleton Avenue, the tree cannot be seen from numbers 38, 40, 46 and the owners of number 44, where it can be seen, consider it a nuisance and are opposing the TPO.

*The Eucalyptus cannot be described in any way as an amenity.*

**2. The tree is not suited to a domestic garden**

The Eucalyptus is an alien, non-domestic tree, imported from Australia and suited to tropical and sub-tropical areas. It is an extremely fast growing tree (roughly up to 8 feet of growth per year) and at 42 Middleton Avenue it currently

stands at some 70 feet in height. The view of the DCC TPO Officer is that the tree in question is still young - it will grow to approximately 200 feet. The Eucalyptus is described as one of the tallest trees in the world. Furthermore, its tap roots are 6 feet deep and lateral roots will extend to 100 feet in all directions. It is generally considered as a problem when situated near to buildings and can crack cisterns, clog water pipes and damage services.

The planting of Eucalyptus trees outside of Australia is subject to much debate, due to its rapid growth, demands on water, expansive root structure and impact on other species. Its growth in the UK is so significant due to the absence of natural restraints and pests.

For some time the tree at 42 has been causing problems, dropping branches and bark, leaves burning the lawn and suffocating other species.

We have been considering whether to reduce or remove the tree as it is becoming completely out of context with the garden and research we have carried out, since receiving the TPO letter, has convinced us that it is simply not suited to a domestic garden.

**There is a consensus (even among the 'pro-eucalyptus' community) that the planting of eucalyptus in domestic gardens is not advisable. In cities it is best-suited to large expansive areas such as commons and parks.**

*The Eucalyptus has no place and is out of scale in a domestic garden.*

### **3. The tree is dangerous**

The Eucalyptus is recognized as a dangerous tree, especially when growing in an unsuitable area such as a domestic garden.

Its natural growth cycle involves the dropping of entire branches (which can be extremely dense and dangerous) splitting of bases, cupping, twisting or collapsing. In Australia, it is actually known as the '*widow maker*' due to the number of people killed by falling branches. It is not used in plantations for the same reason. The tree continually drops leaves and significant amounts of bark (see enc picture as current evidence at 42 Middleton) and it is an aggressive grower dominating all other species.

Amazingly, the Eucalyptus has high levels of phenolics and toxic terpenoids as well as weak mutagenics and carcinogenics. World health leading company, Merck, states that the Eucalyptus has been implicated in the deaths of small animals and the oils contained in the leaves is poison if ingested (as little as 4 to 5 ml can be fatal for humans!). The toxic nature of the Eucalyptus means birds

and other wildlife avoid it – again explaining to us the mystery of why birds never nested there at 42, despite its height.

**We have had incidents of branches falling at 42 and until now had assumed this had been due to adverse weather. Clearly, this is not the case – falling branches are part of the natural growth pattern and can occur at any time. We are seriously concerned about the danger now caused by the tree in its natural state, to family and visitors including many young children.**

In addition, branches on the tree at 42 have been reduced on the north side leaving a serious imbalance in its remaining branch distribution and splits have recently appeared at the tree's base and root system.

We are seriously concerned that if left, the stability of the tree is a danger to 42 and to the houses being constructed at 44, plot 2 of which immediately adjoins the tree. Consideration might be given here to assessing the risk from another of the Eucalyptus's features – its tendency to burn rapidly due to its flammable aromatic oils.

*The Eucalyptus is clearly dangerous, especially in a domestic garden.*

#### **4. The TPO process has been flawed.**

The proposal to consider a TPO for the Eucalyptus has been initiated by small minority resident opposition to a planning application for plot 5 at the base of 42. It is our understanding that regulations state that the award of a TPO cannot be used as a tactic to block a bona fide planning application. This is the sole motivation in this case and we were surprised not to be involved or consulted in any way in considering the TPO.

Furthermore, the issue had not been raised at any point by Derby City Council officers in all discussions relating to either the original planning permission (given to development at 44) or during extensive consultations in preparing the amended planning application for land at 42.

Quite the opposite, we understand that the planning officer had understood that the position was 'OK' and gave a clear indication to that effect. We were advised that as the Eucalyptus is alien, it could be replaced by British specimen. We could have taken action to remove the tree in advance of planning but chose not to and the TPO appears to punish this goodwill.

We also understand that the decision to award the TPO was not overwhelming and indeed was a '50/50' decision. The DCC TPO officer stated to us that there are far more deserving trees in Derby.

As owners we were never consulted, no visit has been made to our garden, nor permission sought and indeed the TPO notification arrived on the morning we were setting off on holiday, so have little time to assemble this response. The letter dated 8 August from the Legal Clerk, was addressed anonymously and didn't even have the courtesy to be addressed personally to us, despite being Council Tax payers and on the electoral register.

