

THE 2012 TPO REGULATIONS

Update Briefing[©]

**Dr Dealga O'Callaghan FICFor. F.Arbor.A.
Chartered Arboriculturist**

www.dealgas-treeconsultancy.co.uk

In Association With

www.baseuk.net



©This presentation and all content is the intellectual property of Dealga's Tree Consultancy Ltd and cannot be reproduced or used by any other party without prior written consent



ITINERARY FOR THIS WEBINAR

1. The TPO Regulations 2012 - General Points
2. Summary of the Principal Changes
3. Changes in Detail
4. Form of the Order
5. Appeals
6. Summary



ITINERARY FOR THIS WEBINAR

1. The TPO Regulations 2012 - General Points
2. Summary of the Principal Changes
3. Changes in Detail
4. Form of the Order
5. Appeals
6. Summary

TPO REGULATIONS 2012

Statutory Instrument 2012 No. 605

Town and Country Planning, England

The Town and Country Planning (Tree Preservation) (England) Regulations 2012

Made: 28th February 2012

Laid Before Parliament: 5th March 2012

Coming into force: 6th April 2012

TPO REGULATIONS 2012

Purpose:

The Government's aspiration is to simplify the TPO system and reduce the amount of 'red tape' involved, which it says adds cost and places unnecessary burdens on local government, individuals and businesses.

The approach is to produce one universal set of TPO Regulations that will govern all TPOs made since the 1940s irrespective of when they were made and confirmed, and, irrespective of the regulations that applied at the time they were made.

The Government is using powers in section **192** of the Planning Act 2008 and the transitional arrangements are set out at section **193** of the 2008 Act.

Statutory Instrument 2012 No. 605 implements the Section 192 of Planning Act 2008, which omits and amends Part VIII, Chapter 1 '*Special Controls – Trees*' of the Town & Country Planning Act 1990; and inserts a new section **202A to G** into the 1990 Act.

TPO REGULATIONS 2012

Section 193(2) of the Planning Act 2008 omits the content of all existing TPOs, other than the identification of the order and the trees.

The omitted content is replaced by the new form of order set out in the 2012 Regulations.

These changes are made by an Act of Parliament, i.e. The Planning Act 2008.

Therefore the 2012 Regulations must be read in conjunction with Sections 192 & 193 of the Planning Act 2008.

TPO REGULATIONS 2012

An issue that has been raised is, because the effect of SI 2012 No. 605 is essentially to reconfirm TPOs dating back to the 1940s, and to confirm TPOs that may not have been confirmed, it could this be open to legal challenges?

Also, as older TPOs and in particular 'area' orders may now be inaccurate with respect to the trees at were originally protected because of changes in land use and/or development in the intervening period, will this lead to problems of enforcement?

The answers are as follows:

These changes are made by and Act of Parliament, i.e. The Planning Act 2008, and

Once an Order is confirmed, its validity can never be challenged in any legal proceedings whatsoever by virtue of section 284(1) of the 1990 Act.

TPO REGULATIONS 2012

The Town and Country Planning (Tree Preservation) (England) Regulations 2012

“The Regulations” or “The 2012 Regulations”

Replace the following Statutory Instruments

The 1969 Regulations as amended and all previous Regulations;

1999 No. 1892 (The 1999 Regulations);

2008 No. 2260;

2008 No. 3202

ITINERARY FOR THIS WEBINAR

1. The TPO Regulations 2012 - General Points
2. Summary of the Principal Changes
3. Changes in Detail
4. Form of the Order
5. Appeals
6. Summary



TPO REGULATIONS 2012

Summary of the Principal Changes

1. A consolidated and streamlined TPO system:

- a. All of the provisions of every existing TPO are cancelled except for information identifying the 'order' and the protected trees, i.e. the name of the order, the map and the first schedule;
- b. Existing TPO legislation is amended by section 192 of The Planning Act 2008.

2. Immediate Protection

- a. Under the 2012 Regulations trees are protected immediately the new TPO is created and served, i.e. It dispenses with the need for a section 201 direction.

3. Informing interested parties

- a. The 2012 Regulations goes back to the system in the 1969 Regulations in that the new TPO has to be served only on those parties who have a right to prune or fell the trees covered by the order;
- b. LPAs have discretion as to which other parties should be served; and
- c. Where the order is created following the service of a notice under section 211(3) trees in Conservation Areas, the new TPO must be served on the person who served the s211(3) notice.

