

EVIDENCE NOTE ON TREES AND LARGE SHRUBS IN CONSERVATION AREAS / SETTING OF HERITAGE ASSETS

1. Consultation Response C55

1.1 C55 is that 'I have a concern that planning rules protecting Conservation Areas and the settings of heritage assets such as Listed Buildings with regard to the integration of trees and shrubs into development are unclear and ineffective, leading to excessive loss of trees and degradation of the Conservation Area/Listed Building. This is a particularly Cornish and Falmouth issue, where the good climate leads to shrubs growing to far greater proportions than elsewhere in England. The result is that too many 'trees' are excluded from protection because they are perceived to be shrubs and fall outside the rules governing the protection of trees. This is despite a High Court ruling that a tree is 'anything that would ordinarily be regarded as a tree'. In other words, if a large shrub is big enough to be seen as a tree by the public, it should also be seen as a tree so far as Planning is concerned. The Falmouth Neighbourhood Plan, as a very local planning tool, would be a good place to clear this anomaly up so far as the local area is concerned, and I suggest that a policy be put into the Plan which extends protection to large 'tree-like' shrubs.'

1.2 **The stakeholder Group have agreed to insert an appropriately worded policy and guidance note into the NDP.** This document presents the evidence material supporting that policy.

2. Definition of Tree for Planning Purposes

2.1 [Tree preservation orders](#) (TPO's) can be used to prohibit the cutting down, uprooting, topping, lopping, willful damage to, or willful destruction of protected trees or woodlands. This applies to roots as well as stems and branches.

2.2 In addition, in [conservation areas](#), the cutting down, lopping or topping of trees must be notified to the [local authority](#) 6 weeks in advance so they can consider whether the tree contributes to the character of the [conservation area](#) and whether to impose a [tree preservation order](#).

2.3 However, in the case of protected areas, rather than specifically identified trees, or in the case of [conservation areas](#), this raises the question as to what precisely constitutes a tree?

2.4 In the case of *Palm Developments Ltd v Secretary of State for Communities and Local Government* in 2009, Mr Justice Cranston took an amazing 12,000 words to consider the issue. He decided that "There is no statutory definition of a tree. I conclude that with [tree preservation orders](#) there are no limitations in terms of size for what is to be treated as a tree. In other words, saplings are trees... "Tree" must therefore mean anything that would ordinarily be regarded as a tree. Thus it would not include a shrub, a bush or scrub."

2.5 This represents a change from a previous judgment by Lord Denning MR in the *Batchelor* case, who concluded "...many saplings were not trees and would need to be of over 180-200mm diameter before they could be...".

2.6 However, despite the very broad interpretation by Mr Justice Cranston a number of exceptions are set out in The Town and Country Planning (Tree Preservation)(England) Regulations 2012.

2.7 In relation to trees preservation orders, exceptions apply to:

- Dead trees.
- Where works are required on the operational land of a [statutory undertaker](#).
- For national security reasons.
- Fruit trees that are part of a business.
- In relation to the implementation of a [planning permission](#).
- At the request of the [Environment Agency](#) or a [drainage](#) body.
- Works required for safety.

2.8 See <http://www.legislation.gov.uk/uksi/2012/605/regulation/14/made> for more information.

2.9 In relation to [conservation areas](#), exceptions apply to:

The cutting down or uprooting:

- of a tree whose diameter does not exceed 75 millimetres; or
- where carried out for the sole purpose of improving the growth of other trees, of a tree whose diameter does not exceed 100 millimetres; or

The topping or lopping of a tree whose diameter does not exceed 75 millimetres.

For the purpose of this regulation:

- where a tree has more than one stem at a point 1.5 metres above the natural ground level its diameter shall be treated ... as exceeding 75 millimetres or 100 millimetres respectively, if any stem when measured over its bark at that point exceeds 75 millimetres or 100 millimetres respectively; and
- In any other case, the diameter of a tree shall be ascertained by [measurement](#), over the bark of the tree, at a point 1.5 metres above the natural ground level.

3. Expert Views

3.1 Many experts agree that the legal and technical differentiation of tree and shrub is problematic and support the view that if 'it looks like a tree, it is a tree', as can be seen from the extract from the UK Tree Care Forum at Appendix A

3. 2 Many Shrubs are considered by botanists to be cable of being in both shrub and tree form. See Appendix B.

4. Proposed POLICY DG 9: Trees and large tree-like shrubs in the Conservation Area

4.1 To meet the representation, the following policy is proposed, which should be supported by a small guidance note.

Reasoned Justification: Falmouth's Conservation Area includes many residential curtilages which have been formed from the grounds of larger Georgian, Victorian and Edwardian mansions and villas, the gardens of which contain trees and planted areas which contribute to the historic setting of the Area and nearby heritage assets. These often include shrubs which because of the favourable climate have grown to a substantial height and a tree-like form and make as significant a contribution to historic setting as do trees.

