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2011

## TREE PRESERVATION ORDERS

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**Scottish Planning Series**

**PLANNING CIRCULAR 1 2011**

**Tree Preservation Orders**

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## INTRODUCTION

1. This Circular and attached annex set out Scottish Government Policy on TPOs and trees in conservation areas contained in the Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc. (Scotland) Act 2006 and the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas)(Scotland) Regulations 2010 (SSI 2010/434). This circular is intended to provide an overview of the new TPO procedures, explaining how the requirements from the Act and Regulations fit together.

## INTERPRETATION

“The 1997 Act”	The Town and Country Planning (Scotland) Act 1997 as amended by the 2006 Act
“the 2006 Act”	The Planning etc. (Scotland) Act 2006
“the 2010 Regulations”	The Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas (Scotland) Regulations 2010 (SSI 2010/434)
“section”	Unless otherwise stated, means a section of the 1997 Act as amended by the 2006 Act
“TPO”	Tree Preservation Order

## **GENERAL DUTY AS RESPECTS TREES <sup>1</sup>**

2. Both Scottish Ministers and the planning authority have a duty to ensure, whenever it is appropriate, that in granting permission for any development adequate provision is made, by the imposition of conditions, for the preservation or planting of trees.

3. Planning authorities have duties to:

- make such tree preservation orders as appear to the authority to be necessary with the grant of such permission; and
- from time to time to review any TPO and consider whether it is requisite to vary or revoke the TPO.

## **TREE PRESERVATION ORDERS**

### **Power to make Tree Preservation Orders <sup>2</sup>**

4. A planning authority may make a TPO if it appears to them to be :

- expedient in the interest of amenity and/or,
- that the trees, groups of trees or woodlands are of cultural or historical significance.

### **Power For Scottish Ministers to make TPOs <sup>3</sup>**

5. If it appears to Scottish Ministers that it is expedient that a TPO, or a variation or revocation Order, should be made, they may make such an Order.

6. Scottish Ministers are only likely to use this power in exceptional circumstances where national issues of importance are raised.

### **Making the TPO**

7. Section 160 (1) of the 1997 Act gives planning authorities powers to make TPOs and section 160 (3) sets out what provisions a TPO may include.

8. The Scottish Government's preferred Model Order is contained within Annex A.

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1 Section 159 of the 1997 Act  
2 Section 160 of the 1997 Act  
3 Section 164 of the 1997 Act

9. The Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas (Scotland) Regulations 2010 make provision for the form of a TPO and the procedure to be followed when making and confirming a TPO. Regulation 3 requires that a TPO must define the position of the trees to which it relates by means of a map. The map must be to a scale which is sufficient to give a clear indication of the position of the trees. In terms of section 161 (2) a confirmed TPO must be recorded in the Register of Sasines or registered in the Land Register of Scotland. Land Register applications need to be identifiable on the Ordnance Survey Map and any deed presented for registration in either the Register of Sasines or the Land Registers should also meet this criteria.

10. A TPO will take effect on a date that is specified in the order, but will expire within a period of 6 months after this date if it has not been confirmed by the planning authority within that 6 month period.<sup>4</sup>

11. A TPO may also be made for any trees to be planted in compliance with a condition of planning permission. The TPO will apply from the time that the trees are planted.<sup>5</sup>

### **Procedures and Representations**

12. A planning authority must as soon as may be after making the TPO<sup>6</sup> -

- make a copy of the TPO available for public inspection at a convenient place to the locality in which the affected trees are situated;
- give notice of the TPO in a newspaper circulating in the locality including a statement with the following information:
  - the grounds for making the TPO;
  - where and what times a copy of the TPO may be inspected;
  - how representations may be made to the planning authority; and
  - the date by which any representations are to be received (this must be at least 28 days after the date of the notice).
- send a copy of the TPO to the Forestry Commission; and
- send a copy of the TPO to all interested persons together with a notice containing the information contained within the newspaper notice.

13. Any person may make a representation on the TPO.<sup>7</sup> Every representation shall be made in writing, state the grounds of the representation and specify the particular trees to which it relates. The planning authority must consider any representations before confirming a TPO.

### **Confirming the TPO**

14. The planning authority may confirm the TPO either:<sup>8</sup>

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4 Section 161(1) of the 1997 Act  
5 Section 160(5) of the 1997 Act  
6 Regulation 4 of the 2010 Regulations  
7 Regulation 5 of the 2010 Regulations  
8 Section 161(1A) of the 1997 Act

- without modification; or
- subject to such modifications as they consider expedient.

15. As soon as a TPO is confirmed, the planning authority are required to record it in the appropriate Register of Sasines or register it in the Land Register of Scotland.<sup>9</sup>

16. The Keeper will continue to offer a free service to consider draft TPOs prior to registration in either the Register of Sasines or the Land Register, preferably with a minimum of 10 working days to complete this service.

17. Where the TPO is confirmed,<sup>10</sup> it must be endorsed to that effect including an indication of whether the order was confirmed with or without modifications and the date.

18. As soon as possible after confirming the order the planning authority must give notice to:

- the Forestry Commission;
- interested persons; and
- any person who made a representation.

19. The following are interested persons –<sup>11</sup>

- An owner, lessee and occupier of the land on which the trees groups of trees or woodlands to which the TPO relates are situated
- Any other person who to the knowledge of the planning authority, would but for the TPO be entitled -
  - to fell, top, lop, uproot or otherwise damage or destroy any tree to which the tree preservation order relates; or
  - to work by surface working any material in, on or under such land.

20. The notice is to state the date and reasons for the confirmation of the TPO. Where modifications were made, it is to state the reasons for this and where and at what times a copy of the TPO can be inspected. Where the order is modified then a copy of the TPO requires to be attached to the notice served on the Forestry Commission and interested persons.

21. The planning authority must make a copy of the TPO available for public inspection in a place convenient to the locality of the affected trees and free of charge at all reasonable hours at the office of the planning authority.