4. Exemptions are now termed 'Exceptions' from the need to obtaining consent

- a. The Regulations remove "dying" trees from the exceptions;
- b. The Regulations replace "safety" and "dangerous" with "*To remove the risk of serious harm*";
- c. The Regulations specify clearly that "the removal of dead branches from a living tree" is a recognised exception.
- d. The Regulations define what is meant by 'statutory undertaker' clearly & precisely.

TPO REGULATIONS 2012

5. Prior notice of an intention to carry out excepted works

- a. The Regulations define those situations where notice in writing is required in relation to excepted works;
- b. The Regulations specify that, unless the works are to alleviate an immediate risk of serious harm, the notice period should be five working days; (previously this was a 'grey' area).

6. Consents

- a. The power of an LPA to modify or revoke a consent that it has already granted and which the applicant may not have implemented, no longer exists.

7. Duration of consents

- a. Where a consent is granted for tree works it is valid for a period of two years from the date on which the consent was granted.
- b. The works can only be carried out once, but, there is provision for the attachment of a condition that allows for repeat works.

8. Planting replacement trees

- a. Replanting conditions can now apply to woodland locations;
- b. Conditions can be applied as to where and when planting is to be done;
- c. Conditions can be applied that specify any work or methodology to be undertaken to protect trees planted in pursuance of conditions.

9. Compensation

- a. The power to serve Article 5 Certificates in relation to orders made under the 1969 Regulations has been withdrawn, but existing A5 Certificates remain in force.

ITINERARY FOR THIS WEBINAR

1. The TPO Regulations 2012 - General Points
2. Summary of the Principal Changes
3. Changes in Detail
4. Form of the Order
5. Appeals
6. Summary



1. A CONSOLIDATED & STREAMLINED TPO SYSTEM

This is perhaps the most contentious change as it abolishes all provisions of the previous regulations and replaces this with the provisions of the 2012 Regulations, (Section 193(2) of the Planning Act 2008).

This could be viewed as ‘*ex post facto* Law’ or retrospective legislation.

However, Parliament has the right to apply legislation retrospectively under the doctrine of ‘Parliamentary Sovereignty’, which allows Parliament at Westminster to enact any law it wishes.

The question that is relevant is, are the changes that result from this legislation so severe as to compromise people’s rights to a serious degree?

The Memorandum that accompanies the Regulations is clear on this point at paragraph 6 ‘European Convention on Human Rights’, - “*As the instrument is subject to a negative resolution procedure and does not amend primary legislation, no statement is required*”.

1. A CONSOLIDATED & STREAMLINED TPO SYSTEM

This means that the Statutory Instrument does not amend / alter any primary legislation. The Instrument itself has been created from changes to primary legislation, i.e. Those changes to the 1990 Act made under the powers in sections 192 & 193 of The Planning Act 2008.

It can be concluded that the Government has taken legal advice on the matter, particularly as a number of consultation responses raised the issue of landowner's rights being compromised by the changes, for example:

An old area order dating from say the 1970s, that covered land that was at the time undeveloped or green field, but in 2012 has been developed. Are any of the original trees still present? Can they be identified with certainty? If so and there is a violation of the TPO and a prosecution results, is the instrument upon which the prosecution is brought (the TPO) reliable given that it has now been replaced with the new form of TPO?

This is an interesting question!

1. A CONSOLIDATED & STREAMLINED TPO SYSTEM

It is possible that the defence might mount a challenge on the basis that the landowner had not had sight of the new TPO, which in fact is the instrument upon which the prosecution is brought.

However, it is likely that a landowner in the now developed area would be aware of the presence of the TPO because a TPO is a land charge that would show up during a conveyance search. Even if she / he was not aware of the TPO, this is not a defence and in any event the offence has not changed over the years.

The important issue for Local Planning Authorities is to have a process to deal with these eventualities, because the 2012 Regulations are, in effect, forcing LPAs to review, amend or revoke older TPOs – Some LPAs have done this but many have not.

The statistics about TPOs in England are both interesting and disturbing!

TPO STATISTICS IN THE UK*

1. The average council has about 400 TPOs
2. The projected total number of TPOs across the country is @ 162,000.
3. On average 23% of all TPOs (@ 37,000) have either not been confirmed, or evidence of their confirmation cannot be produced.
4. 40% of all TPOs (@ 64,500) were over 20 years old as of 2006.
5. 21% of all TPOs (@ 34,000) are 'area' orders.
6. 18% of all TPOs (@ 30,000) are woodland orders made before 1986.
7. 10% of all TPOs (@ 16,000) were made before June 1976.