This process has clearly been inconsistent and unsatisfactory and we have a legitimate expectation for this to be considered in due course. We reserve the right to consider use of the DCC Complaints Procedure and subsequent referrals to assess the level and standard of service.

**In conclusion, it our belief that a TPO is not warranted for the Eucalyptus at 42 Middleton Avenue as it is dangerous, is directly in the way of a development for which detailed planning permission has been granted and is at risk of becoming a legal nuisance.**

The amenity basis of the TPO is clearly flawed within a Catch 22-like situation. The inescapable fact is that the only way that the Eucalyptus might at some point in the future be considered as an amenity (if the amenity is defined as purely as being viewed) is if it is allowed to grow out of control to its eventual height of some 200 feet. However, this would not be allowed (even within the constraints of a TPO) as the tree would be an even greater danger than it currently is. Reasonable maintenance would result in a reduction in its size and so it would never be able to be seen from the immediate vicinity.

We agree with the view of the TPO officer that the provisional decision was marginal and hope that the case outlined above results withdrawal of the TPO.

If the TPO is upheld we will be requiring confirmation in writing that DCC accepts full liability for any consequences, damage or accidents as a result of the risks outlined above as they are documented and predictable.

If you require any further information do not hesitate to contact us.

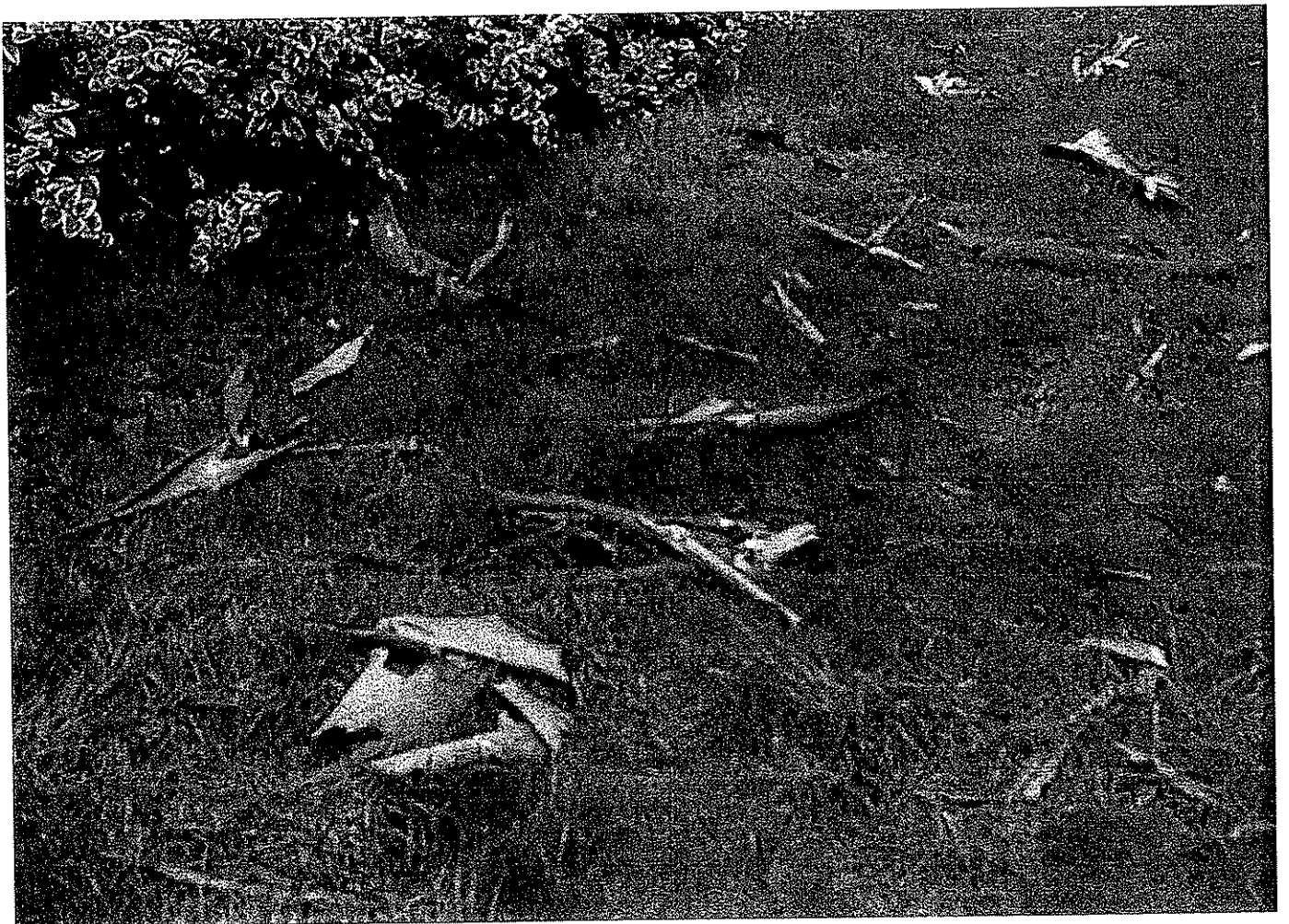
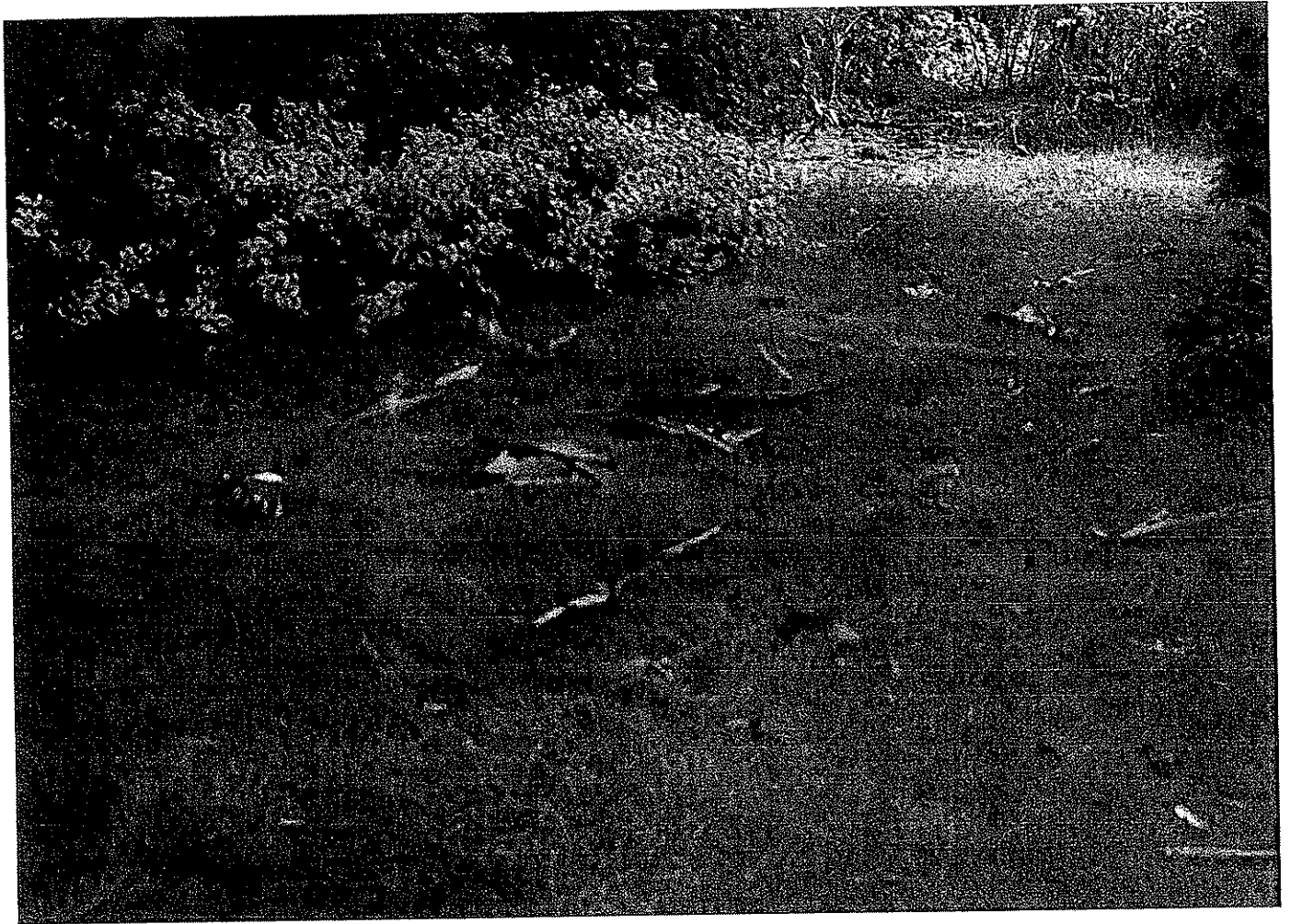
We look forward to hearing from you in due course.

