

**The situation surrounding the Yew Tree, at
 'Mayfield,' Barnsley Road, Dodworth.**

March 2009.

1.0. Background.

- 1.1. Permission has recently been sought for the removal of this tree. It was refused; I have not seen the refusal notice. The neighbour who lives at Allen-Bar had sought permission as the tree severely shades her living room.



Photograph 1.



Photograph 2.

- 1.2. Photograph 1 shows the tree as viewed from the opposite side of Barnsley Road while photograph 2 shows the tree as viewed from the driveway of 'Mayfield.' Allen Bar is the 2 storey house on the left of the first picture. Photograph 1 was taken in December and photograph 2 was taken in 2006 at the time the Tree Preservation Order (TPO) was served. For the purposes of this report I shall regard the tree as 8 metres tall with a 6 metre spread. I objected to the serving of this TPO in 2006; in my opinion my objections were summarily dismissed at that time.

- 1.3.

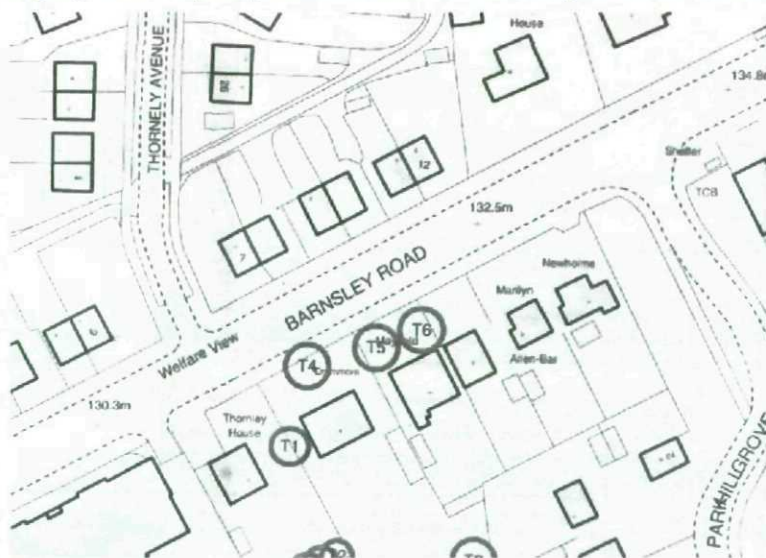


Diagram 1.

The plan to the left is an excerpt from the TPO served by Barnsley MBC. North is at the top of the plan and we can see that T6, the Yew is to the north west of Allen Bar.

- 1.4. While I have not taken any precise measurements from the photographs it seems that the tree is growing reasonably vigorously. It seems somewhat larger in the recent picture and shading Allen-Bar more than I remember from 2006.
- 1.5. The owner of Allen-Bar, Mrs Kinvig applied to remove the tree on the grounds that it is causing severe shade and that to adequately prune the tree would leave a poor specimen with low amenity value. The owners of the tree agreed that they would accept whatever work the Local Planning Authority would permit. This permission was refused although with the inference that some pruning would be acceptable.
- 1.6. I arranged a meeting with the Tree Officer Ms Wareham, and a Development Control Officer Ms Bibby. This was to discuss what pruning would be suitable. Both Officers were keen to avoid discussing anything to do with the serving of the TPO although Ms Wareham claimed that she had used the TEMPO system to evaluate the tree's TPO worthiness. She did not offer to show me the evaluation. Both Officers were unwilling to enter into any discussion about 'amenity valuation' or the suitability of the TEMPO system for appraising TPO worthiness. They were equally unenthusiastic about discussing whether the TPO was served properly.

2.0. Amenity Valuation.

- 2.1. 'Amenity valuation' is a term used in the "Blue Book," that is "Tree Preservation Orders; a guide to the law and good practice." This is the Government's guidance on the serving of Tree Preservation Orders and carries the weight of a 'Government Circular.' What this means is that a Local Planning Authority really ought to follow its guidance.
- 2.2. Amenity valuation in the Blue Book's terms means to assess the importance of a tree in the surrounding landscape. The book states that Planning Departments should develop methods of appraising amenity value. This is a fairly abstract concept and one that many Planning Departments fail to grasp. It can be reasoned that all trees provide benefits and therefore all trees have a positive value. In this case we can see that while the tree may provide some small visual benefit to people passing by on Barnsley Road, the negative benefit to people who might reasonably want some daylight to reach their homes might outweigh that very small benefit to passers-by.

