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| Cabinet | AGENDA ITEM No. 9 |
| 17 October 2022 | PUBLIC REPORT |

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| Report of: | Adrian Chapman, Executive Director Place & Economy | |
| Cabinet Member(s) responsible: | Cllr Nigel Simons Cabinet Member for Waste, Street Scene and the Environment | |
| Contact Officer(s): | Jim Newton - Assistant Director Planning & Building Control (interim) | 07551046980 |
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TREE MANAGEMENT: REVIEW OF EXISTING POLICY FOR MANAGING TREE RELATED SUBSIDENCE CLAIMS AGAINST THE COUNCIL

| RECOMMENDATIONS | |
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| FROM: Adrian Chapman - Executive Director Place & Economy | Deadline date: N/A |
| <p>It is recommended that Cabinet:</p> <ol style="list-style-type: none"> 1. Endorse the draft tree related subsidence policy (Appendix 1 to the report), together with the resolution of the Climate Change and Environment Scrutiny Committee of 5 September 2022. 2. Recommend to Full Council that the Trees and Woodland Strategy be further amended by way of introduction of the newly created tree related subsidence policy. | |

1. ORIGIN OF REPORT

1.1 This report is submitted to Cabinet following consideration of the draft policy and supporting information by the Climate Change & Environment Scrutiny Committee on the 5 September 2022.

2. PURPOSE AND REASON FOR REPORT

2.1 The primary purpose of this report is for Cabinet to determine what, if any, amendments to the Trees and Woodland Strategy are considered appropriate, and thereby recommend such amendments to the next available Full Council meeting. The Trees and Woodland Strategy is a major policy item, and therefore only Full Council can amend its content.

2.2 This report is for Cabinet to consider under its Terms of Reference No. 3.2.14, *'To commission reviews by and determine any changes of policy proposed by the Scrutiny Committees and Commissions making recommendations to Council about proposed changes to the Council's major policy and budget framework.'*

3. TIMESCALES

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| Is this a Major Policy Item/Statutory Plan? | YES | If yes, date for Cabinet meeting | 17 October 2022 |
| Date for relevant Council meeting | 7 December 2022 | Date for submission to Government Dept. | N/A |

4. BACKGROUND AND KEY ISSUES

4.1 This report has been written following a high profile proposed tree felling case the City Council grappled with. This was a complex case requiring the felling of a mature Oak tree in Bretton, following a proven tree related subsidence property damage claim against the council. For context, the tree in question was owned by PCC, on PCC land, but causing damage to third party property (a residential property, and highly likely a second residential property). Appendix 1 focuses on many of the issues raised by that case, namely trees owned by the council, which are causing damage to other assets, whether that be third party assets (e.g., homes) or our own assets (e.g., the highway). This agenda item, including appendix 1, does not deal with trees owned by other parties; the existing Trees and Woodland Strategy (and wider planning policy and case law) responds to such issues.

4.2 The existing Trees and Woodland Strategy has been very effective in putting in place clear processes and guidelines as to how the city council will not only discharge its statutory functions in relation to Trees and Woodland, but also establishes guidelines, or 'service standards', in respect of this important resource, a matter which is a very 'public facing' service.

Notwithstanding the success of the current Strategy, for a number of reasons as explained in this report, Cabinet is asked to consider and offer its thoughts on potential changes to the Strategy. Any such recommended changes or comments will then be recommended to Full Council.

Tree related subsidence in Peterborough

4.3 The risks posed by PCC trees have been well known for many years and is clearly identified as a risk within the current Trees and Woodland Strategy and the corporate risk register. It is, however, considered that the council is approaching a critical point at which the insured risk from trees needs to be more widely communicated and understood along with a review of governance processes to ensure that future cases are managed in a consistent manner and decisions taken which are understood and accepted corporately and by the community.

It is accepted that this is not an easy matter to deal with. There will be many cases where, unfortunately, the most appropriate solution is the one which has the least worst outcome.

To put the matter into context, it is a statement of fact that trees currently pose the **single most significant insurance liability to Peterborough City Council (i.e., a greater risk, for example, than that posed by our highways)**. This risk is posed through a range of circumstances, as described within the attached appendix

Proven claims totalling £1.13million have been received by the Council over the last 7 years. Over the past few years, responding to the above cases has almost entirely been on the basis of felling trees where a proven case of damage exists. Felling is the simplest, cheapest and proven way of dealing with the 'nuisance' (defined in a legal sense). Costs would have been substantially more if alternative (non-felling) options were taken (estimated to be within the range of £5-10 million), and sometimes no alternative to felling is possible (for practical or legal reasons).

Lessons learned from the Bretton Oak

- 4.4 Whilst it is clear that that the decision-making process on the Bretton tree was undertaken in accordance with existing policy and the constitution, there are some potential back-end process improvements that could be made. Appendix 1 provides suggested actions for future decision making in regard to trees implicated in a similar manner.