Yours Sincerely

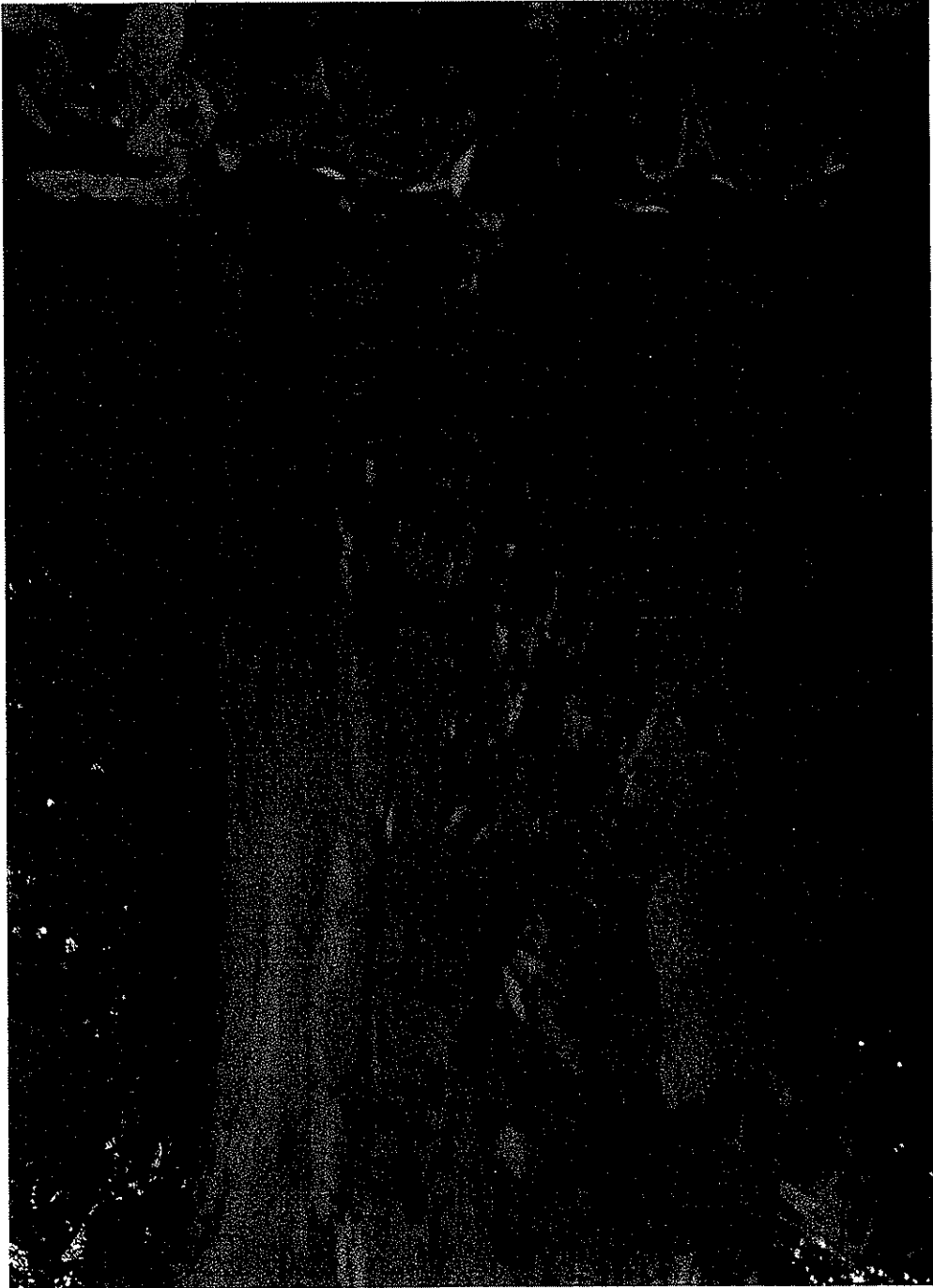


John and Elaine FORKIN  
enc









DEVELOPER	
FILE NO.	
DATE	SEP 27 2007
BY	D. Smith
REPLIED	

44 Middleton Avenue  
Littleover  
Derby  
DE23 6DL

Assistant Director Regeneration,  
Derby City Council,  
Regeneration and Community Services Dept,  
Derby  
DE1 1XB

01 September 2007

Dear Sir,

### **Objection to Tree Preservation Order 2007, No. 492**

My wife and I wish to formally object to the above order which identifies a single Eucalyptus tree, T1, at number 42 Middleton Avenue, i.e. next door.

We wish to object for the following reasons:

1. The stated grounds of "visual public amenity" are not of sufficient degree to justify the granting of a TPO, according to the guidance published by the Department for Communities and Local Government (Previously Office of the Deputy Prime Minister). This clearly states that the fact that a tree is publicly visible is not in itself sufficient to warrant a TPO. Special factors such as its rarity, value as a screen, or contribution to the character or appearance of a conservation area should be taken into account. None of these factors apply in this case.

We both realise that any nuisance caused by a tree to its owner and owners of land, which the tree overhangs or threatens, has to be balanced against any significant public amenity. However, we cannot believe that the minor visual amenity of merely being able to see a large and inappropriately sited tree, which, although common, is not a native species, can outweigh the nuisance to those who live in its shadow. However, there is a more serious consideration. This tree has proved to be dangerous as detailed below, and the danger of death or serious injury must outweigh what appears to be a very minor visual amenity.