3.0. TPO Legislation.

- 3.1. The Blue Book has to wrestle with numerous problems; primarily that the legislation does not permit a Planning Department to demand a tree owner undertakes maintenance work. A modification to the legislation was proposed in 1994; the Batho review. At that time it was proposed that a system of 'Tree Management Orders' be introduced. Under this scheme the Local Planning Authority would not only be able to prevent a tree owner from removing or pruning a tree, they would be able to demand that maintenance work was undertaken. However the Government rejected this idea as being too burdensome on all concerned.¹ It follows that if a Local Planning Authority want a tree owner to undertake some work then they ought to be prepared to offer some inducement to the tree owner, a grant of some sort.

¹ See chapter 16 of "The Law of Trees, Forests and Hedgerows" by Charles Mynors, published by Sweet and Maxwell.

- 3.2. The Blue Book also uses the words 'outstanding' or 'special' in relation to 'amenity value.' We can infer from that that a protected tree ought to be something more than a fairly nondescript or average specimen. The Blue Book emphasises that visibility is the major factor in amenity valuation categorically stating that nature conservation alone is insufficient justification for a TPO.

4.0. TEMPO.

- 4.1. The TEMPO system was presented by the Officers as an amenity valuation system but it is not. Its full title is 'Tree Evaluation Method for Preservation Orders.' It is a fairly simple point scoring system, a tree has to score a certain number of points before it can be considered worthy of TPO protection. Various clauses are included and if a score of 0 is achieved in any section then it is immediately deemed unworthy of protection. This tree would score a maximum 5 points for condition, it's in good condition, but zero points for 'retention span;' that is its life expectancy. TEMPO has the following rider under the section on retention span; (0 score) *Includes trees which are an existing or near future nuisance, including those clearly outgrowing their context, ...* I have spoken with the authors and they acknowledge that life expectancy should be taken to mean "until such a time as pruning is unavoidable." As the Officer has acknowledged that the tree can be pruned because it's causing excessive shade, in other words "it's a nuisance," then we can see that TEMPO regards the tree as unsuitable for protection, and the evaluation stops there.
- 4.2. If, as I have no doubt will be the case, the Officer claims that only minor pruning would be required and the tree should therefore be given 1 point (for 10-20 years retention span) we would then move on to the 'relative public visibility' section. This is essentially the size of the tree and its position. TEMPO tacitly acknowledges that an unseen tree ought not to be protected and that a large tree is more noticeable than a small tree. TEMPO refers to the Helliwell System² as a guide to size, which essentially looks at the cross sectional area of the crown of the tree. By this it means the area of the crown from a 2 dimensional point of view. If we accept my measurements of 8 metres tall and 6 metres wide with a roughly triangular crown we would get an area of 24m². If we round that up a little, to account for the crown not being perfectly triangular, we would fit in the lower range of Helliwell's 'medium' size. This gives us 3 or 4 points. I would say 3 as it is not a particularly noticeable specimen.
- 4.3. We then move on to "other factors" for which we would score only 1 point. Essentially TEMPO is looking for something that increases the tree's importance. In this case there is nothing and so it scores 1. This would be a maximum total of 11, which would allow us to reach TEMPO's "expediency assessment."
- 4.4. Here we need to note that the Blue Book states that Orders should not ordinarily be served on trees in good management. It tacitly acknowledges that this would be a waste of Officer time and Council resources. TEMPO awards 5 points for an immediate threat to a tree. This is plainly not a sensible thing to include as it means that a Council ought to be protecting a tree just because someone has decided to cut it down, it takes no account of whether a tree is dangerous or affecting the growth of another tree. We need to remember here that if TEMPO has been adhered to up to this point then such trees would already have been excluded.

² Amenity Valuation of Trees and Woodlands developed by D R Helliwell and published by the Arboricultural Association.

Nonetheless it is counterintuitive to value a tree more highly just because someone wants to get rid of it.

- 4.5. I have attached a TEMPO data sheet completed with my appraisal to the rear of this report.

5.0. The Helliwell System.

- 5.1. As TEMPO references Helliwell then we could reasonably suggest that we might just as well use Helliwell in the first place. It does claim to be an amenity valuation system and it has been used for many years; including by the Courts in prosecutions for TPO infringements and disputes over compensation. The system isolates 6 factors and awards points that are multiplied together. In this way a tree scoring zero in any category will be valued as zero. So if a tree is dead it scores zero for life expectancy which fits with Blue Book advice and states; "in the Secretary of State's view it would be inappropriate to protect a tree which is dead...." Helliwell permits the use of a financial conversion factor but we don't need this for an amenity valuation.
- 5.2. We do however need a minimum value for a tree to be considered TPO worthy. The maximum score under Helliwell is 4096. For a tree to score this it would need to be large, with a minimum 100 year life expectancy, in a prominent position, standing alone, a suitable species and of very good form. We need to note that the multiplication system means that the value increases exponentially, so if my aforementioned imaginary tree was of only average form then it would only score 2048.
- 5.3. In my opinion for a tree to be worthy of protection it ought to be at least average. Under Helliwell a medium sized tree of a reasonable species, in reasonable condition, with a reasonable life expectancy, in an area not well off for trees, would score 64. This Yew tree would score 24.
- 5.4. We need to note here that the tree achieves a low score (1) for life expectancy. This is because it will need pruning. As TPO legislation does not enable the Council to 'demand' pruning the tree must be regarded as only having the time before it requires pruning as its life expectancy.
- 5.5. I have attached a completed Helliwell data sheet to the rear of this report.