A POSSIBLE PROCESS TO ADDRESS THE IMPLICATIONS

An LPA may want to start a review of its oldest TPOs, i.e. those pre 1976 or pre August 1999 and select 'Area' orders first. They could allocate perhaps two days per month to this or out-source the project.

Having reviewed the TPOs it could:

1. Revoke the really inaccurate/unreliable TPOs
2. Amend the more reliable ones.

In the case at 2 above, it could redraft the TPO to reflect the high value amenity trees, groups of trees or woodlands present, and create a new TPO under the 2012 Regulations, whilst at the same time revoking the original TPO.

The same process could be followed if an application for tree works was received for work to trees on an old TPO, i.e. Review and revoke, or review, make a new TPO and revoke the old one.

A POSSIBLE PROCESS TO ADDRESS THE IMPLICATIONS

The key to making this happen properly is communication!

TPO Applications typically come to the Arboricultural Officer (AO) while the planning department, the council solicitors and land charge section are also key stakeholders in the TPO system.

Communication between all parties is key and to make this happen requires a **Policy** and/or a **Process**!

Those of you who are AOs should initiate the appropriate steps within your Councils to get a workable policy / process in place.

A combination of pro-active review of the older TPOs and action when tree works applications are made, should work well.

The legal implications may have to wait for a legal challenge, but it is likely that the new system would be upheld.

2. IMMEDIATE PROTECTION

Under the 2012 Regulations a new TPO comes into force as a provisional order on the date it was made - The previous need to cite section 201 of the 1990 Act in this regard is no longer necessary.

The time lines governing provisional orders remain unchanged, i.e. The order is in force until:

1. The six month period has elapsed;
2. The date on which the order is confirmed;
3. The date on which the authority decides not to confirm the order.

Although not specifically stated in the 2012 Regulations, the assumption is that if an order is not confirmed within the six month period, it can be confirmed at any time thereafter.

3. INFORMING INTERESTED PARTIES

The 2012 Regulations revert to the pre August 1999 approach that the order must be served on the persons interested in the land affected by the order.

This is generally taken to mean those people who would normally have the right to prune or fell the trees, i.e. The landowner(s).

LPAs have discretion on which other parties upon which to serve the order. For example, next door neighbours where the trees are boundary trees and overhang neighbouring properties.

A significant change is that where an order is made as a consequence of the service of a notice under s211(3) (Conservation Area) the LPA must serve the order on the person who served the notice. This is important as often an agent, (contractor or consultant) acts for a landowner, particularly if the works notified are because of tree related subsidence damage.

4. EXCEPTIONS (FORMERLY EXEMPTIONS)

This section – Regulation 14 – has been expanded and amended considerably, a significant change is the removal of ‘*dying*’ trees from the exceptions.

‘*Dead*’ trees remain as exceptions but this raises the question as to what constitutes a ‘dead tree’? Apart from the obvious, what is the position of an elm for example that is infected with Dutch elm disease? Is it dying or dead? Dutch elm disease is a death sentence.

The former ‘*have become dangerous*’ exception has been replaced with “... *To the extent that such works are urgently necessary to remove an immediate risk of serious harm ...*” This will result in some debate and controversy at the local level: was the work urgently needed? Was the danger immediate?

The removal of dead branches from a living tree has been included as a specific exception, which is good.

What constitutes a ‘statutory undertaker’ is now clearly defined, which is an improvement on the previous regulations, and there are quite a number of organisations that qualify as statutory undertakers from Airport Operators to Electric Utilities to Railway Operators through to Water & Sewerage Undertakers, see R14(3) (a) to (h).

5. PRIOR NOTICE FOR EXEMPTED WORKS

There are welcome changes in Regulation 14 in so far as it provides clarification on what notice is required for exempted works, specifically:

If the tree is dead or the work is urgently required to remove a risk of serious harm, the written notice should be “*as soon as practicable after the works have become necessary*” – note this does not say after the works have been completed! (LPAs may have to exercise discretion on this point from time to time.)

For all other exempted works the period of notice is “*at least five working days*” - This is a welcome clarification as up to now the five day notice period was more custom and practice rather than required by the regulations.

Historically the five days notice applied only to the old S198(6) to give the LPA five days to assess whether or not it required trees to be replanted, it was not included in any of the previous sets of Regulations.