2. This Eucalyptus tree is dangerous. It has on several occasions shed large branches **without warning**. The branches it has shed have been large and extremely heavy. They are extremely heavy because of the high density of the Eucalyptus wood and because of their size. What makes the tree particularly dangerous is the fact that these branches fell without warning, not during high winds or other extreme conditions when the odd branch might reasonably be expected to be blown down from a tree. We have since learned that this is a characteristic of certain Eucalyptus trees and has resulted in many deaths and serious injuries in Australia, where the tree is

native. It is a simple matter of fact that this particular tree is dangerous and should not therefore be subject to a TPO.

3. The third objection to the TPO is the fact that the serious danger from the tree caused by falling branches constitutes a nuisance in the legal sense. We discussed this in person with our neighbours who own the tree, who then became as concerned as us about the possible danger of serious injury or worse to visitors and young children. We believe they were planning on removing the tree because of this danger. They were unaware that there is a history of serious damage from falling trees on the site. We are at the top of a hill and subject to high wind gusts because of the surrounding topography. Thirty years ago a large tree at 44 Middleton Avenue was blown down in high winds causing serious damage. It destroyed a car, and two garages, but fortunately caused no injuries.

Finally, we understand that the TPO was initiated as a result of pressure from objectors wishing to block a planning application for land to the rear of 42 Middleton Avenue. We find this surprising because this is not the purpose of a TPO as confirmed by the Department for Communities and Local Government. A planning application should be decided on its own merits and where a planning application involves removal of trees there is the opportunity for the effects of this to be considered before any application is granted. To confirm a TPO in the light of these facts could be considered an abuse of the TPO system, and would encourage the premature removal of trees before any planning application was submitted.

We realise that the history of this Eucalyptus tree and the history of the site would not have been known to the council when the TPO was made but now that we have confirmed that this tree is demonstrably dangerous we trust that the council will decide to revoke or not confirm the order.

Yours faithfully,

Dr and Mrs Edworthy

44 Middleton Avenue  
Littleover  
Derby  
DE23 6DL

Assistant Director Regeneration,  
Derby City Council,  
Regeneration and Community Services Dept,  
Derby  
DE1 1XB

16 November 2007

Dear Sir,

**Objection to Tree Preservation Order 2007, No. 492**

Following telephone conversations and a meeting with Jason Humphreys, Tree Preservation Order Officer, I am writing this second letter to expand on the points contained in my objection letter of 01 September 2007. I am doing this because the above tree is dangerous and I am presenting my evidence of this as requested so that there is no doubt. I am also taking the opportunity of this second letter to quantify the very limited views of the tree which I drew attention to in my earlier letter and which, in my opinion, fail to provide sufficient "visual public amenity" to justify the granting of a TPO. I have used the guidance published by the Department for Communities and Local Government (Previously Office of the Deputy Prime Minister). Finally, I comment again on the legal nuisance presented by this tree.

**This tree is dangerous:**

In my previous letter I showed that the tree is dangerous because it has shed large branches **without warning**. I have been pressed by yourselves to quantify exactly when this occurred and how large the branches were. I cannot tell you exactly when this occurred or the exact sizes of these falling branches because I did not record the facts in my diary at the time as I had no reason to. I am a scientist and I do not exaggerate observations, so for the avoidance of doubt, let me state the following:

**On at least three occasions large branches have fallen from this tree. These branches, of the order of 3 metres long, have been of sufficient mass (weight) to cause serious injury or death should they have landed on a person, even an adult, having fallen through a distance of the order of ten metres. I observed at the time that these large branches did not seem to fall as a result of high winds. In other words they seemed to fall without warning.**

**There have probably been more than three occasions when I have observed fallen branches from this tree on my land, and I expect there have been similar falls on the owner's land, but I can confirm a minimum of three. I am prepared, if necessary, to state these facts on oath, and will certainly be doing so in the future if the TPO is confirmed and death or injury results from further falls.**

Prior to the provisional TPO I had discussed the danger arising from this Eucalyptus tree with the owner, who had agreed to remove the danger by removing the tree. He has been prevented from doing this because of the TPO, so the danger remains directly as a result of this TPO.

It is a simple matter of fact that this tree is dangerous and should not therefore be subject to a TPO. I understand that you have contacted an arborer to get advice on the danger posed by this tree. With the best will in the world, such a person will only be able to give an opinion of what is likely to happen in future. I am stating facts of what has happened in the past and which, by implication, cannot be ruled out in the future.