### **Action where TPO is not confirmed**

22. Where a planning authority decides not to confirm a TPO<sup>12</sup> it must as soon as is practicable:

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9 Section 161(2) of the 1997 Act  
 10 Regulation 6 of the 2010 Regulations  
 11 Regulation 2 of the 2010 Regulations  
 12 Regulation 7 of the 2010 Regulations

- endorse the TPO with a statement to that effect with the date of the decision; and
- give notice of its decision to:
  - the Forestry Commission;
  - interested persons; and
  - any person who made a representation.

### **Varying and Revoking Orders**

23. Section 275(8) of the 1997 Act makes it clear that planning authorities may vary and revoke TPOs by making another order.

24. A revocation order is a TPO which revokes another TPO whilst a variation order is a TPO which varies another TPO.<sup>13</sup>

25. The procedures for making and confirming either a variation or revocation order are essentially the same procedures that are used for making and confirming a TPO.

26. There is no requirement to provide a map for revocation or variation Orders where trees are being removed from the original Order,<sup>14</sup> however this does not prohibit the use of a map where it is thought to be of assistance.

27. Where a variation or revocation Order is confirmed the planning authority must endorse the original Order with a statement to that effect, specifying the date and title of the variation or revocation order.<sup>15</sup>

28. Where a revocation Order is confirmed the planning authority must withdraw from public inspection the copy of the original Order.<sup>16</sup>

### **Offences and Penalties**

29. It is an offence<sup>17</sup> for any person in contravention of a TPO to cut down, uproot, wilfully destroy a tree or wilfully damage, top or lop a tree in such manner as to be likely to destroy it without the consent of the planning authority.

30. A person guilty of an offence shall be liable on summary conviction to a fine not exceeding £20,000 and on conviction of indictment to a fine.

### **Applications for consent**

31. Section 28(2)(c) of the 2006 Act provides Scottish Ministers with powers to determine the form and manner of applications for consent under a TPO.

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13 Regulation 2 of the 2010 Regulations  
 14 Regulation 3(3) of the 2010 Regulations  
 15 Regulation 6(6) of the 2010 Regulations  
 16 Regulation 6(7) of the 2010 Regulations  
 17 Section 171 of the 1997 Act

32. The Regulations require<sup>18</sup> that the application must be made to the planning authority specifying the operations for which consent is sought, the reasons for such operations and must identify by means of a map or plan (of sufficient size and scale) the protected trees that would be affected.

33. Applications for consent may be made by using the ePlanning system. Information and guidance on the use of the ePlanning system is available at <https://eplanning.scotland.gov.uk/WAM/>.

## **Exemptions**

34. A TPO may make exemptions<sup>19</sup> to the prohibition of cutting down, topping, lopping, uprooting, wilful damage or wilful destruction of trees except with the consent of the planning authority.

35. The Model Order (Annex A) provides a list of suggested exemptions.

36. Without prejudice to any other exemptions made by the TPO, nothing in the TPO shall prohibit the uprooting, felling or lopping of trees if :<sup>20</sup>

- it is urgently necessary in the interests of safety
- it is necessary for the prevention or abatement of a nuisance<sup>21</sup>
- it is in compliance with any obligation imposed under an Act of Parliament or an Act of the Scottish Parliament,

so long as notice in writing of the proposed operations is given to the planning authority as soon as practicable after the operations become necessary.

37. Section 162 of the Act<sup>22</sup> sets out the exemptions for the Forestry Commission.

38. Although not a requirement of legislation, Scottish Government Policy is that consent under the order should not be required where full planning permission has been granted that involves works to trees. This is reflected in the exemptions in the Model Order contained within Annex A.

## **REPLACING TREES**

### **The Duty to Replace Trees**

39. Under Section 167 of the Act the landowner is under a duty to replace a tree which is removed in contravention of the TPO. Outside woodlands the duty also applies if the tree is removed because it is urgently necessary to do so in the interests of safety.

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18 Regulation 9 of the 2010 Regulations

19 Section 160(3) of the 1997 Act

20 Section 160(6) of the 1997 Act

21 Section 160(6)(ba) of the 1997 Act. "it is authorised by an order granting development consent" – Schedule 2 Planning Act 2008

22 As amended by Section 95 of the Planning and Compulsory Purchase Act 2004

40. The duty on the landowner is to plant another tree of an appropriate size and species at the same place as soon as he/she reasonably can.

41. The duty transfers to the new owner if the land changes hands.<sup>23</sup> When planted, the replacement tree is automatically protected by the original TPO.<sup>24</sup> The planning authority has powers to dispense with the duty to plant a replacement tree.<sup>25</sup>

### **The Duty to Replace Woodlands**

42. With respect to woodlands, it is sufficient if the landowner<sup>26</sup> plants the same number of trees:

- on or near the land on which the trees stood; or
- on such other land as may be agreed between the planning authority and landowner;
- and in such places as may be designated by the planning authority.

### **Enforcing the Duty: Notices Requiring the Replacement of Trees**

43. If it appears to a planning authority that a duty to replace trees or woodlands has not been complied with they can enforce the duty by serving on the landowner a notice under section 168 of the 1997 Act (a notice requiring the replacement of trees). The notice requires to be served within 2 years from the date of the alleged failure to comply with the duty. The notice also requires to specify a period at the end of which it is to take effect and cannot be a period less than 28 days beginning with the date of the service of the notice.

### **Enforcing Conditions of Consent Section**

44. The planning authority may also serve a notice under section 168 requiring the replacement of trees to enforce against any condition of consent granted under a TPO requiring the replacement of trees. Again it must appear to the planning authority that the condition has not been complied with, and the notice must be served on the landowner. The notice requires to be served within 2 years from the date of the alleged failure to comply with the duty. The notice also requires to specify a period at the end of which it is to take effect and cannot be a period less than 28 days beginning with the date of the service of the notice.

