

PLANNING AND BUILDING (JERSEY) LAW 2002 (AS AMENDED)

Appeal under Article 108 (2) (l) against a decision made under Article 58 to include a tree on the List of Protected Trees

Report to the Minister for the Environment

By Sue Bell MSc., BSc, FCIEEM, CEcol, CWEM,
An Inspector appointed under Article 107

Appellant: Conway Tower Properties Ltd

Reference: T/2016/0001

Location: Wayside Café and adjacent land, Le Mont Sohier, St Brelade

Appeal Procedure and Date: Written representations & site inspection

Site Visit procedure and Date: Accompanied, 12th January 2017

Date of Report: 7th March 2017

Introduction and Background

1. This is an appeal against the decision to include sixteen trees near Wayside Café, St Brelade, on the List of Protected Trees under Article 58 (2) of the Planning and Building (Jersey) Law 2002 (as amended).
2. The Notice of Listing was served on 12th August 2016. This followed the lapse of a provisional listing, which was made on 18th January 2016 using delegated powers.
3. The trees included in the list are located on land near Wayside Café in St Brelade. The site is adjacent to the coast and comprises a car park, tennis court, restaurant and retail use. There is also an area of dune and a residential shack. The site has been subject to pre-application discussions with the Department concerning a proposed development.

Listing description

4. The Notice of Listing applies to the following trees (the reference numbers correspond to locations marked on the accompanying plan to the Notice):
 - T2 English Oak
 - T4 Fig
 - T5 - T15 Maritime pines
 - T17-T19 Evergreen oaks
5. A cypress hedge, which was also included within the provisional listing, was not included in the Notice of Listing of 12th August.

Grounds of Appeal

6. The appellant considers that:
 - The process for listing the trees was unreasonable and flawed; and
 - The trees do not merit listing.

7. Firstly I will consider the listing process, before addressing each of the specific grounds of appeal.

The listing process

8. Under Article 58 of the Planning and Building (Jersey) Law 2002 (as amended), trees may be protected through inclusion on the List of Protected Trees. These are trees which the Chief Officer is satisfied should not be “*cut down, lopped or otherwise altered or harmed without the Chief Officer’s permission*”. The reason for protection is “*in the interests of the amenity of Jersey.*” Article 60 allows the Chief Officer to make a ‘provisional listing of trees’.
9. Article 59 of the Planning and Building (Jersey) Law 2002 (as amended) sets out the procedures to be followed when adding a tree to the list. A notice stating the intention to include the tree on the list must be served on the owner of the land on which the tree is growing or displayed in a conspicuous position near the tree. The Chief Officer shall take into account any representations that relate specifically to the proposed inclusion of the tree on the list. A similar notification process applies to provisional listing under Article 60.
10. Policy NE4 of the Island Plan 2011 (amended 2014) broadens the scope of the legal requirement:

“Trees, woodlands..... - which are of landscape, townscape, amenity, biodiversity or historical value will be protected by:

 3. *Adding individual trees and groups of trees which make an important contribution to the landscape, townscape or local amenity value of a site or area to the List of Protected Trees.”*
11. Whilst there do not appear to be any published detailed criteria to explain how the amenity value of trees will be assessed, generic advice is available on the States of Jersey web site. This suggests that trees are included on the list, “*where they have a high amenity value and make a valuable and important contribution to the local environment.*” Trees are most often protected when they are subject to some form of threat, usually a development proposal. The website further states that assessments of amenity value will be carried out by an arboriculturalist taking account of:
 - The size of the tree;
 - The life expectancy of the tree;
 - The tree’s position (and the public enjoyment it provides)
 - The presence of other trees
 - The relation of the tree to its setting;
 - The form of the tree and other special features including
 - If it is rare
 - If it is of exceptional landscape value
 - If it screens an unpleasant view
 - It is important in a larger composition.
12. Details of how data should be collected, analysed or weighted to make the assessment of amenity value do not appear to have been published.