Reference to section 6.4 of the official publication "Tree Preservation Orders: A Guide to the Law and Good Practice" gives the following guidance on when a tree is considered dangerous: *"The threatened danger does not actually have had to have occurred; it is sufficient to find that, by virtue of the state of the trees, their size, their position and such effect as any of those factors have, one can properly conclude that the trees have become dangerous. The Court will look at what is likely to happen, such as injury to a passing pedestrian."*

See also **Smith v Oliver (1989)**

The fact that large, heavy, branches with the potential to cause death or serious injury, have repeatedly fallen without warning, and is now on record, confirms this danger.

This danger would be exacerbated in future if the tree were allowed to remain, because the development of the site to the rear of 44 Middleton Avenue, for which full planning permission has been granted, would increase the probability of a person being hit by these falling branches. As I pointed out in my earlier letter, shedding branches without warning is a characteristic of certain Eucalyptus trees. Many deaths and serious injuries have resulted in Australia, where the tree is native.

I again state that it is a simple matter of fact that this tree is dangerous and should not therefore be subject to a TPO.

### **The Visual Public Amenity of this tree is extremely limited:**

In order for a tree to have a Visual Public Amenity value it seems reasonable to assume that the tree must be publicly visible. Since my previous letter in which I described this tree as a very minor visual amenity, I have quantified exactly from where the tree can be seen, and how much of the tree is visible. The results are quite surprising. The tree can only be seen from a very short section of Middleton Avenue, not even extending to the full frontages of numbers 42 and 44, from short section of the turning circle at the end of Middleton Avenue, and from a short section of Bretton Avenue. There is also a very short section of the turning circle at the end of Heath Avenue, approx 2 metres in length, from which the tree is visible. I have plotted the angles over which the tree is visible, with some surprising results:

At no point is the whole of the tree visible. The most that can be seen is approximately 70 % of the tree, which is currently briefly visible if one looks sideways while walking past the end of the driveway to number 44 Middleton Avenue. However this view will be substantially blocked by other trees when they are in leaf.

If we add together all the angles over which more than 50% of the tree is visible, the total adds up to 16 degrees, and as there are 360 degrees in a circle, this represents less than 5 % of the solid angle around the tree. By contrast, a tree in an open space would typically have over 95 % of the tree visible over 100 % of the solid angle around the tree.

If we extend the criteria to find out over what solid angle at least 5 % of the tree is visible, i.e. at least a "glimpse", even then the total of solid angles only adds up to 65 degrees, i.e. just 18 % of solid angle.

I stress that when these observations were made in mid November, the tree was probably at its most visible. When other trees are in leaf, they will further block even these very limited views of the tree.

I believe the guidance published by the Department of Communities and Local Government, referred to above, would require very special factors to be present to justify a TPO on grounds of public visual amenity with such limited and incomplete views of the tree. Examples of special factors listed in this document are rarity, value as a screen, or a contribution to the character or appearance of a conservation area. None of these special factors apply in this case so surely the TPO cannot be justified on the grounds of Visual Amenity.

### **The Tree is a legal nuisance**

I described the nuisance (in the legal sense) caused by the dropping of branches onto my property in my previous letter. I am fortified after reading the judgement in **Perrin & Ramage v Northampton Borough Council**



(2006) to see that this nuisance would be considered an "actionable nuisance".

If you require any clarification of any of the above details, please contact me as above.

Yours faithfully,

Dr R M Edworthy, B.Tech, Ph.D, C.Eng, C.Phys, MIEE, M.Inst.P

44 Middleton Avenue  
Littleover  
DE23 6DL

Councillor Robin Wood,  
The Chairman, Planning Control Committee,  
Derby City Council.

15.01.2008

Dear Sir,

**Planning Control Committee meeting, 17.01.2008 and TPO No 492**

I am taking the unusual step of writing to you directly to ask if you will consider postponing consideration of this item until a later meeting.

I am concerned that the report of the Director – Regeneration and Control has failed to accurately address the objections I submitted in letters dated 01.09.2007 and 16.11.2007 and I believe the report gives a misleading, and in some cases inaccurate, account. I note that the agenda for the above meeting includes major projects in Derby so limited time for analysis, cross-checking, and discussion, might lead to the report being taken at face value.

I would also urge that an accompanied site visit is made, by yourself if possible, so that the accurate quantification of the tree's visibility, and hence the very limited "Visual Public Amenity" which I detailed in my letter dated 16.11.2007 can be confirmed. I would also be able to show how misleading paragraph 2.9 of the report is as there is clear evidence of missing branches. I feel I must be allowed an opportunity to correct the misleading way in which paragraph 2.9 tries to dismiss my evidence.

In my opinion, the above report has not been written in an objective way and requires detailed comment. For example, the report implies that the criteria in the government document "Tree Preservation Orders: A Guide to the Law and Good Practice" have been met. However, I showed in my letters where these criteria fail, and the report does not address these specific criteria. Instead there is just a general statement that the above government document has been considered. It may well have been considered, but that is not the same as complying with the required criteria.