45. Trees planted in accordance with a condition are automatically protected by the original TPO.<sup>27</sup>

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23 Section 167(5) of the 1997 Act  
24 Section 167(4) of the 1997 Act  
25 Section 167(2) of the 1997 Act  
26 Section 167(3) of the 1997 Act  
27 Section 168(3A) of the 1997 Act

## **Execution and Costs of works required by Section 168 Notice.**

46. If within the period specified in the notice of the replacement of trees or within such an extended period as the planning authority allow any trees which are required to be planted have not been planted then the planning authority may: <sup>28</sup>

- enter the land and plant those trees; and
- recover from the landowner or lessee any reasonable expenses incurred.

47. If the landowner or lessee was entitled to appeal to the Scottish Ministers but did not do so, the landowner or lessee will not be able to dispute the validity of the action of the planning authority to plant trees or to recover reasonable expenses. <sup>29</sup>

48. In calculating the amount of expenses to be recovered the planning authority may include in that amount the proportion of administrative expenses as seems to be appropriate. <sup>30</sup>

49. Where a notice requiring the replacement of trees has been served:

- any expenses incurred by the owner, lessee or occupier of any land for the purpose of complying with the notice; and
- any sums paid by the owner or lessee of any land with respect to expenses incurred by the planning authority in planting trees with the notice

are recoverable from the person responsible for the cutting down, destruction or the removal of the original trees. <sup>31</sup>

50. If a landowner complains and it appears to a sheriff that the occupier of the land is preventing the carrying out of the work required under the notice of the replacement of trees, the sheriff may be warrant authorise the owner to go on to the land and carry out the work. <sup>32</sup>

51. The planning authority which executes the works required by a notice of the replacement of trees may sell any materials removed by it from the land unless the owner claims those materials within 3 days of their removal by the planning authority. Where such materials are sold the planning authority shall pay the owner the proceeds of the sale after deducting any expenses recoverable by them. <sup>33</sup>

52. Where a planning authority seeks to recover reasonable expenses from the landowner and the landowner proves:

- he/she is receiving the rent in respect of that land merely as a trustee, tutor, curator, factor, or agent of some other person; and

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28 Section 170(1) of the 1997 Act

29 Section 170(2) of the 1997 Act

30 Section 170(3) of the 1997 Act

31 Section 170(4) of the 1997 Act

32 Section 170(5) of the 1997 Act

33 Section 170(6) & (7) of the 1997 Act

- he/she has not, since the date of the service on him/her of the demand for payment has not had, in his/her hands on behalf of that other person sufficient money to discharge the whole demand of the authority,

his/her liability shall be limited to the total amount of money which he/she has or has had in his/her hands on behalf of that other person.<sup>34</sup>

53. A planning authority which has not recovered the whole of any such expenses from a trustee, tutor, curator, factor or agent for the reasons above, may recover any unpaid balance from the person on whose behalf the rent is received.<sup>35</sup>

54. Any person who wilfully obstructs a person executing the notice of the replacement of trees shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.<sup>36</sup>

## APPEALS

55. The legislation provides no right of appeal to Scottish Ministers against a TPO, either when made or confirmed.

56. Subject to the provisions of a TPO an appeal can be made to Scottish Ministers following the refusal of an application to cut down or carry out works to trees.

57. The Scottish Government expects that planning authorities will use the Model Order (Annex A) with respect to the provisions for appeals against refusal of consent required by a TPO. This will ensure that appeals procedures are consistent with those procedures for appealing against a decision on a planning application.

### **Appeals against Notices requiring the replacement of trees**<sup>37</sup>

58. A person on whom a notice requiring the replacement of trees is served upon may appeal to Scottish Ministers under section 169 on the following grounds:

- that the replacement of trees with respect to a TPO or any conditions of consent are not applicable or have been complied with;
- that in all circumstances the replacement of trees with respect to a TPO should be dispensed with;
- that the requirements of the notice are unreasonable in respect of the period or the size or species of trees specified in it;
- that the planting of a tree or trees in accordance with the notice is not required in the interests of amenity or would be contrary to the practice of good forestry;

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34 Section 170(8) of the 1997 Act  
 35 Section 170(9) of the 1997 Act  
 36 Section 170(10) of the 1997 Act  
 37 Section 169 of the 1997 Act

- that the place on which the tree is or trees are required to be planted is unsuitable for that purpose.

59. An appeal may be made by either giving written notice to the Scottish Ministers before the end of the period in the Notice requiring the replacement of trees of which it is to take effect, or by sending such notice to them in a properly addressed and prepaid letter posted to them at such time, in the ordinary course of post, it would be delivered to them before the end of that period.

60. A person who makes an appeal to Scottish Ministers shall submit either when giving notice<sup>38</sup> a statement in writing:

- specifying the grounds on which he is appealing against the notice requiring the replacement of trees; and
- giving such further information as may be so prescribed.

61. Scottish Ministers may prescribe the procedure to be followed on appeals against notices requiring the replacement of trees. Circular 6/2009 Planning Appeals<sup>39</sup> explains the processes involved in appeals to Scottish Ministers.

62. Where such an appeal is brought, the notice requiring the replacement of trees shall have no effect pending the final determination or the withdrawal of the appeal.

63. On Such an appeal the Scottish Ministers may:

- correct any defect, error or misdescription in the notice; or
- vary its terms,

if they are satisfied that the correction or variation will not cause injustice to the appellant or the planning authority.

64. On determination of such an appeal the Scottish Ministers shall give directions for giving effect to the determination including, where appropriate, directions for quashing the notice.

65. Schedule 4 of the Act (determination of certain appeals by a person appointed by Scottish Ministers) applies to appeals against notices requiring the replacement of trees.

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38 Section 169 of the Act and Regulation 13 of the Town and Country Planning (Appeals)(Scotland) Regulations 2008

39 <http://www.scotland.gov.uk/Publications/2009/07/03100023/0>

## COMPENSATION

### Compensation in respect of a TPO<sup>40</sup>

66. TPOs make provision for the payment by the planning authority of compensation for loss or damage caused or incurred as a result of:

- the refusal of any consent under the TPO; or
- the grant of a consent subject to conditions.