Policy DG9: 'Development in Conservation Areas should carefully integrate existing trees and large tree-like shrubs into the design and layout of proposals, taking care to ensure that their relationship to the historic context and setting of the Area and any heritage assets within it is adequately preserved and enhanced. Loss of trees and large tree-like shrubs which make a contribution to the historic context and setting will not be supported
 Definition of tree for planning purposes'

Guidance Note:

Trees and Large Tree-Like Shrubs in the Conservation Area - Background

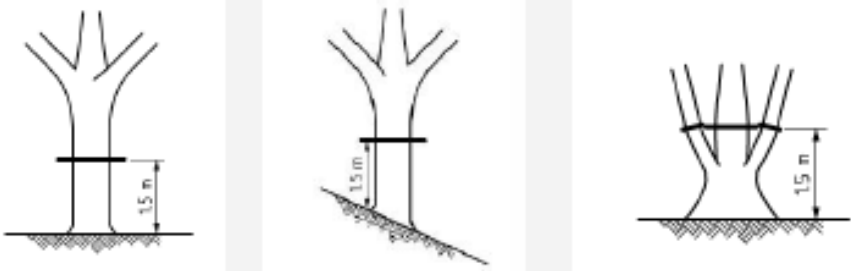
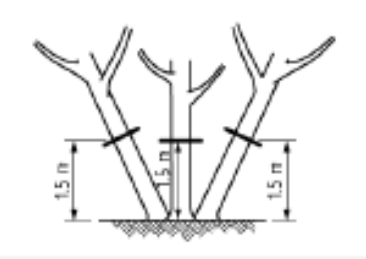
Anyone proposing to cut down or carry out work on a tree within a Conservation Area must give the LPA six weeks' prior notice. This allows time to consider whether a TPO should be made on the tree, for example because of its contribution to historic setting, or if work can continue. This only applies if the person carrying out the work wants to cut down or carry out work to trees greater than 7.5 cm in diameter (measured 1.5 metres above natural ground level) or 10 cm if thinning to help the growth of other trees.

As a result of the favourable climate in Falmouth some shrubs within the former curtilages of mansions and villas have grown into tree-like forms and proportions and make as significant a contribution to the historic setting as do trees. It is therefore desirable that such large tree-like shrubs are afforded the same consideration in design as is given to trees.

A 2009 High Court judgement stated that a tree is '...anything that would ordinarily be regarded as a tree'. (*Palm Developments Ltd vs Secretary of State [2009] EWHC 220 (Admin)*)

Therefore it is reasonable to say that in the Conservation Area if a shrub is of tree-like proportions and form, and has a stem (or multi stem) diameter of 7.5 cm (or 10 cm in the case of thinning) 1.5m above normal ground level, then it should be considered as if it were a tree.

Guidance as to the measurement of tree stems is given in British Standard BS 5837: 2012 'Trees in relation to design, demolition and construction – Recommendations'

Where a tree has more than one stem at a point 1.5 metres above the natural ground level its diameter is treated as exceeding 7.5 cm or 10 cm respectively, if any stem when measured over its bark at that point exceeds 7.5 cm or 10 cm respectively.

Appendix A: Extract from the UK Tree Care Forum
<http://www.tree-care.info/uktc/archive/2015/msg03203>

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Or maybe....

If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck

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-----Original Message-----

From: uktc-request@xxxxxx.tree-care.info
[mailto:uktc-request@xxxxxx.tree-care.info] On Behalf Of Charles Mynors
Sent: 08 October 2015 10:57
To: UK Tree Care
Subject: RE: RE: anything that ordinarily one would call a tree

That is correct. **Most statutes define "tree" to include "shrub"** - because, for example, it does not matter whether the green, leafy thing causing problems to the highway or the railway is a tree or a shrub; it just needs to be dealt with. One notable exception is the Airports Act, which enables airport authorities to get rid of trees that are getting in the way of incoming aircraft - for obvious reasons that does not include shrubs. Which rather makes the point. By contrast the Plant Health Orders rightly have a very wide definition, as they are designed to prevent the spread of disease, in whatever type of plant it occurs.

The other exception is the Town and Country Planning Act 1990, which simply relates to preserving a "tree". Given that it is possible for a tree to be preserved from the moment of its planting (where it is planted in replacement for another one that has been removed), it is not surprising that "tree" includes sapling, or even seedling.