There is not sufficient time for a detailed response, highlighting the lack of clarity and objectivity in the report to be prepared and distributed to members in advance of the meeting on 17.01.2008, but without this I feel the decision would be made on a biased and misleading report, hence my request for this item to be postponed.

Yours faithfully,

Dr R M Edworthy

A. WHITING  
MORNINGTIDE  
MIDDLETON DRIVE  
LITTLEOVER  
DERBY

Dear Sir or Madam,

I am writing to you about 42,  
Middleton Avenue Littleover Derby  
and the tree preservation order  
2007 N° 492, in the hope that  
the trees will not be chopped  
down thus destroying all the wild  
lifes habitats and also for our own  
pleasure of such a view that we  
now have, I purchased the house  
for the beautiful scenery & privacy  
which could now be replaced by more  
housing, there is not a lot of Greenery  
left nowadays, I consider myself  
lucky to have such a view, I hope  
to be fortunate enough to keep some  
of it.

Yours Sincerely

◁

Re: Tree Preservation Order,  
42 Middleton Avenue, Littleover, Derby,  
No 492, 2007.

14 Middleton Ave,  
Littleover,  
Derby,  
DE23 6DL.

30 August '07

Dear Sir/Madam,

We are writing in connection with the Tree Preservation Order, (2007, no. 492). We would like to support the order, due to the view offered by the tree across Middleton Avenue and Middleton Drive.

This public amenity is recognisable from a wide area and should be conserved so that the public can continue to enjoy it, and the character of the area is maintained.

Yours sincerely,

[Signature]

119 Bretton Avenue  
Littleover  
Derby  
DE23 6EE  
Tel: 07872 197789

30 August 2007

**Re: Derby City Council [42 Middleton Avenue, Littleover, Derby]  
Tree Preservation Order 2007 # 492**

Dear Sir/Madam,

I am writing in support of the above tree preservation order and wish to oppose further building work on the Middleton Avenue site.

I am a local resident directly affected by the new building site which has already destroyed some established trees and is negatively impacting on my outlook. The tree in question is very well established and still enables me to enjoy some leafy aspect rather than more tall buildings. When I moved into the area, I was told that local residents love their trees and are passionate about retaining them.

Therefore I wish to register my support for this and other tree preservation orders in the vicinity as I do not wish to live in an urban jungle but want to retain natural elements.

Yours sincerely

✓  
Mrs Ena Junokas

DEVELOPMENT	CITY OF DERBY	RES DEPT
FILE NO	DS6	
DATE	7 1 AUG 2007	
REF	Card add. J. J. G.	
REPLIED	Refer to Jason Humphries in TPO	
	copy of STD for completion.	
	707/1300.	

~~John Booth  
Parks~~

~~Jason Humphreys  
Planning~~

P J Kidd  
The Chalet  
Middleton Drive  
Littleover  
Derby  
DE23 6DP

Assistant Director Regeneration  
Derby City Council  
Regeneration and Community Services Dept  
Derby  
DE1 1XB

1<sup>st</sup> Sept 2007



Dear Sir,

RE: Propose house building at the rear of 42 Middleton Avenue, Littleover, Derby

I am pleased to hear of the Tree Preservation Order Number 492, and hope it remains in place for ever!

The trees in question are both of pleasing to the eye and environmentally useful ie:(removal of carbons, etc.).

There are very few trees in the area, this being due to The Council Policy of tree removal along highways.

Surely we must preserve the above trees for the future of the planet and the generations whom will follow.

Yours faithfully,  
P J Kidd

## Humphreys, Jason

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**From:** Skaper, Antony  
**Sent:** 05 September 2007 16:05  
**To:** Humphreys, Jason  
**Subject:** FW: TPO 492  
**VF-DOC-ID:** 00258248.HST  
**VF-ITEM-ID:** 2454350:28137609  
**VF-MT-CODE:** 14250  
**VF-MT-TYPE:** V2GA

Jason

Address details for Mr Donoghue and Ms Donoghue below.

Antony.

**Antony Skaper** | Legal Clerk| Corporate and Adult Services Department | Derby City Council, PO Box 6292, Council House, Derby, DE1 2ZL | Telephone 01332 255461 Minicom 01332 256666 | [www.derby.gov.uk](http://www.derby.gov.uk)

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**From:** JS DONOGHUE  
**Sent:** 05 September 2007 15:55  
**To:** Skaper, Antony  
**Subject:** RE: TPO 492

Dear Mr. Skaper,

The address is 40, Middleton Avenue, Littleover, Derby. DE23 6DL.

Many thanks.