67. To ascertain whether someone is entitled to compensation in any particular case it is necessary to refer to the TPO in question. Exceptions and conditions may be specified in the TPO.<sup>41</sup>

68. Except as may be provided by Section 166(5) of the 1997 Act, any question of disputed compensation will be referred to the Lands Tribunal. The provisions of sections 9 and 11 of the Land Compensation (Scotland) Act 1963 shall apply subject to any necessary modifications and to the provisions of any regulations made under the 1997 Act.

### Compensation in respect of a replanting direction<sup>42</sup>

69. Where:

- the planning authority gives a replanting direction to secure the replanting of woodland which is felled in the course of forestry operations; and
- the Forestry Commission decides not to make any grant or loan in respect of the replanting,

the planning authority is liable to pay compensation for any loss or damage caused or incurred as a result of complying with the direction.

70. In deciding not to make any grant or loan the Forestry Commission must be satisfied that the replanting direction frustrates the use of the woodland for the growing of timber or other forest products for commercial purposes and in accordance with the rules of good forestry practice. The Forestry Commission must, at the request of the person under a duty to comply with the direction, give a certificate stating the grounds for its decision.

71. A claim for compensation must be made within 12 months from the date on which the direction was given or, if an appeal is made, within 12 months from the date of Scottish Ministers' decision. The period for making a claim may be extended at the discretion of the planning authority. Any question of disputed compensation shall be determined in accordance with Section 70 of the Countryside (Scotland) Act 1967.

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40 Section 165 of the 1997 Act

41 Section 165(1) of the 1997 Act

42 Section 166 of the 1997 Act

## CONSERVATION AREAS

72. The law relating to conservation areas is in Part II of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. Conservation areas are areas of special architectural or historical interest the character or appearance of which it is desirable to preserve or enhance. Their designation provides the basis for the positive management of an area.

73. Trees in conservation areas which are already protected by a TPO are subject to the normal TPO controls. The Act also makes special provision for trees in conservation areas which are not the subject of a TPO. Under Section 172 anyone proposing to cut down or carry out work on a tree in a conservation area is required to give the planning authority six weeks prior notice. The purpose of this requirement is to give the planning authority an opportunity to consider whether a TPO should be made in respect of the tree. Any notified works must be carried out within 2 years from the date of the notice.

### Exemptions<sup>43</sup>

74. Exemptions to the requirement to give prior notice are set out in Regulation 8. You do not have to give the planning authority six weeks notice:

- for cutting down a tree in accordance with a felling licence granted by the Forestry Commission under the Forestry Act 1967;
- for work on a tree on land in the occupation of a planning authority when this is done by or with the consent of the authority;
- for work on a tree with a diameter not exceeding 75 millimetres (or where the tree is in a woodland, 100 millimetres where this is done to improve the growth of other trees);
- for work on a tree by or on behalf of the Forestry Commission on land placed at its disposal in pursuance of the Forestry Act 1967, or otherwise under its management or supervision;
- for work on a tree by or at the request of a statutory undertaker where the land on which the tree is situated is operational land and the work is necessary:
  - in the interests of the safe operation of the undertaking,
  - in connection with the inspection, repair or renewal of any sewers, mains, pipes, cables or other apparatus of the statutory undertaker, or
  - to enable the statutory undertaker to carry out permitted development;
- for works on a tree cultivated for the production of fruit in course of a business trade;
- for the pruning in accordance with good horticultural practice, of any tree cultivated for the production of fruit;
- for works to a tree where that work is required to enable a person to implement a planning permission other than:
  - an outline planning permission or planning permission in principle, or

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43 Section 173 of the 1997 Act

- permitted development rights; granted on application under Part 3 or section 242 of the Act, or deemed to have been granted;
- for work on a tree by or at the request of the Scottish Environmental Protection Agency to carry out permitted development;
- where the cutting down, topping, lopping or uprooting of a tree if:
  - it is urgently necessary in the interests of safety;
  - it is necessary for the prevention and abatement of a nuisance; or
  - it is in compliance with any obligation imposed by or under enactment

### **Giving Notice** <sup>44</sup>

75. The six weeks prior notice does not have to be in any particular form. It must however describe the work proposed and include sufficient particulars to identify the trees.

76. The six weeks prior notification may be made by using the ePlanning system. Information and guidance on the use of the ePlanning system is available at <https://eplanning.scotland.gov.uk/WAM/>.

77. It is important that the prior notification sets out clearly what work is proposed, it may be helpful for applicants to discuss their ideas with a tree officer within the planning authority. If the planning authority receives a vague prior notification it is advised to seek clarification from the person that submitted it.

### **What the Planning Authority can do** <sup>45</sup>

78. The planning authority can deal with a six week prior notification in one of three ways. It may:

1. Make a TPO if justified in the interests of amenity and/or for cultural or historical significance (The proposal would then have to be the subject of a formal application under the TPO);
2. Decide not to make a TPO and allow the six week period to expire, at which point the proposed work may go ahead as long as it is carried out within two years from the date of the notice; or
3. Decide not to make a TPO and inform the applicant that the work can go ahead.

79. The planning authority cannot refuse consent or grant consent subject to conditions. This is because the prior notification is not an application for consent under a TPO.

### **Register**

80. Section 175 of the Act requires planning authorities to keep available for inspection a register of all prior notifications.

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<sup>44</sup> Section 172 of the 1997 Act

<sup>45</sup> Section 172(3) of the 1997 Act

## **Penalties** <sup>46</sup>

81. Anyone who cuts down, uproots, wilfully destroys a tree or wilfully damages, tops or lops a tree in a conservation area in such a manner as to be likely to destroy it, without giving the six weeks prior notification is guilty of an offence. A person found guilty of an offence shall be liable on summary conviction to a fine not exceeding £20,000 and on conviction of indictment to a fine.