Methods used to assess the amenity value of trees at Wayside Café

13. The Department has used two different evaluation systems to assess the amenity value of trees at the appeal site.
14. The initial assessment undertaken for the purposes of the provisional listing used methods set out in The British Standard (BS) 5837:2012 *Trees in relation to design, demolition and construction - recommendations*. This provides an approach for deciding which trees on a development site are worthy of retention based on a consideration of the species that are present, together with the height, diameter, spread of the crown, age, condition and life expectancy of each tree.
15. Following the appellant's objections to the provisional listing, the Department subsequently carried out an assessment using the 'Helliwell' system (2008). This is a method for placing a monetary value on the visual amenity provided by individual trees or woodland. The factors considered during this assessment mirror those aspects listed in paragraph 11 above, which are identified on the States' webpage as determining factors in the selection of trees for listing. Scores are assigned to each factor and then multiplied together to produce an overall comparative score. The guidance does not provide advice as to the minimum scores required in order for a tree to be considered of high value.
16. The appellant has conducted their own assessment of the trees using the 'Helliwell' system. The work was carried out by an arboriculturalist.
17. There is some variation in the scores produced by the 'Helliwell' assessments carried out by the Department and the appellant. These are considered in more detail in paragraphs 35 - 51, but at this stage it is pertinent to note that the 'Helliwell' system relies heavily on expert judgement. As such, it is recognised as having the potential to lead to different scores being produced by different surveyors, or even the same surveyor visiting the site on different dates.

Process for listing the trees was unreasonable and flawed

18. Having set out the listing process, I now consider how this was applied for the trees near Wayside Café.

Case for the appellant

19. Three issues have been raised by the appellant:
 - Whether it was necessary and proportionate to serve the provisional listing;
 - Choice of method to assess amenity value; and
 - Whether the correct notification procedures were followed.
20. Whether it was necessary and proportionate to serve the provisional listing: The appellant contests that the trees were not under threat, and hence it was unnecessary to issue a provisional listing to protect them and prejudicial to their integrity to have done so. They note that there were times when trees could legally have been felled on the site (prior to the serving of the provisional listing and the period between the expiration of the provisional listing and the serving of the Notice of Listing), but this did not occur.
21. Choice of method to assess amenity value: The use of the BS 5837:2012 to inform the provisional listing has also been questioned by the appellant. They note that

information provided by the Director of Planning (Policy & Projects) suggested that the ‘Helliwell’ method should be used.

22. Whether the correct notification procedures were followed: The appellant has questioned whether the correct procedures for serving the Notice to List have been followed. They state that one of the trees included in the listing is not located on the appellant’s land and they do not know whether that owner has been notified in the correct manner, and if not, whether this makes the listing process as a whole null and void.

Case for the Department

23. Whether it was necessary and proportionate to serve the provisional listing: The Department considers that it was proportionate to use their provisional listing powers, owing to the history of the site including pre-application discussions for development.
24. Choice of method to assess amenity value: It is accepted by the Department that the ‘Helliwell’ assessment would be a normal choice for assessing the amenity value of trees, but they maintain that both ‘Helliwell’ and BS 5837:2012 provide a reasonable basis upon which to consider factors contributing to amenity. The Department notes that BS 5837:2012 is an appropriate method for this site owing to the absence of tree survey data and the potential for the site to be developed.
25. Whether the correct notification procedures were followed: The Department maintains that the correct procedures were followed for both the provisional listing and Notice to List.

