



City of Westminster

# Cabinet Member Report

**Meeting or Decision Maker:**

Cabinet Member for City Management  
and Air Quality

**Date:**

15 April 2024

**Classification:**

General Release

**Title:**

New duty to consult on the removal of  
street trees

**Wards Affected:**

All

**Policy Context:**

Fairer Council/Fairer Environment

**Key Decision:**

No

**Financial Summary:**

A new burdens payment to implement  
the duty is proposed

**Report of:**

Phil Robson, Interim Director of  
Highways

## **1. Executive Summary**

- 1.1 This report seeks approval of a decision making process for new duty to consult on the removal of street trees.

## **2. Recommendations**

- 2.1 The Cabinet Member is asked to approve:
- The authorisation of the Director of Highways to determine whether street trees should be felled, where they are subject to Section 96a of the Highways Act 1980, (the 'duty to consult').
  - That the Director of Highways may refer the decision on whether street trees should be felled, where they are subject to the duty to consult, to the Executive Director, Cabinet Member or Committee according to the specific circumstances of the case and/ or local or public interest.
  - In cases where the removal of a street tree is outside the scope of the duty to consult or is subject to an exemption within the legislation or guidance, that the decision on whether to fell a tree may be made by the Head of Arboricultural Services.
  - That the Head of Arboricultural Services may refer the decision on whether a street tree is outside the duty to consult, or is subject to an exemption, to the Director of Highways, according to the specific circumstances of the case and/ or local or public interest.

## **3. Reasons for Decision**

- 3.1 Removing street trees can be contentious. Demonstrating that a tree is exempt from the duty to consult is likely to be subject to dispute and maybe subject to legal challenges on the decision making process. As such, an agreed process is required.

## **4. Background, including Policy Context**

- 4.1 The [Environment Act 2021 Section 115](#) inserted [Section 96A into the Highways Act 1980](#), and imposes a duty on Local Highway Authorities (LHAs) to consult on the removal of street trees – the 'duty to consult'. This legislation came into force on 01 December 2023. Guidance on implementation has been issued by DEFRA to tree officers but has yet to be published formally by the Government. Details are contained within Appendix 1.
- 4.2 The legislation was conceived in response to events in Sheffield, where a large numbers of mature street trees were removed, resulting in considerable public

concern and dispute and a public inquiry. Ultimately an open apology was issued by Sheffield City Council.

- 4.3 The DEFRA guidance is prescriptive in terms of the way that LHAs must consult. It requires a notice to be placed on the tree, and on the LHA website and/ or made available at its office for at least 28 days. The form of the notice is prescribed in the guidance. A response to the consultation, the reasons for the decision and the decision itself must then be posted on the tree, and published on line/ in an office. At least further 28 days must then elapse before the tree is felled, if that is the decision. The LHA must ensure the notice remains on the tree until it is felled.
- 4.4 The response to the consultation should set out the details of the consultation, the results of the consultation (such as the number of responses and sentiment of the majority whether in favour of or against the proposed felling), the LHA decision and the reason for the decision, including the LHA consideration of the consultation responses and why alternatives to felling were not possible to implement. If relevant, it should also include details of any replanting proposal.
- 4.5 Many street trees will fall outside scope of the legislation, or will be exempt from its requirements. For example, no consultation is required for the removal of trees on classified roads, or for the removal of dead trees. In Westminster, it is likely that duty to consult will largely be confined to removal of street trees:
  - Which are alleged to be the cause of subsidence damage;
  - Are part of place shaping schemes or public realm improvements; and
  - Which are deemed discriminatory under the terms of section 20 or 29 of the Equality Act 2010, because they are causing an obstruction, where there are appropriate and proportionate engineering solutions which would allow the retention of trees.
- 4.6 When street trees are implicated in subsidence damage they are usually the subject of a claim against the Council's insurance. Deciding whether a tree should be felled on the grounds of subsidence damage is made on the basis of an assessment of the tree, the technical information submitted to support an insurance claim, and the financial risk to the Council. Removal of trees implicated in subsidence damage can be contentious because the claims often relate to trees of high amenity value. There have been a number of high profile cases in recent years for example, <https://www.theguardian.com/environment/2023/nov/18/hammocks-dawn-raids-and-court-dates-the-fight-to-save-a-london-tree>
- 4.7 Removal of trees as part of place shaping schemes or to accommodate public realm improvements can also be controversial. The merits of the trees have to be weighed against the benefits of the scheme, and stakeholders will often take

opposing views. The public realm scheme in Queensway generated considerable opposition to tree removal, [Petition · Save Queensways' Trees · Change.org](#)