## **Replacement of trees** <sup>47</sup>

82. If a tree in a conservation area is removed, uprooted or destroyed in contravention of section 172 of the Act the landowner is placed under a duty to plant another tree of an appropriate size and species at the same place as soon as he or she reasonably can. The same duty applies if a tree is removed because it is dead, dying or dangerous or because it is causing a nuisance. The duty attaches to subsequent owners of the land, although the planning authority has powers to dispense with the duty.

## **RIGHTS OF ENTRY**

### **Imminent danger to trees: entry to affix a copy of TPO** <sup>48</sup>

83. If it appears to a planning authority that a tree, group of trees or woodlands:

- on land in their district; and
- in respect of which they have made a TPO,

may be in imminent danger of being cut down, topped, lopped, uprooted, wilfully damaged or wilfully destroyed and it is expedient that a copy of the order should be affixed to the trees, then a person authorised by the planning authority may enter the land to affix a copy of the order.

84. This does not prejudice the procedure to be followed in connection with the confirmation of a TPO.

### **Rights to enter without warrant**

85. Any person duly authorised in writing by a planning authority may enter any land for the purpose of:

- surveying it in connection with making or confirming a TPO;
- ascertaining whether an offence has been committed with regards to a TPO or a tree in a conservation area; or

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46 Section 172(4) of the 1997 Act

47 Section 174 of the 1997 Act

48 Section 161A of the 1997 Act

- determining whether a tree replacement notice should be served on the owner of the land,

if there are reasonable grounds for entering for the purpose in question.<sup>49</sup>

86. Admission shall not be demanded as a right to any building used as a dwellinghouse, unless 24 hours notice of the intended entry has been given to the intended occupier. Any right to enter shall be exercised at a reasonable hour.<sup>50</sup>

87. Any person duly authorised in writing by Scottish Ministers may enter any land for the purpose of :

- surveying it in connection with making, amending or revoking a TPO if there are reasonable grounds for entering for that purpose.<sup>51</sup>

88. Scottish Ministers shall not authorise any person without consulting the planning authority. Admission shall not be demanded as a right to any building used as a dwellinghouse unless 24 hours notice of intended entry has been given to the intended occupier. Any right to enter shall be exercised at a reasonable hour.<sup>52</sup>

89. Any person who is duly authorised in writing by the planning authority may enter any land in connection with the exercise of any function conferred on the planning authority by or under sections:

- 159 to 163
- 167 to 170<sup>53</sup>.

90. Admission shall not be demanded as a right to any land which is occupied unless 24 hours notice of the intended entry has been given to the occupier. Any right to enter shall be exercised at a reasonable hour.<sup>54</sup>

91. Any person who is an officer of the Valuation Office may enter any land for the purpose of surveying it, estimating its value, in connection with a claim for compensation in respect of any land which is payable by the planning authority under section 165 (compensation in respect of TPOs).<sup>55</sup>

92. Admission shall not be demanded as a right to any land which is occupied unless 24 hours notice of the intended entry has been given to the occupier. Any right to enter shall be exercised at a reasonable hour.<sup>56</sup>

93. Any person who is duly authorised in writing by the Scottish Ministers may enter any land in connection with the exercise of any functions conferred on the Scottish Ministers by or under sections.

- 160-162

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49 Section 176(1) of the Act  
 50 Sections 176(7) & (8) of the Act  
 51 Section 176(2) of the Act  
 52 Sections 176(7) & (8) of the Act  
 53 Section 176(3) of the Act  
 54 Sections 176(7) & (8) of the Act  
 55 Section 176(4) of the Act  
 56 Sections 176(7) & (8) of the Act

- 168(1) to (3)
- 169-170<sup>57</sup>.

94. Admission shall not be demanded as a right to any land which is occupied unless 24 hours notice of the intended entry has been given to the occupier. Any right to enter shall be exercised at a reasonable hour.<sup>58</sup>

### **Right to Enter Under Warrant<sup>59</sup>**

95. If the sheriff is satisfied that there are reasonable grounds to enter any land for any of the following purposes:

- surveying it in connection with making or confirming a TPO;
- ascertaining whether an offence has been committed with regards to a TPO or a tree in a conservation area;
- determining whether a tree replacement notice should be served on the owner of the land; or
- surveying it in connection with making, amending or revoking a TPO,

and that admission to the land has been refused, or a refusal is reasonably apprehended or in the case is one of urgency, he may issue a warrant authorising any person duly authorised in writing by a planning authority, or as the case may be, the Scottish Ministers to enter the land.

96. Admission to land shall be regarded as having been refused if no reply is received to a request for admission within a reasonable period.

97. A warrant authorises entry on one occasion only and that must be within one month from the date of the issue of the warrant, and at a reasonable hour, unless the case is one of urgency.

### **Rights of Entry : supplementary provisions<sup>60</sup>**

98. Any power conferred under or by virtue of Section 176 (Rights to Enter without warrant) or Section 176 (right to enter under warrant) shall be construed as including the power to take samples from any tree and samples of the soil.

99. A person authorised to enter land in the exercise of a right to entry:

- shall, if required, produce evidence of his authority and state the purpose of the visit before entering;
- may take such other persons as may be necessary; and
- on leaving the land shall, if the owner or occupier is not present, leave it as effectively secured against trespassers as it was found.

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57 Section 176(5) of the 1997 Act

58 Sections 176(7) & (8) of the 1997 Act

59 Section 177 of the 1997 Act

60 Section 178 of the 1997 Act

100. Any person who wilfully obstructs a person acting in the exercise of a right of entry shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

101. If any damage is caused to the land or moveable property in the exercise of the right of entry, compensation may be recovered by an person suffering the damage from the authority who gave the written authority for the entry or, as the case may be the Scottish Ministers.