In summary the process improvements include:

- greater transparency of evidence submitted to substantiate claims
- decisions to fell a Council owned TPO tree might have benefitted from being referred to the Planning Committee (*see recommendation of The Climate Change and Environment Scrutiny Committee section 5*)
- the age of the tree was incorrectly communicated
- the need to balance mitigation actions against the benefits delivered by trees, and communicate these clearly

Proposed Tree Related Subsidence Policy

- 4.5 Finally, the appendix provides a policy that more precisely recognises the value of the Council's tree stock in respect to claims and aligns remediation or mitigation accordingly. It provides a process that allows consideration of financial provisioning to mitigate loss other than felling for those tree assets of highest value. These cases being considered at Directorate/Corporate level and a balanced judgement being formed within a greater 'financial envelope'.

Key issues

- 4.6 There are several key issues that have informed the policy created. These include:
- The council has liability for any damage caused by their trees and are required to abate this nuisance (in a legal sense). 'Do nothing' is not an option (or, if such an option was taken, could lead to substantial legal claims and costs)
 - Often the standard of proof in subsidence cases falls to the balance of probabilities. If there is 51% chance "more likely than not" that the tree is the cause of the damage, then the claim will succeed (subject to other legal defences).
 - There is no entitlement to any particular level of evidence with a claim- either the evidence proves causation, or it does not.
 - Defences such as "the foundations were poor" or "the tree was there first" have been proven not to be acceptable defences in case law.
 - In nearly all cases the alternative options to felling are available, but with varying degrees of risk, cost and amenity loss associated with them.
 - Where mitigation is instigated, the council should also consider other foreseeable future risk beyond the implicated property.

5. CONSULTATION

- 5.1 Prior to drafting this paper, a meeting was held with the Chair of Climate Change & Environment Committee, a reserve appointee, representatives of the Woodland Trust and the Portfolio Holder which helped inform the report and appendix. However, this should not be taken to mean that the report and appendices are necessarily endorsed by such parties.

The Climate Change and Environment Scrutiny Committee has been consulted on this paper, at its meeting of 5th September 2022. Having considered the report and **RESOLVED to endorse** the draft revised policy subject to the **RECOMMENDATION** to amend the proposal so that Peterborough City Council do not automatically refer claims against Council owned TPO trees to the Planning Committee and instead rely on the existing procedures in place.

Following publication the draft strategy was shared with a representative of the Woodland Trust and a Tree Officer within Sheffield City Council.

6. ANTICIPATED OUTCOMES OR IMPACT

- 6.1 It is anticipated that Cabinet will endorse the potential change to the existing Trees and Woodland Strategy, in the form of an addendum of the new policy to the Strategy and recommend such changes to Full Council.

7. REASON FOR THE RECOMMENDATION

- 7.1 The proposed updated policy for dealing with tree related subsidence claims has considered current best practice and has been developed alongside the framework of resources available to the Council and extensive working knowledge of the tree resource within the city.

Although the existing approach taken was considered an effective form of risk mitigation it was considered that trees should be more fairly accounted for in the decision making of the council. The changes made add clarity to operational guidelines and are considered beneficial to provide a clearer understanding for all customers.

8. ALTERNATIVE OPTIONS CONSIDERED

- 8.1 Other alternative options include:
1. Keep policy as existing – This was dismissed as it was considered that the Council would not adequately take account of the value of trees within the decision-making process.
 2. Introduce a policy that recommends alternative forms of mitigation for all tree claims. This was dismissed as it would be financial prohibitive.

9. IMPLICATIONS

Financial Implications

- 9.1 The proposed policy offers scope for alternative forms of mitigation to be delivered outside of the existing tree budget, which has been shown to be historically financially prohibitive. The costs of such are somewhat unknown in scale or time however it will fall within the associated Directorate to make a balanced judgement informed by cost / benefit analysis within their much broader financial envelope.

Legal Implications

- 9.2 Each landowner has the right (subject to planning and any other relevant consent requirements) to do what they wish on their own land without interference from adjacent landowners. It is, thus, perfectly acceptable the Council to grow trees on its own land and for the roots to extract moisture from its own land but it is fundamentally unacceptable for a Council owned tree to extract moisture from another's land where it causes damage to their property. The Council would be liable for the damage and would have legal duty to abate the nuisance caused.

Equalities Implications

- 9.3 There are no known implications, positive or negative.

Rural Implications

- 9.4 There are no known implications, positive or negative.

Carbon Impact Assessment

- 9.5 Implicated trees are assumed to be healthy and growing and consequently will have a positive impact in terms of capturing carbon from the atmosphere. Felling the tree/s would obviously stop that carbon capture, albeit any replacement trees would over time, should they mature, likely capture a similar level of carbon. alternative options of underpinning or root barriers would mean the tree/s continue to capture carbon. However the extensive works involved in themselves have a carbon impact. Whilst difficult to quantify, there is a potential for the alternative options (whereby the tree is saved) to be carbon negative, or will take a long time to become carbon neutral or

carbon positive. Overall, the numbers for all options are, on the scale of things fairly marginal.

10. BACKGROUND DOCUMENTS

Used to prepare this report, in accordance with the Local Government (Access to Information) Act 1985

10.1 Trees and Woodland Strategy 2018

11. APPENDICES

11.1 Appendix 1- Managing PCC Tree Stock – Establishing an Updated and Robust Decision Taking Process for Tree Related Subsidence Claims

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