Inspector’s assessment

26. Whether it was necessary and proportionate to serve the provisional listing: S60 of the Planning and Building (Jersey) Law 2002 (as amended) applies where the “*Chief Officer considers it necessary or expedient to restrain the actual or apprehended removal of, or damage to, a tree suitable for inclusion on the List of Protected Trees.*”
27. In my view, the requirement allows for situations where the Chief Officer is aware of a real and immediate risk to trees, but also allows for listing as a precautionary measure, where there is a perception that there is a possibility of harm to a tree. Such an approach acts as a safeguard against unknown factors. Given the history of the site, including the change in land ownership, and pre-application discussions, it does not seem unreasonable for the Department to have taken a precautionary approach and made a provisional listing of the trees. I do not see this precautionary approach as questioning the integrity of the appellant.
28. Choice of method to assess amenity value: General criteria that will be considered during an assessment of amenity value are included on the States of Jersey website (see paragraph 11). These appear to mirror the factors included in the ‘Helliwell’ assessment (2008), although this is not explicitly stated on the website. No guidance is available on the website of the way in which these factors will be measured and evaluated. This means there is an apparent lack of transparency in the Department’s decision-making process, which makes it difficult for owners of trees to understand how the amenity value of trees has been assessed. This does not necessarily mean that decisions on amenity are not justified, but it does make it difficult for others to understand how those decisions have been reached.

Publication of the detailed guidance or confirmation that the ‘Helliwell’ assessment methods are being applied, would help the public have confidence in the listing process.

29. The Department advised the appellant to use the ‘Helliwell’ method to conduct their own assessment of the amenity value of trees, but used the British Standard for its own initial assessment. However, I note that a ‘Helliwell’ assessment was conducted by the Department at a later stage.
30. The British Standard is aimed at identifying ways in which trees can be incorporated within a development design, whilst the ‘Helliwell’ assessment is designed specifically for amenity evaluations. Whilst I accept that both methods include consideration of amenity and safeguarding of trees, their aims and objectives are subtly different and consequently the outputs from each assessment are not directly comparable.
31. It is regrettable that the initial assessment conducted by the Department did not follow the approach that they had recommended to the appellant, although I accept that the method was appropriate for identifying trees to be retained following development of a site. Nevertheless, I am satisfied that the Department has applied structured and appropriate assessment methods, including a ‘Helliwell’ assessment to underpin its determination of the amenity value of the trees for inclusion on the List of Protected Trees.
32. Whether the correct notification procedures were followed: This issue relates to T19, which the appellant states, is not on their land. That is an issue for the Department to consider, but I am satisfied that the Notice to List has been applied correctly in respect of the appellant and the trees on land in their ownership.

Merit in listing the trees

Case for the appellant

33. The appellant has considered criteria for issuing Tree Preservation Orders under Part VIII of the English Town & Country Planning Act 1990, to assist them in clarifying the meaning of amenity. Based on this guidance, the appellant believes that a reasonable degree of public benefit should accrue from the listing of a tree and this should be defined by reference to the visibility, individual impact and wider impact of the trees. Using these criteria, the appellant does not consider that the trees provide a reasonable degree of public benefit. In addition, the appellant considers that when applying the ‘Helliwell’ assessment, the Department’s arboriculturalist uses a lower threshold value than is usual in England, for identifying trees of high amenity value.

Case for the Department

34. The Department does not consider that English planning laws or the requirements for Tree Preservation Orders made under those laws have any application in Jersey. In the Department’s view, the listed trees are important for the amenity of Jersey. Furthermore, this assessment is based on an objective consideration of the amenity value of the trees, undertaken by an appropriately qualified arboriculturalist using two different assessment methods (BS 5837:2012 and a ‘Helliwell’ assessment). The Department’s arboriculturalist has indicated that when applying the ‘Helliwell’ assessment, he uses a score of 100 as a rough threshold above which trees should

be considered for inclusion on the List of Protected Trees. In the Department's view, all the trees included within the list meet this minimum threshold.