## **TRANSITIONAL ARRANGEMENTS**

102. The powers and procedure set out in sections 161 and 163 before the commencement of the new system on that date will continue to apply to a provisional TPO made before 1 February 2011.<sup>61</sup> Similarly while the new Regulations replace the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 1975, the provisions of the 1975 Regulations will continue to apply to a TPO made before 1 February 2011.<sup>62</sup>

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61 The Planning etc. (Scotland) Act 2006 (Saving and Transitional Provisions) Order 2010

62 Regulation 11 of the 2010 Regulations

## ANNEX A

### MODEL FORM OF TREE PRESERVATION ORDER

#### **[The Town and Country Planning (Scotland) Act 1997]**

#### **[Title of Tree Preservation Order including number and year]**

The [name of planning authority] make the following Tree Preservation Order in exercise of the powers conferred by section 160 of the Town and Country Planning (Scotland) Act 1997 and all other powers enabling them to do so.

#### **Citation, commencement and interpretation**

1.—(1) This Order may be cited as the [title of order, including number and year] and takes effect on [date].

(2) In this Order—

“the 1992 Order” means the Town and Country Planning (General Permitted Development) (Scotland) Order 1992(

1);

“the Act” means the Town and Country Planning (Scotland) Act 1997;

“protected tree” has the meaning given in article 2

#### **Protected Trees**

2.—(1) A protected tree is a tree specified in Schedule 1 to this Order or comprised in a group of trees or in a woodland specified that Schedule.

(2) The position of such trees, groups of trees or woodlands is identified in the manner indicated in Schedule 1 and on the map annexed to this Order.

(3) Where any ambiguity as to the identification of a protected tree arises between the map and the specification in Schedule 1 to this Order, the map is to prevail.

#### **Prohibited acts**

3. Subject to the provisions of the Act and the exemptions specified in article 4, no person is except with, and in accordance with, the consent of the planning authority—

(a) to cut down, top, lop, uproot, wilfully damage or wilfully destroy; or

(b) to cause or permit the cutting down, topping, lopping, uprooting, or wilful damage or wilful destruction of,

a protected tree.

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(1) [S.I. 1992/223].

## Exemptions

### 4.— Nothing in article 3 is to prevent—

- (a) the cutting down of a tree in accordance with a felling licence granted by The Forestry Commissioners under the Forestry Act 1967<sup>(2)</sup>;
- (b) the cutting down, uprooting, topping or lopping of a tree on land in the occupation of a planning authority when this is done by or with the consent of that authority;
- (c) the cutting down, uprooting, topping or lopping of a tree having a diameter not exceeding 75 millimetres;
- (d) the cutting down or uprooting in a woodland of a tree having a diameter not exceeding 100 millimetres where this is done to improve the growth of other trees;
- (e) the cutting down, uprooting, topping or lopping of a tree by, or on behalf of, The Forestry Commissioners on land placed at their disposal in pursuance of the Forestry Act 1967 or otherwise under their management or supervision;
- (f) the cutting down, topping, lopping or uprooting of a tree by or at the request of a statutory undertaker, where the land on which the tree is situated is operational land<sup>(3)</sup> of the statutory undertaker and the work is necessary—
  - (i) in the interests of the safe operation of the undertaking;
  - (ii) in connection with the inspection, repair or renewal of any sewers, mains, pipes, cables or other apparatus of the statutory undertaker; or
  - (iii) to enable the statutory undertaker to carry out development for which planning permission is granted by the 1992 Order,provided that notice in writing of the proposed operations is given to the planning authority as soon as practicable after the operations become necessary
- (g) the cutting down, topping, lopping or uprooting of a tree cultivated for the production of fruit in the course of a business or trade where such work is in the interests of that business or trade;
- (h) the pruning, in accordance with good horticultural practice, of any tree cultivated for the production of fruit;
- (i) the cutting down, topping, lopping or uprooting of a tree where that work is required to enable a person to carry out works to implement a planning permission (other than an outline planning permission or planning permission in principle) granted on an application under Part 3 or section 242A of the Act<sup>(4)</sup>, or deemed to have been granted (whether for the purposes of Part 3 of the Act or otherwise); or
- (j) the cutting down, topping, lopping or uprooting of a tree by, or at the request of, SEPA to enable SEPA to carry out development for which planning permission is granted by the 1992 Order..

## Directions as to replanting

5.—(1) Where consent is granted under this Order for the felling in the course of forestry operations of any part of a woodland area, the planning authority may give to the owner of the land on which that part of the woodland is situated a direction in writing specifying the manner in which and the time within which the owner must replant trees on that land.

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(2) 1967 c.10.

(3) See sections 214 and 215 of the Act respectively for the meaning of statutory undertaker and operational land.

(4) Section 242A was inserted by section 92(1) of the Planning and Compulsory Purchase Act 2004 (c.5) and amended by section 54(13) of the Planning etc. (Scotland) Act 2006 (asp 17).

(2) Where a direction is given under paragraph (1) and trees on the relevant land are felled (pursuant to the consent), the owner of that land must replant trees on the land in accordance with the direction.

(3) Any direction given under paragraph (1) may include requirements as to—

- (a) species;
- (b) number of trees per hectare;
- (c) the erection and maintenance of fencing necessary for the protection of the replanting;
- (d) the preparations of ground, draining, removal of brushwood, lop and top; and
- (e) protective measures against fire.

### **Adaption and Modification of the Act**

6.—(1) The provisions of the Town and Country Planning (Scotland) Act 1997 mentioned in column 1 of Part 1 of Schedule 2 to this Order are to have effect, in relation to consents under this Order and applications for such consent, subject to the adaptations and modifications specified in column 2 of Part 1 of that Schedule.

(2) The provisions referred to in paragraph (1), as so adapted and modified, are set out in Part 2 of Schedule 2 to this Order.

### **Compensation**

7.—(1) Subject to paragraphs (2) to (5), any person who has suffered loss or damage caused or incurred in consequence of—

- (a) any refusal of consent required under this Order; or
  - (b) any grant of any such consent subject to conditions,
- is entitled to recover from the planning authority compensation in respect of such loss or damage.

(2) A claim for compensation under this Order shall be made by serving on the planning authority a notice in writing stating the grounds of the claim and the amount claimed.

(3) The time within which any such notice shall be given is a period of six months –

- (a) from the date of the decision of the planning authority; or
- (b) where an appeal has been made to Scottish Ministers against the decision of the planning authority, from the date of the decision of Scottish Ministers on the appeal.

