

TECHNICAL PAPER

Duty to consult
Our response

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Duty to consult

Our response

Introduction

The Environment Act (the act) received Royal assent on 9 November 2021 and creates a framework for protecting and enhancing the natural environment through long-term legally binding targets with the new Office for Environmental Protection being created to hold local highway authorities to account.

Through an amendment to section 96A of the Highways Act, the act places a duty on local highway authorities to consult members of the public before felling a highway tree that is not exempt from the duty.

Purpose of the Act

Local highway authorities are facing increasing political pressure to retain trees from several sources including numerous environmental groups and members of the public who through wider awareness are becoming increasingly vocal in their opposition to the removal of street trees in their area.

The consultation process will increase awareness in the local community of requests for the removal of street trees implicated in subsidence damage, which will provide further opportunities for objections by the public and extra pressure on local highway authorities to retain trees.

Public consultation specifics

Guidance has recently been issued surrounding the public consultation process, and the key aspects are detailed below;

- The tree or trees in question specified for felling should have a notice on them.
- The relevant local highway authority should include details in an appropriate location on their website of the proposed felling.
- The relevant local highway authority should make a copy available at their offices.
- The consultation period lasts for 28 days from the notification.
- The local highway authority publishes a response to the consultation, including their decision*, as soon as reasonably possible after close of the public consultation period.

*A timescale for publication of the decision is not specified and the only date referenced at this time is that the local highway authority must publish the decision at least 28 days before the felling.

The public consultation and absence of a specified timescale for publication of a final decision is likely to have an adverse impact on claim lifecycles involving highways trees. On a more positive note, the public consultation is only required for highway trees. It does not relate to trees owned by the local highway authority but are not on a highway. Therefore, vegetation within parks, cemeteries and the like are exempt. Further, and importantly, public consultation is only required when the local highway authority intends to fell the vegetation and this process is not required when another form of tree management is planned, such as crown reduction.

Sedgwick response – arboricultural works

The act does not remove liability and financial pressures will continue to be a consideration when local highway authorities decide whether to allow the removal of a tree. The balance between financial constraints and the local highway authorities' own targets for environmental protection may well be tilted towards the latter, irrespective of increasing costs to the local highway authority for alternative solutions to tree removal.

Publicity of tree removals in the media will result in added pressure on the local highway authority to retain trees. Ignoring this increases the risk of reputational damage not just for local highway authorities but adjusters and insurers alike.

We are alive to the adverse publicity tree removal can cause and we will be adopting a balanced philosophy in respect of highway trees. We have also discussed the issue of future mitigation with local highway authorities, taking into account environmental concerns, following the advent of the act in attempts to foster a collaborative approach. In scenarios where the trees are of high amenity value and the damage is minor, we will consider the feasibility of accepting crown reduction and a commitment to maintain. This will be in conjunction with a robust remedial repair scheme, to ensure a lasting resolution. The pursuit of the removal of high value street trees unavoidably extends the life of claims and can be counterproductive from a reputational viewpoint.

In view of the above and following discussions with local highway authorities, we have worked with our partner Arboriculturists resulting in enhancements to their reports. When highways trees are implicated in the damage, Arboricultural reports are now less prescriptive in terms of mitigation steps to be taken, with the onus now being on the local highway authority to decide on and take the appropriate action to abate the nuisance. The Arboricultural report will provide information on the extent of past tree pruning and dates of this work so we can complete a detailed assessment to ascertain whether the local highway authorities proposals are in order.

Implications

Technical evidence

Detailed supporting technical evidence is already obtained on claims where local highway authority vegetation is implicated, and we do not consider the act will introduce any further requirements in this regard. However, any

request to fell will need to be accompanied by compelling technical evidence, in line with what is already provided to support TPO applications. Therefore, if either the site investigation and/or monitoring is not supportive then we anticipate requests to fell will be readily declined even before the local highway authority consider public consultation.

Returning to our comments surrounding the purpose of the act, one area we will be developing is in relation to the environmental aspect of the claim. We know that the environmental impact of stabilising a building by traditional underpinning could be notably more damaging than tree removal and therefore we will be assessing this aspect on a case-by-case basis considering both the vegetation and stabilisation scheme. This is often overlooked by public protesters. A statement will be provided regarding this aspect accordingly to fully support and justify any request to fell.

Claim cost

With the introduction of the Act and the involvement of the public we do consider there is a prospect of a higher number of highways trees being retained, resulting in the need to increase the quantity of mechanical stabilisation schemes adopted. This could take the form of either root barriers, ground stabilisation or enhancements to the existing foundation arrangements. This will in turn result in additional spend associated with the actual works themselves along with any ancillary costs, such as alternative accommodation.

With regards to claims where the highway tree is reduced, we are alive to the need to provide a lasting repair and in many claims, we will be exploring repair options to improve the structural integrity of the building to counter the continuing influence of the vegetation. Whilst the cost of masonry reinforcement and similar arrangements to improve integrity are not cost prohibitive there will be an element of additional spend on claims on this nature.

The above prompts the question surrounding the volume of claims involving highway trees and hence the overall impact. Historic data confirms the incidents of claims involving highway trees notably increases during surge periods but, overall, we consider only circa 15% of valid subsidence claims involve local highway authority vegetation. In many cases other vegetation is also implicated and in some of these claims the vegetation will not be on the highway, which will reduce the number down further.

Recoveries

Given that the Duty to Consult has yet to be implemented by a large number of local highway authorities due to issues around the cost of administering it, it remains to be seen as to what affect this will have on recoveries. However, it is our opinion that the DTC will not impact on the ability to recover the costs of engineering solutions in situations where local highway authorities refuse to fell their trees following implementing the Duty to Consult. Firstly, the decision to fell a tree still rests with the local highway authority following consultation, even where there is vociferous objection. Secondly the Duty to Consult does not provide a local highway authority with a defence to a claim for tree root nuisance, it is merely a process that must be implemented before a decision for removal can be made. Accordingly, as long as the evidence is supportive of causation, adequate notice has been given and removal of a tree is a reasonable solution to abate the nuisance, the local highway authority will still be required to carry out works to their tree. If they refuse to fell, and/or reduction is not considered to be a suitable solution then recovery of the costs flowing from that decision, should still be possible. Each claim will of course be considered on a case-by-case basis, before advice is given.

Summary

We hope that this document adequately outlines the implications of the pending act and the steps we are introducing to minimise the impact of its introduction to both our insurer clients and customers.

We are acutely aware of the heightened focus this act will bring on subsidence claims involving highway trees and therefore feel our proportionate approach to mitigation will be readily welcomed by all stakeholders, with tree removal only being pursued when essential.

Further information

Please feel free to contact us should you have any further questions regarding the act or if we can assist you with any tree mitigation related aspects.



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