6. & 7. CONSENTS & DURATION OF CONSENTS

Key issues here are that in granting consent the power to attach conditions is strengthened and the extent of conditions is more clearly defined. Previously conditions were actually planning conditions as might be attached to a consent for development.

There is provision for conditions specifying that the work can be carried out on multiple occasions – woodland work or coppice work for example.

For the first time a period of validity is attached to consents that are granted – the period is two years from date upon which the consent was granted.

It is assumed that if the works are not completed within the two year period, the consent lapses.

What is unclear is what happens if the work is started within the two year period, but not completed. Does the act of initiating the work activate the consent to the extent that it cannot lapse?

8. REPLACEMENT TREE PLANTING

As with the previous sections, the issue of planting replacement trees has been clarified.

It is implied at regulation 17(3) that replacement planting applies to woodland sites if the LPA requires it to maintain the special character of the woodland.

Replanting conditions can now specify how, where, and when the replanting is to be done.

Conditions can require 'things to be done, or installed' for the protection of any trees planted in pursuance of the condition(s).

(Refer to S202D (4) of the 1990 Act)

9. COMPENSATION

The provisions in respect to compensation remain largely unchanged from those in the 1999 Regulations and the 2008 amendments, but the issue of Article 5 Certificates has changed.

The power to apply Article 5 certificates has been removed, but the issue of compensation is set out in detail. The costs involved in making an appeal to the Secretary of State against a refusal of consent or against a condition are specifically excluded.

However, existing Article 5 Certificates that apply to trees within orders made before the 2nd of August 1999 remain in force, in spite of anything in the 2012 Regulations - unless the LPA decides to revoke them.

The same applies to replanting notices that may still be in force.

ITINERARY FOR THIS WEBINAR

1. The TPO Regulations 2012 - General Points
2. Summary of the Principal Changes
3. Changes in Detail
4. Form of the Order
5. Appeals
6. Summary

FORM OF THE ORDER (MODEL ORDER)

The new Model Form of Order is now reduced to three pages:

The first page gives the Title of the Order including the year and the name of the Council;

Citation;

Interpretation;

Effect;

The Date it was made; and either

The Seal of the Council; or

The signature of a person authorised to sign on behalf of the Council.

Confirmation – Decision not to Confirm – Variation - Revocation

FORM OF THE ORDER (MODEL ORDER)

The Second Page is the Schedule – previously the First Schedule.
Both the Area and Woodland designations remain.

The Third Page is the Map

Important:

The 2012 Regulations revert to the 1969 Regulations in so far as it states clearly at Regulation 3(4)

“In the case of any discrepancy between the map contained in, or annexed to, and order and the specification contained in the Schedule to that order, the map shall prevail.”

The Map must be to a scale sufficient to give a clear indication of the position of the trees, groups of trees or woodlands to which it related.

Typically the smallest scale should be 1:1250 although 1:500 is better! This should also have road names etc printed on it to facilitate site identification.

ITINERARY FOR THIS WEBINAR

1. The TPO Regulations 2012 - General Points
2. Summary of the Principal Changes
3. Changes in Detail
4. Form of the Order
5. Appeals
6. Summary



APPEALS

The Appeal Process is set out in Part 5 of the 2012 Regulations, i.e. Regulations 18 to 23 inclusive, and there have not been any changes to the appeals process as a result of the 2012 Regulations.

However, an earlier change in 2006/07 resulted in transfer of all TPO Appeal cases to the Planning Inspectorate. Formerly these had been handled by the various Regional Government Offices with appointed external Arboricultural Consultants as Inspectors.

Some of the former Consultants are still used as Inspectors.

The methods of determining TPO appeals remain the same, i.e. by *(i)* Written Representations; or *(ii)* by means of a hearing.

ITINERARY FOR THIS WEBINAR

1. The TPO Regulations 2012 - General Points
2. Summary of the Principal Changes
3. Changes in Detail
4. Form of the Order
5. Appeals
6. Summary



SUMMARY

- ✘ The 2012 Regulations come into force on 06 April 2012;
- ✘ So far they apply only in England, although there is provision for them to apply in Wales in the future;
- ✘ They contain many important changes;
- ✘ They will effectively force LPAs to review their existing TPOs;
- ✘ LPAs should have a policy & process for achieving this;
- ✘ There may be legal challenges;
- ✘ There are significant changes to the exempted works;
- ✘ Consents now have a time limit of two years from the date the consent was granted;
- ✘ The Model Form of Order has changed substantially;
- ✘ There are no changes to the Appeal System.