Barbara Donoghue

*"Skaper, Antony" <Antony.Skaper@derby.gov.uk> wrote:*

\*\*\* Before reading or acting on this e-mail, or opening any attachment, please read Derby City Council's disclaimer and confidentiality statement \*\*\*

Dear Mr Donoghue and Ms Donoghue

Thank you for your email in support of this TPO.

Please can you provide me with your home address so that I can send this to the TPO Officer along with your email letter as I need to give this information to him by the end of the day.

Yours sincerely  
Antony Skaper

**Antony Skaper** | Legal Clerk| Corporate and Adult Services Department | Derby City Council, PO Box 6292, Council House, Derby, DE1 2ZL | Telephone

05/09/2007

01332 255461 Minicom 01332 256666 | [www.derby.gov.uk](http://www.derby.gov.uk)

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**From:** JS DONOGHUE [mailto:  
**Sent:** 05 September 2007 11:42  
**To:** Skaper, Antony  
**Subject:** RE: TPO 492

Dear Mr. Skaper,

We are writing to you in support of TPO 492.

We support the preservation of this tree because of its visual public amenity. It is a dominant feature in the area and whilst it is more visible than its neighbour, the Indian Cedar, they both contribute significantly to the locality in terms of supporting wildlife. The trees are used by a local owl and a great number of birds and therefore make important greening effect on the immediate area.

The eucalyptus is not the only tree worthy of preservation. Several significant trees were hastily felled before planning application was applied for by the owners of 44, Middleton Avenue, with scant disregard for either local residents or the local amenity or local wildlife. their argument being that they were dangerous, which was a baseless contention. We would urge you to review this site with Jonathan Oaks as a matter of the utmost urgency before anything else is poleaxed in the name of property speculation.

Yours sincerely,

John and Barbara Donoghue.

*"Skaper, Antony" <Antony.Skaper@derby.gov.uk> wrote:*

\*\*\* Before reading or acting on this e-mail, or opening any attachment, please read Derby City Council's disclaimer and confidentiality mail \*\*\*

Dear Ms Donoghue

Thank you for your email. I have sent a copy to the TPO Officer for him to reply regarding the condition of the tree.

I confirm that representations can be made by electronic mail. Please ensure that your address is on the email representation when sending it to the Council.

Yours sincerely

Antony Skaper

**Antony Skaper** | Legal Clerk| Corporate and Adult Services Department |  
Derby City Council, PO Box 6292, Council House, Derby, DE1 2ZL |  
Telephone 01332 255461 Minicom 01332 256666 | [www.derby.gov.uk](http://www.derby.gov.uk)  
**Derby City Council – committed to being an Excellent Council**

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**From:** JS DONOGHUE [mailto:bardo007@btinternet.com]

05/09/2007



*Extract from Tree Preservation Orders: A Guide to the Law and Good practise. DETR  
March 2000*

### "Amenity"

- 3.2 The Act does not define 'amenity', nor does it prescribe the circumstances in which it is in the interests of amenity to make a TPO. In the Secretary of State's view, TPOs should be used to protect selected trees and woodlands if their removal would have a significant impact on the local environment and its enjoyment by the public. LPAs should be able to show that a reasonable degree of public benefit would accrue before TPOs are made or confirmed. The trees, or at least part of them, should therefore normally be visible from a public place, such as a road or footpath, although, exceptionally, the inclusion of other trees may be justified. The benefit may be present or future; trees may be worthy of preservation for their intrinsic beauty or for their contribution to the landscape or because they serve to screen an eyesore or future development; the value of trees may be enhanced by their scarcity; and the value of a group of trees or woodland may be collective only. Other factors, such as importance as a wildlife habitat, may be taken into account which alone would not be sufficient to warrant a TPO. In the Secretary of State's view, it would be inappropriate to make a TPO in respect of a tree which is dead, dying or dangerous.
- 3.3 LPAs should be able to explain to landowners why their trees or woodlands have been protected by a TPO. They are advised to develop ways of assessing the 'amenity value' of trees in a structured and consistent way, taking into account the following key criteria:
1. **visibility:** the extent to which the trees or woodlands can be seen by the general public will inform the LPA's assessment of whether its impact on the local environment is significant. If they cannot be seen or are just barely visible from a public place, a TPO might only be justified in exceptional circumstances;
  2. **individual impact:** the mere fact that a tree is publicly visible will not itself be sufficient to warrant a TPO. The LPA should also assess the tree's particular importance by reference to its size and form, its future potential as an amenity, taking into account any special factors such as its rarity, value as a screen or contribution to the character or appearance of a conservation area. As noted in paragraph [3.2](#) above, in relation to a group of trees or woodland, an assessment should be made of its collective impact;
  3. **wider impact:** the significance of the trees in their local surroundings should also be assessed, taking into account how suitable they are to their particular setting, as well as the presence of other trees in the vicinity."