6.0. Nuisance.

- 6.1. I am not qualified to give advice on legal matters so any advice drawn from the following should be confirmed with a Lawyer. Suffice to say that nuisance is generally accepted to mean something more than a "minor irritant." However this is at odds with Common Law.
- 6.2. The Blue Book refers to nuisance in the context of the various Town and Country Planning acts as "actionable nuisance" although it acknowledges the doubt surrounding this interpretation. Indeed the Blue Book (at 6.11) refers to the legal case of "Sun Timber Company v Leeds City Council" where the Recorder suggested that the Acts always meant "actionable nuisance," but acknowledges that this interpretation may not be correct.
- 6.3. Charles Mynors (a Lawyer and the author of the aforementioned book) who is an acknowledged authority on trees and the Law, suggests that other cases mean this is wrong and that the Common Law right to abate a nuisance of overhanging

branches prevails. This means the nuisance does not have to be immediate, action can be taken to prevent a nuisance developing.

- 6.4. Mynors points to the case of *Lemmon v Webb* (1895) at the Court of Appeal where the Judge fairly categorically stated that trespassing branches are a "nuisance." Furthermore he mentioned the prevention of "establishment of rights," which I take to mean that if a tree was allowed to grow branches over someone else's property then a situation could be created whereby the neighbour would lose control of his property. This seems somewhat out-of-date but Mynors goes on to cite various more recent cases where the principle has been followed.
- 6.5. Mynors does go onto discuss how this principle could lead to the destruction of a protected tree's amenity value, but takes the reasonable view that in general most people, when confronted with an important tree, prefer to let matters lie. He does make passing reference to protected trees being something more than just average specimens, and elsewhere mentions that if there was widespread reliance on these common law rights then the need for more legislation would become greater. (See chapter 17 section 5 of "The Law of Trees, Forests and Hedgerows").
- 6.6. While I would not advocate adopting a confrontational approach with the Local Planning Authority, we do find ourselves in something of an unreasonable situation: The Council have acted in a very cavalier fashion; riding roughshod over the Secretary of State's advice with no redress available to us. Meanwhile, if we were to treat their procedures with such disregard we would end up in Court, facing a considerable fine.
- 6.7. In this case I think it is plain that this tree is preventing the reasonable enjoyment of the property and the Council ought to permit remedial work.

7.0. Proposal.

- 7.1. I believe that TPO legislation was never meant to protect every nondescript tree and that this tree does not justify protection. Therefore the Council should grant permission for its removal. The Council may consider this not in the best interest of trees in their borough but ultimately they should not use TPO legislation in a way that might provoke public antipathy towards trees. This is because it will only discourage people from growing trees.
- 7.2. If despite all this the Council are still reluctant to see the tree removed they should grant permission for the tree to be pruned. The pruning should be aimed at reducing the height and spread by approximately 25%. Any lesser works would require frequent repetition; this work ought not to require repetition for at least 5 years.
- 7.3. While the owners of the tree will consent to pruning work and indeed fund it, I do not see that they should be obliged to enter into a long-term management program that has effectively been specified by the Local Planning Authority. Nor do I see any way the Council can invoke current legislation to require this work to be undertaken. Therefore I think it would be reasonable of the Council to make at least a significant contribution to the cost of the work or undertake it themselves.