But that does not mean that it is automatically sensible (even if arguably lawful) to preserve anything that is, at least in theory, a tree. The key, as pointed out by others, is whether it is expedient to preserve the particular plant in question. I entirely agree that it is right to focus on protecting proper trees, not on regulating gardening activity.

As for conservation areas, in the event of a prosecution, it is for the authority to prove - beyond reasonable doubt - that the object removed was indeed a tree. Which leaves the way open for the punter to argue that he or she thought it was a shrub. And of course there is a minimum size limit, which will remove many shrubs - and which should cause over-zealous authorities to pause before prosecuting for felling "trees" just over the size limit.

Best wishes,

Charles Mynors

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-----Original Message-----

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[<mailto:uktc-request@xxxxxx.tree-care.info>] On Behalf Of Jon Heuch

Sent: 08 October 2015 10:20

To: UK Tree Care

Subject: RE: RE: anything that ordinarily one would call a tree

In the context of the Electricity Act it is specified that shrubs are trees

And The Plant Health (Forestry) Order 2005 defines

"tree" means a living tree or shrub, or a living part of a tree or shrub, at any stage of growth; and living parts of a tree shall include-

(a) fruit or seed,

(b) branches with or without foliage,

- (c) a tree or shrub that has been cut and which retains any foliage,
- (d) leaves or foliage,
- (e) a tree or shrub in tissue culture, and
- (f) bud wood, cuttings or scions;

So we're just wasting our time if we want one definition to fit all circumstances. One difficulty is that the law defines words for particular acts and you have no right to rely on a definition for another act. You can of course always try!

Anything one would ordinarily call a tree. M'lord this leafless branch I would normally call a tree (as I am a plant pathologist and use the Plant Health Order all the time) so, other than for the fact it is dead, I want to serve a TPO..the Order says a leafless branch can be described as a "living part". That's an argument obvious in its ridiculousness.

As for whether trees are defined by species or by individual specimens there are too many species (not so many in the UK) that are described by botanists as "tree or shrub" for use by species to be of much use. It's probably why many "tree" books include the word "shrub" in their title.

Jon

We can't proffer a definition where the legislation has failed to do so, but context is everything and I think this debate overlooks an important point. In the context of a TPO it has to be (a) a tree and (b) one whose preservation is in the interests of the amenity of the area. One could also infer (and that is perceived to be under threat, but that's not important here. The amenity argument ties into the government guidance and aspects of public visibility. So through size or prominence, or lacks thereof, a shrub could be deemed protectable, giving it the formal status of a tree, and a nearby tree by its diminutive stature deemed not worthy of protection, giving the illusion that it was considered not to be a tree.

Amenity trumps treeness within the broad parameters of what could ordinarily be called a tree.

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Definitions are good, but rarely satisfy. Even the SI definition of the metre

had to be changed in 1986 from "equal to 1 650 763.73 wavelengths of the orange-red emission line in the electromagnetic spectrum of the krypton-86 atom in a vacuum" to "the length of the path travelled by light in vacuum during a time interval of 1/299792458 of a second" because it was too uncertain. Good luck mto anyone trying to pin down 'tree'. For now I maintain that really what would be needed for occasional marginal cases would be a definition of TPOableness, because the issues of treeness and amenity are inseparable. What is important about whether they are trees or shrubs, if the potential for height is overlooked as being more of a visibility and therefore amenity issue? I suspect it is the semi-permanent nature of woody perennials. They are long-lasting in the landscape just as buildings are. As such, whether they are trees or tree-like shrubs or shrubs that have uncharacteristically achieved tree-like stature is surely irrelevant? Or should I say, would be, to a judge or an ordinary person.

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I hate to disagree with you of all people Jon, but a definitive description of the loose term 'Tree' is never going to happen and I don't think it is necessary. There are too many variables.

So, what From my position it looks as if you first need to do to refine what you seek to define. At the moment I think you seek to define what a tree is for the purposes of amenity in the interests of a Tree Preservation Order? You then still have major problems in that this can vary from one area to another depending on the landscape and locality ... rural urban and so on, your criteria. So, what it all boils down to is your subjective opinion, each case on its own merits ... ultimately, what that plant contributes to the visual amenities of the locality in the interests of the wider public, bearing in mind that an LPA has to do what it does at public expense. A tree, is a plant that has grown to a point where ordinary people call it a tree ... not what us pedantic experts trying to find a perfect definitive description to pigeon hole think. As said before, I will not TPO laurels and large shrubs as a rule but you know what if it was special enough and, if the location was sparsely tree covered I could! I think we have something here that is more complex than, Fermat's Last Theorem ...

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Appendix B

Shrub

From Wikipedia, the free encyclopedia

List of shrubs (bushes)

Those marked with * can also develop into tree form.