- 4.8 Trees are exempt from the duty to consult where they are required to be felled in order to comply with a duty to make reasonable adjustments in Section 20 of the Equality Act 2010, because the tree is causing an obstruction, or because of the prohibitions on discrimination in the provision of services in Section 29 of the Equality Act 2010. The decision to exempt a tree for these reasons is based on an assessment of whether there are appropriate and proportionate engineering solutions that can remedy the obstruction or prevent discrimination. Demonstrating a street tree is exempt from the duty to consult on this basis may give rise to dispute on the basis that alternative engineering solutions to tree removal are considered appropriate by stakeholders, or because the cost of implementing such solutions is considered to be proportionate.
- 4.9 It is foreseeable that the LHA decision to exempt trees in relation to the Equalities Act may be subject to legal challenge, because they involve matters of judgement on reasonableness and proportionality. Challenges may also be made on the exemption of trees for other reasons, for example, if a tree is deemed by the LHA to be dangerous. Government advice is that a LHA must ensure that it has sufficient evidence to prove that a street tree is exempt from the duty to consult, but in practice this is likely to be more difficult than it appears.
- 4.10 In Westminster, only a small number of street trees are removed each year. Over the financial years 2020/21 to 2023/23, an average of 63 trees per year were removed. Fewer than 10 trees in a healthy condition were removed each year. However, each consultation could prove controversial and result in complaints or lead to legal challenge. Officers from the Tree Team, Public Realm Team, Place Shaping Team, Highways Inspectorate and Insurance Team are all likely to be involved in some or all cases. It is also likely that tree officers will need to spend time to advise stakeholders why trees are considered to be outside the scope of the duty, or are exempt from the duty.
- 4.11 The method of implementation of the duty to consult is currently in development. The process has some similarities to the Traffic Management Order (TMO) procedure, which is managed by WSP on behalf of the Council. WSP are engaged in discussions with tree officers about adapting the TMO process for the duty to consult.

## **5. Financial Implications**

- 5.1 DEFRA have advised that a New Burdens payment will be provided to allow for the implementation of the duty to consult, but no details have been forthcoming to date, despite the legislation coming into force on 01 December 2023.
- 5.2 It is likely that delays in removing trees will result from the duty to consult, which may give rise to financial implications. In particular, there is a risk of additional costs to the Council if delays to tree removal are introduced when trees are considered to be the cause of subsidence damage. The Insurance Team, Place Shaping Team and the Public Realm Team are aware of this new duty.
- 5.3 On the basis of the duty to consult applying to 10 to 20 trees each year, and each case taking about 1 week of officer time, a best estimate at this stage is approximately 360-720 hours of officer time each year. Additional costs to set up the new consultation process and deal with enquires about trees which are out of scope or exempt from the duty will also be incurred.
- 5.4 A fee proposal has been requested from WSP to set up and assist in implementation of the new consultation process. Details will be reported verbally.

## **6. Legal Implications**

- 6.1 The new legislation and associated guidance prescribe the form of consultation which the LHA is required to undertake. The guidance is attached at Appendix 1.
- 6.2 There is no penalty in the legislation for LHA's who fail to comply with the duty to consult. If respondents to the consultation are unhappy with the Council's decision, they may use the Council's normal complaints procedure. As is normally the case, if individuals are dissatisfied with the outcome of a complaint, they may make a final complaint to the Local Government and Social Care Ombudsman if they believe the LHA has mismanaged a case and not followed the prescribed process.
- 6.3 If the LHA fail to follow the correct process, it is also open to objectors to launch a legal challenge.

## **7. Carbon Impact**

- 7.1 Whilst the removal of street trees has an impact on stored carbon, the decision making process will have no greater impact than the current situation.

## **8. Equalities Implications**

- 8.1 The prescribed form of the consultation intends to avoid discrimination in the consultation process, in particular in ensuring provision of both digital and non-digital options for responding to the consultation are made available to the public.
- 8.2 The legislation embeds consideration of sections 20 and 29 of the Equality Act 2010 in determining whether trees are exempt from the duty to consult.

## 9. Consultation

- 9.1 No consultation on this report has been carried out.

**If you have any queries about this report or wish to inspect any of the background papers, please contact:**

Barbara Milne. Email: [bmilne@westminster.gov.uk](mailto:bmilne@westminster.gov.uk), tel:07790386505

## APPENDICES

Appendix 1 DEFRA guidance on the Duty to Consult on Felling Street Trees

## BACKGROUND PAPERS

- [Environment Act 2021 section 115](#)
- [Highways Act 1980 section 96a](#) (inserted by the Environment Act section 115)
- <https://www.theguardian.com/environment/2023/nov/18/hammocks-dawn-raids-and-court-dates-the-fight-to-save-a-london-tree>
- [Petition · Save Queensways' Trees · Change.org](#)

For completion by the **Cabinet Member for City Management and Air Quality**

**Declaration of Interest**

I have no interest to declare in respect of this report

Signed:

Date: 15 April 2024

NAME: Councillor Paul Dimoldenberg

State nature of interest if any:

*(N.B: If you have an interest, you should seek advice as to whether it is appropriate to make a decision in relation to this matter)*

For the reasons set out above, I agree the recommendation(s) in the report entitled **New duty to consult on the removal of street trees** and reject any alternative options which are referred to but not recommended.

Signed: \_\_\_\_\_

Cabinet Member for City Management and Air Quality

Date: 15 April 2024

If you have any additional comment which you would want actioned in connection with your decision you should discuss this with the report author and then set out your comment below before the report and this pro-forma is returned to the Secretariat for processing.

Additional comment:

If you do not wish to approve the recommendations, or wish to make an alternative decision, it is important that you consult the report author, the Director of Law, City Treasurer and, if there are resources implications, the Director of People Services (or their representatives) so that (1) you can be made aware of any further relevant considerations that you should take into account before making the decision and (2) your reasons for the decision can be properly identified and recorded, as required by law.

Note to Cabinet Member: Your decision will now be published and copied to the Members of the relevant Policy & Scrutiny Committee. If the decision falls within the criteria for call-in, it will not be implemented until five working days have elapsed from publication to allow the Policy and Scrutiny Committee to decide whether it wishes to call the matter in.