Inspector's assessment

35. As noted in paragraph 30, both the BS 5837:2012 and 'Helliwell' methods are recognised evaluation tools, although they have slightly different purposes. Of the two approaches, the 'Helliwell' assessment appears to fit most closely with the criteria for selection of trees that is included on the State's website. The weakness of both systems is that they involve a certain degree of subjectivity.
36. I have considered the 'Helliwell' assessments prepared by both the appellant and the Department. Whilst there are areas of agreement between them, there are also some differences in the scores that have been allocated for individual features. As the overall 'Helliwell' score is produced by multiplying together scores for the individual features, this can result in a significant difference in the overall score that is achieved.
37. The main criterion where there is a consistent difference of opinion between the appellant and the Department is in the treatment of "special features". The appellant's arboriculturalist has provided a qualitative assessment of any features that they felt were notable, whereas the Department's arboriculturalist has provided a numerical score, which has been included in the calculation of the total score for each tree. I understand that the inclusion of special features was removed from the 2008 version of the 'Helliwell' assessment. Be that as it may, the inclusion of this additional multiplier means that the total scores provided by the Department's arboriculturalist are considerably higher than the corresponding scores for the same tree produced by the appellant's arboriculturalist. Thus, in spite of the apparent application of the same method, the total score for each tree cannot readily be directly compared as they do not represent a 'like for like' comparison. However, it is possible to make a direct comparison of the scores awarded for each individual criterion (other than special features).
38. I have given further consideration to the merits of including each individual tree or group of trees on the List of Protected Trees.
39. T2 is an English oak, which is located on the north-eastern corner of the site. There were differences in opinion concerning the relation of the tree to its setting and its form, with the Department's arboriculturalist scoring these more highly. The spread of the canopy was assessed to be greater by the appellant's arboriculturalist.
40. Both assessments consider this tree as having little - some importance in the landscape. It is located in a prominent position, on a raised bank adjacent to the boundary with Mont Sohier. Consequently it is visible to the public who use the road and/or the car park. As Mont Sohier is the main route to St Brelade's Bay, which is a popular holiday destination, I consider the tree to have the potential to be enjoyed by large numbers of people. In this respect I consider it acts as an asset in the landscape and so is relatively suitable for its location, despite its position on top of a bank. The tree is relatively young, and so potentially could be present in the street scene for some time to come. On balance, I agree that this tree meets the requirements to be included on the List of Protected Trees.

41. T4 is a fig tree located towards the centre of the car park. The main areas of difference in opinion relate to the importance of the position of the tree in the landscape and its relation to its setting.
42. The importance of a tree within the landscape is an expression of the visual prominence of the tree. The tree is very visually prominent within the car park, although its visibility from outside the boundary of the site is more restricted. Its suitability within its setting is a very subjective assessment, however, I consider it to be an interesting feature, and its scale and proportion are appropriate for the setting. As the car park is used by the public, it has the potential to be seen and appreciated by large numbers of people. On balance, I agree that this tree meets the requirements to be included on the List of Protected Trees.
43. T5 - T15 are a group of Maritime pines that are located along the southern edge of the car park, above the slope down to the promenade and the beach. These trees are of varying heights and ages, with some being rather stunted. Despite differences in position, height, form and age, each arboriculturalist has assigned a single value to apply to each tree within the group. The main areas where there is a difference of opinion relate to the useful life expectancy, importance of position in landscape, relation of the tree to its setting, and form.
44. The Department's arboriculturalist considers the trees to have a shorter life span than the appellant's arboriculturalist, but both assess the trees as having at least a life span of 40 years. The Department's arboriculturalist considers the trees to have some importance in the landscape, whilst the appellant's arboriculturalist considers them to have little - some importance.
45. The appellant's arboriculturalist considers the trees to be moderately unsuitable for their location and to have a poor form. In making this assessment, the appellant's arboriculturalist has highlighted that the pines are considered an invasive species. By contrast, the Department's arboriculturalist considers the trees to be fairly suitable for the location and an asset to the landscape, and that the trees have a good form. They consider that poor, sandy soil near the sea is a usual location for Maritime pines. The Department has also indicated that they do not consider the invasiveness of species to be a material matter.
46. The tops of some of the pine trees can be seen from the promenade, and from the beach. They can also be seen from the viewpoint on the raised ground at the east of the bay. In addition, the taller trees are very conspicuous when viewed from the car park. However, the position of the trees means that they act to obscure the view of the Tower from the eastern end of the bay, and obscure the view of the beach and the sea from the car park. The 'Helliwell' guidance indicates that trees which obscure an attractive view are not likely to be suitable for their location.
47. The smaller trees that lie between the car park and the beach are currently inconspicuous from the car park as they are hidden by the taller trees and the topography means that they cannot be seen from the promenade or beach. The exposed location of the trees means that some of them have been shaped by prevailing wind conditions and hence their form is poor.
48. Each of the trees only just met the threshold set by the Department's arboriculturalist as an indicator of high amenity value. In conclusion, whilst the trees are partially visible to potentially large numbers of people, their position