(4) No claim may be made under this article if the amount in respect of which the claim would otherwise have been made is less than £1,000.

(5) No compensation shall be payable to a person—

- (a) for loss of development value or other diminution in the value of the land;
- (b) for loss or damage which was not reasonably foreseeable when consent was refused or was granted subject to conditions;
- (c) for loss or damage reasonably foreseeable by that person and attributable to failure to take reasonable steps to avert the loss or damage or to mitigate its extent; or
- (d) for costs incurred in appealing to the Scottish Ministers against the refusal of any consent required under this Order or the grant of any such consent subject to conditions.

(6) In this article—

“development value” means an increase in value attributable to the prospect of development;

and, in relation to any land, the development of it shall include the clearing of it.

**[Application of tree preservation order to future planting**

**8.** This Order applies to any tree specified in Schedule 1 to this Order which is to be planted in pursuance of a condition imposed by virtue of section 159(a) of the Act as from the time when those trees are planted.**5]**

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**5** This provision may be included in relation to trees planted pursuant to a condition imposed under section 159(a) of the Act in order to ensure that in granting planning permission for development adequate provision is made for the preservation or planting of trees.

# SCHEDULE 1

Article 2

Trees Specified Individually<sup>(1)</sup> (coloured green on the map)

No. on Map	Description	Situation <sup>(2)</sup>
[T1]	[Oak]	
[T2]	[Ash]	

Trees Specified by Reference to an Area<sup>(1)</sup> (within a continuous black line on the map)

No. on Map	Description	Situation <sup>(2)</sup>
[A1]	[Trees (of whatever species) standing within the area marked A1 on the map]	
[A2]	[The ash, beech, larch and oak trees within the area marked A2 on the map]	

Groups of Trees<sup>(1)</sup> (within a broken black line on the map)

No. on Map	Description	Situation <sup>(2)</sup>
[G1]	[Group consisting of 3 pine, 2 ash and 3 elm]	
[G2]	[Group consisting of 10 sycamore]	

Woodlands<sup>(1)</sup> (within a continuous red line on the map)

No. on Map	Description	Situation <sup>(2)</sup>
[W1]	[Mixed hardwoods consisting mainly of ]	
[W2]	[Mixed conifers and deciduous trees consisting mainly of ]	

3

<sup>(1)</sup> Every heading should be included in the Schedule, and the word “NONE” written in where necessary. The entries above are shown as examples in each category.

<sup>(2)</sup> The description entered under the column headed “Situation” should be a description suitable for recording in the Land Register of Scotland or the Register of Sasines.

<sup>(3)</sup> Authenticate in the manner appropriate to the authority making the Tree Preservation Order.

## SCHEDULE 2

### PART I PROVISIONS OF THE TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997 APPLIED WITH ADAPTATIONS OR MODIFICATIONS

Provision of the Town and Country Planning (Scotland) Act 1997	Adaptation or Modification
Section 36 (Registers of applications etc.)	<p>For subsections (1) to (3) substitute—</p> <p>“(1) The planning authority shall in relation to this Order keep a register of all applications for consent under this Order, containing—</p> <ul style="list-style-type: none"> <li>(a) information as to the nature of such applications, the decisions of the planning authority thereon,</li> <li>(b) information as to any appeal to Scottish Ministers and the decisions of Scottish Ministers thereon, any compensation awarded in consequence of the decisions of the planning authority or Scottish Ministers; and</li> <li>(c) any directions as to the replanting of woodlands.”</li> </ul>
Section 37 (determination of applications: general considerations)	<ul style="list-style-type: none"> <li>(a) In subsection (1)—</li> <li>(d) for “planning permission” where those words first appear;” substitute “consent under a tree preservation order”;</li> <li>(e) for “sections 27B(2) and 59(1)(b) substitute “subsections (1A) and (1B)”;</li> <li>(f) for “planning permission” in both of the other places where those words appear substitute “consent under the order”;</li> <li>(g) after “think fit”, insert, “(including conditions limiting the duration of the consent or requiring the replacement of trees)”;</li> </ul> <p>(b) After subsection (1) insert—</p>

	<p>“(1A) Where an application relates to an area of woodland, the authority shall grant consent so far as accords with the practice of good forestry, unless they are satisfied that the granting of consent would fail to secure the maintenance of the special character of the woodland or the woodland character of the area.</p> <p>(1B) Where the authority grant consent for the felling of trees in a woodland area they shall not impose conditions requiring replacement where such felling is carried out in the course of forestry operations (but may give directions for securing replanting).”.</p> <p>(c) Omit subsections (2) and (3); and</p> <p>(d) In subsection (4) for paragraphs (a) to (c) substitute—</p> <p>“(a) consent under a tree preservation order; or</p> <p>(b) any consent, agreement or approval required by a condition imposed on the grant of such consent,”</p>
<p>Section 44 (effect of planning permission)</p>	<p>(a) references to ‘planning permission’ are to be treated as references to ‘consent required by a tree preservation order’;</p> <p>(b) for ‘the permission’ substitute ‘the consent’;</p> <p>(c) for ‘to develop land’ substitute ‘to carry out works’; and</p> <p>(d) after ‘land’ insert ‘on which the tree or trees to which the consent relates are situated’.</p> <p>(e) Omit subsections (2) and (3).</p>
<p>Section 47 (right to appeal against planning decisions and failure to take such decisions)</p>	<p>(a) For subsection (1) substitute—</p> <p>“(1) Where a planning authority—</p> <p>(a) refuse an application for consent under a tree preservation order or grant it subject to conditions;</p> <p>(b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of consent under such an order;</p>