TREE EVALUATION METHOD FOR PRESERVATION ORDERS (TEMPO)

SURVEY DATA SHEET & DECISION GUIDE

Date: <u>Dec 08</u>	Surveyor: <u>WLA</u>
Tree details TPO Ref (if applicable): <u>TG</u> Tree/Group No: _____ Species: <u>Yew</u> Owner (if known): <u>BROOK HOUSE</u> Location: <u>DOONWORTH</u>	

REFER TO GUIDANCE NOTE FOR ALL DEFINITIONS

Part 1: Amenity assessment

a) Condition & suitability for TPO

- | | |
|---------------------|-------------------------|
| 5) Good | Highly suitable |
| 3) Fair | Suitable |
| 1) Poor | Unlikely to be suitable |
| 0) Dead | Unsuitable |
| 0) Dying/dangerous* | Unsuitable |

* Relates to existing context and is intended to apply to severe irremediable defects only

Score & Notes

5 NOT ACTUALLY GREAT BUT BETTER THAN FAIR

b) Retention span (in years) & suitability for TPO

- | | |
|-----------|-----------------|
| 5) 100+ | Highly suitable |
| 4) 40-100 | Very suitable |
| 2) 20-40 | Suitable |
| 1) 10-20 | Just suitable |
| 0) <10* | Unsuitable |

* Includes trees which are an existing or near future nuisance, including those clearly outgrowing their context, or which are significantly negating the potential of other trees of better quality

Score & Notes

0 Needs Pruning

c) Relative public visibility & suitability for TPO

Consider realistic potential for future visibility with changed land use

- | | |
|---|---------------------|
| 5) Very large trees with some visibility, or prominent large trees | Highly suitable |
| 4) Large trees, or medium trees clearly visible to the public | Suitable |
| 3) Medium trees, or large trees with limited view only | Suitable |
| 2) Young, small, or medium/large trees visible only with difficulty | Barely suitable |
| 1) Trees not visible to the public, regardless of size | Probably unsuitable |

Score & Notes

3 (ONLY IF PRUNED)

d) Other factors

Trees must have accrued 7 or more points (with no zero score) to qualify

- | | |
|--|--|
| 5) Principal components of arboricultural features, or veteran trees | Score & Notes

<u>1</u> |
| 4) Tree groups, or members of groups important for their cohesion | |
| 3) Trees with identifiable historic, commemorative or habitat importance | |
| 2) Trees of particularly good form, especially if rare or unusual | |
| 1) Trees with none of the above additional redeeming features | |

Part 2: Expediency assessment

Trees must have accrued 9 or more points to qualify

- | | |
|-------------------------------|--|
| 5) Immediate threat to tree | Score & Notes

<u>1</u> |
| 3) Foreseeable threat to tree | |
| 2) Perceived threat to tree | |
| 1) Precautionary only | |

Part 3: Decision guide

- | | |
|-------|-----------------------|
| Any 0 | Do not apply TPO |
| 1-6 | TPO indefensible |
| 7-10 | Does not merit TPO |
| 11-14 | TPO defensible |
| 15+ | Definitely merits TPO |

Add Scores for Total:

Decision:

HELLIWELL DATA SHEET FOR TREES

T6

MAYFIELD

BARNESLEY ROAD, DOOWORTH

TREE NUMBER	SCORE	NOTES
1. <u>Size</u> 0 less than 2m² 0.5 very small 2-5m² 1 small 5-10m² 2 10-20m² 3 20-30m² 4 medium 30-50m² 5 50-100m² 6 large 100-150m² 7 150-200m² 8 very large 200m²+	4	
2. <u>Life expectancy*</u> 0 less than 2 years 1 2-5 years 2 5-40 years 3 40-100 years 4 100+ years	1	ALREADY NEEDS PRUNING
3. <u>Position (Importance in the Landscape)</u> <u>Private assessment</u> 0.25 trees on remote parts of large country estates 0.5 garden trees in groups of no particular individual importance 0.75 prominent garden trees 1.0 main feature or focal point <u>Public assessment</u> 0 trees not visible from any public vantage point 0.5 trees only seen with difficulty or by a very small number of people 1 most trees in woodlands, back gardens or in groups of trees, etc. 2 individual roadside trees. Trees close to busy roads. Trees in public parks. Close to public footpaths in grounds of hospitals, colleges etc. 3 prominent individual trees in well-frequented places such as town centres, shopping centres, etc. 4 trees which are of crucial importance as the principal feature of a public place	2	
4. <u>Other trees</u> 0.5 more than 70% of the visual area covered by trees, and at least 100 trees in total 1 more than 30% of the visual area covered by trees and at least 10 trees in total 2 more than 10% of the visual area covered by trees, and at least 4 trees in total 3 less than 10% of the visual area covered by trees, but at least one other tree present 4 no other trees present in the area under consideration	3	
5. <u>Relation to setting</u> 0 totally unsuitable 0.5 moderately unsuitable 1 just suitable 2 fairly suitable 3 very suitable 4 particularly suitable	1	WOULD NOT CHOOSE YEW FOR THIS POSITION UNLESS PROPOSING CLIPPING
6. <u>Form</u> 0.5 Trees which are of poor form 1 trees of average form 2 trees of above average form	1	

TOTAL = 24