means that they obscure attractive and interesting views. Also, I do not consider the trees to be especially attractive specimens. Consequently, on balance, I do not consider that these trees meet the requirements to be included on the List of Protected Trees.

49. T17 - T19 are three evergreen oak trees located on the eastern boundary of the property. My comments are focused on T17 and T18, which lie on land in the appellant's ownership, but also apply to T19.
50. The main areas of difference in the scores produced by the respective arboriculturalists relate to the importance of the position of the trees in the landscape, the relation of the trees to their setting and their form. The appellant's arboriculturalist has considered the trees to have a greater importance in the landscape than the Department's arboriculturalist. The Department's arboriculturalist considers that they are fairly suitable for their setting and have a good form, whilst the appellant's arboriculturalist considers them to be just suitable and to have a poor form.
51. The trees are prominent features along the boundary of the property. They are visible within the car park, but have a more restricted visibility from the public road. They can be seen from the viewpoint at the eastern end of the promenade, but do not obscure the view of the Tower. Evergreen oaks have a relatively long life expectancy and can grow to a considerable size. The Department has indicated that in its opinion the trees do not pose any particular detriment to nearby buildings, although they acknowledge that the trees may require management as they grow. On balance, I consider that these trees meet the requirements to be included on the List of Protected Trees.
52. The appellant's arboriculturalist has highlighted that the evergreen oaks (and Maritime pines) are considered invasive species, and has used this in their assessment of their suitability for the setting. I provide further comment on this in paragraph 54.

Other issues

53. The appellant has referred to the large numbers of trees in the wider area, which are not included on the List of Protected Trees. Inclusion (or exclusion) of other trees from the list is not a deciding factor. Any tree that is important for the amenity of Jersey can be included on the list; inclusion is not limited to only the 'best' examples.
54. The appellant's arboriculturalist has indicated that two of the tree species (Maritime pine and Evergreen oak) are considered invasive in Jersey and are controlled on nature conservation sites nearby. The law does not make any distinction between the species of tree that should be considered for inclusion on the List of Protected Trees. In the absence of supplementary statutory guidance on this matter, it is up to the Chief Officer to identify which trees require protection "*in the interests of the amenity of Jersey*" in accordance with Article 58 (2) of the Planning and Building (Jersey) Law 2002 (as amended).

Overall Conclusion

55. For the reasons set out above, I conclude that it was appropriate for a provisional listing to be served and that the correct process has been followed for listing the trees. The absence of published criteria explaining how trees will be evaluated

means that there is a lack of transparency in decision-making. However, I am satisfied that a structured assessment of the amenity value of the trees has been carried out using an appropriate method.

56. Having considered the differences in opinion between the appellant and the Department about the scores to be assigned for particular criteria for specific trees, I conclude that there is justification to include trees T2, T4, T17 - T19 on the List of Protected Trees. I do not think that the inclusion of the group of Maritime pines T5 - T15 is justified, owing to their impact on obscuring important views of the Tower and their irregular form.

Inspector's recommendation

57. For the reasons outlined above, I recommend that the Minister should dismiss the appeal in relation to trees T2, T4, T17 - T19. However, I recommend that the Minister allow the appeal in relation to trees T5 - T15 and that these trees should consequently be removed from the List of Protected Trees.

Sue Bell

Inspector 07/06/2016