	<p>(c) give a direction under a tree preservation order, or refuse an application for any consent, agreement or approval of that authority required by such a direction; or</p> <p>(d) have not given notice of their decision on such an application within the period of 2 months beginning with the date on which the application was received by the authority [or within such extended period as may at any time be agreed upon in writing between the applicant and the authority],</p> <p>the applicant may by notice appeal to the Scottish Ministers”.</p> <p>(b) Omit subsections (1A), (2) and (4).</p> <p>(c) For subsection (3) substitute—</p> <p>“(3) Any appeal under this section shall be made in writing, specifying the grounds on which the appeal is made; and such notice shall be served on the Scottish Ministers within a period of three months beginning with, in the case of an appeal made under—</p> <p style="padding-left: 40px;">(a) an appeal under paragraphs (a) to (c) of subsection (1), the date of the decision notice or the direction, as the case may be; and;</p> <p style="padding-left: 40px;">(b) paragraph (d) of that subsection, the date of expiry of the period mentioned in that paragraph,”.</p> <p>(d) For subsection (5) substitute—</p> <p>“(5) For the purposes of the application of section 48(1), in relation to an appeal made under subsection (1)(d), it shall be assumed that the authority decided to refuse the application in question.”.</p>
Section 47A	
Section 48 (determination of appeals)	(a) In subsection (5)(a)—

	<ul style="list-style-type: none"><li>(i) for “sections 33, 37(1) to (3), 38(1) to (3), 41(1) and (2) and 42 and Part I of Schedule 3” “section 37(1), (1A) and (1B)”; and</li><li>(ii) for “planning permission” substitute “consent under a tree preservation order”.</li></ul> <p>(b) Omit subsections (5)(b) and (6) to (8).</p>
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PART II  
PROVISIONS OF THE TOWN AND COUNTRY PLANNING (SCOTLAND)ACT  
1997, AS ADAPTED AND MODIFIED BY PART I

The following provisions of the Town and Country Planning Act 1997, as adapted and modified by Part I of this Schedule, apply in relation to consents, and applications for consent, under this Order.

**Section 36**

**36.—**(1) The planning authority shall in relation to this Order keep a register of all applications for consent under this Order, containing—

(a) information as to the nature of such applications, the decisions of the planning authority thereon,

(b) information as to any appeal to Scottish Ministers and the decisions of Scottish Ministers thereon, any compensation awarded in consequence of the decisions of the planning authority or Scottish Ministers; and

any directions as to the replanting of woodlands.”

(4) Every register kept under this section shall be available for inspection by the public at all reasonable hours.

**Section 37**

**37.—**(1) Where an application is made to a planning authority for consent under a tree preservation order—

(a) subject to subsections (1A) and (1B) they may grant consent under the order, either unconditionally or subject to such conditions as they think fit (including conditions limiting the duration of the consent or requiring the replacement of trees); or

(b) they may refuse consent under the order.

(1A) Where an application relates to an area of woodland, the authority shall grant consent so far as accords with the practice of good forestry, unless they are satisfied that the granting of consent would fail to secure the maintenance of the special character of the woodland or the woodland character of the area.

(1B) Where the authority grant consent for the felling of trees in a woodland area they shall not impose conditions requiring replacement where such felling is carried out in the course of forestry operations (but may give directions for securing replanting).

(4) The date of the grant or refusal of—

(a) consent under a tree preservation order; or

(b) any consent, agreement or approval required by a condition imposed on the grant of such consent,

shall be the date on which the notice of the planning authority's decision bears to have been signed on behalf of the authority.

### **Section 44(1)**

**44.—(1)** [Without prejudice to the provision of this Part as to the duration, revocation or modification of consent required by a tree preservation order], any grant of consent required by a tree preservation order shall (except in so far as the consent otherwise provides) enure for the benefit of the land on which the tree or trees to which the consent relates are situated and all persons for the time being interested in it.

### **Section 47**

**47.—(1)** Where a planning authority—

(a) refuse an application for consent under a tree preservation order or grant it subject to conditions;

(b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of consent under such an order;

(c) give a direction under a tree preservation order, or refuse an application for any consent, agreement or approval of that authority required by such a direction; or

(d) have not given notice of their decision on such an application within the period of 2 months beginning with the date on which the application was received by the authority [or within such extended period as may at any time be agreed upon in writing between the applicant and the authority],

the applicant may by notice appeal to the Scottish Ministers ”.

“(3) Any appeal under this section shall be made in writing, specifying the grounds on which the appeal is made; and such notice shall be served on the Scottish Ministers within a period of three months beginning with, in the case of an appeal made under—

(a) an appeal under paragraphs (a) to (c) of subsection (1), the date of the decision notice or the direction, as the case may be; and;

(b) paragraph (d) of that subsection, the date of expiry of the period mentioned in that paragraph.”.

(5) For the purposes of the application of section 48(1), in relation to an appeal made under subsection (1)(d), it shall be assumed that the authority decided to refuse the application in question.

## **Section 47A**

**47A.—**(1) In an appeal under section 47(1), a party to the proceedings is not to raise any matter which was not before the planning authority at the time the decision appealed against was made unless that party can demonstrate-

- (a) that the matter could not have been raised before that time, or
- (b) that its not being raised before that time was a consequence of exceptional circumstances.

(2) Nothing in subsection (1) affects any requirement or entitlement to have regard to-

- (a) the provisions of the development plan, or
- (b) any other material consideration.

## **Section 48**

**48.—**(1) On an appeal under section 47 the Scottish Ministers may—

- (a) allow or dismiss the appeal, or
- (b) reverse or vary any part of the decision of the authority (whether the appeal relates to that part of it or not),

and may deal with the application as if it had been made to them in the first instance.

(3) If the Scottish Ministers propose to reverse or vary any part of the decision of the planning authority to which the appeal does not relate, they shall give notice of their intention to the planning authority and to the appellant and shall give each of them an opportunity of making representations about their proposal.

(5) In relation to an appeal to the Scottish Ministers under section 47—

- (a) sections 37(1), (1A) and (1B) shall apply, with any necessary modifications, in relation to an appeal to the Scottish Ministers under section 47 as they apply in relation to an application for consent under a tree preservation order which falls to be determined by the authority.

(9) Schedule 4 applies to appeals under section 47, including appeals under that section as applied by or under any other provision of this Act.



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