A

Abelia (Abelia)
Acer (Maple) *
Actinidia (Actinidia)
Aloe (Aloe)
Aralia (Angelica Tree, Hercules' Club) *
Arctostaphylos (Bearberry, Manzanita) *
Aronia (Chokeberry)
Artemisia (Sagebrush)
Aucuba (Aucuba)

B

Berberis (Barberry)
Bougainvillea (Bougainvillea)
Brugmansia (Angel's trumpet)
Buddleja (Butterfly bush)
Buxus (Box) *

C

Calia (Mescalbean)
Callicarpa (Beautyberry) *
Callistemon (Bottlebrush) *
Calluna (Heather)
Calycanthus (Sweetshrub)
Camellia (Camellia, Tea) *
Caragana (Pea-tree) *
Carpenteria (Carpenteria)
Caryopteris (Blue Spiraea)
Cassiope (Moss-heather)
Ceanothus (Ceanothus) *
Celastrus (Staff vine) *
Ceratostigma (Hardy Plumbago)
Cercocarpus (Mountain-mahogany) *
Chaenomeles (Japanese Quince)
Chamaebatiaria (Fernbush)
Chamaedaphne (Leatherleaf)
Chimonanthus (Wintersweet)
Chionanthus (Fringe-tree) *

Choisya (Mexican-orange Blossom) *
Cistus (Rockrose)
Clerodendrum (Clerodendrum)
Clethra (Summersweet, Pepperbush) *
Clanthus (Glory Pea)
Colletia (Colletia)
Colutea (Bladder Senna)
Comptonia (Sweetfern)
Cornus (Dogwood) *
Corylopsis (Winter-hazel) *
Cotinus (Smoketree) *
Cotoneaster (Cotoneaster) *
Cowania (Cliffrose)
Crataegus (Hawthorn) *
Crinodendron (Crinodendron) *
Cytisus and allied genera (Broom) *

D

Daboecia (Heath)
Danae (Alexandrian laurel)
Daphne (Daphne)
Decaisnea (Decaisnea)
Dasiphora (Shrubby Cinquefoil)
Dendromecon (Tree poppy)
Desfontainea (Desfontainea)
Deutzia (Deutzia)
Diervilla (Bush honeysuckle)
Dipelta (Dipelta)
Dirca (Leatherwood)
Dracaena (Dragon tree) *
Drimys (Winter's Bark) *
Dryas (Mountain Avens)

E

Edgeworthia (Paper Bush) *
Elaeagnus (Elaeagnus) *
Embothrium (Chilean Firebush) *
Empetrum (Crowberry)
Enkianthus (Pagoda Bush)
Ephedra (Ephedra)
Epigaea (Trailing Arbutus)
Erica (Heath)
Eriobotrya (Loquat) *
Escallonia (Escallonia)
Eucryphia (Eucryphia) *
Euonymus (Spindle) *
Exochorda (Pearl Bush)

F

Fabiana (Fabiana)
Fallugia (Apache Plume)
Fatsia (Fatsia)
Forsythia (Forsythia)
Fothergilla (Fothergilla)
Franklinia (Franklinia) *
Fremontodendron (Flannelbush)
Fuchsia (Fuchsia) *

G

Garrya (Silk-tassel) *
Gaultheria (Salal)
Gaylussacia (Huckleberry)
Genista (Broom) *
Gordonia (Loblolly-bay) *
Grevillea (Grevillea)
Griselinia (Griselinia) *

H

Hakea (Hakea) *
Halesia (Silverbell) *
Halimium (Rockrose)
Hamamelis (Witch-hazel) *
Hebe (Hebe)
Hedera (Ivy)
Helianthemum (Rockrose)
Hibiscus (Hibiscus) *
Hippophae (Sea-buckthorn) *
Hoheria (Lacebark) *
Holodiscus (Creambush)
Hudsonia (Hudsonia)
Hydrangea (Hydrangea)
Hypericum (Rose of Sharon)
Hyssopus (Hyssop)

I

Ilex (Holly) *
Illicium (Star Anise) *
Indigofera (Indigo)
Itea (Sweetspire)

J

Jamesia (Cliffbush)
Jasminum (Jasmine)

Juniperus (Juniper) *

K

Kalmia (Mountain-laurel)

Kerria (Kerria)

Kolkwitzia (Beauty-bush)

L

Lagerstroemia (Crape-myrtle) *

Lapageria (Copihue)

Lantana (Lantana)

Lavandula (Lavender)

Lavatera (Tree Mallow)

Ledum (Ledum)

Leitneria (Corkwood) *

Lespedeza (Bush Clover) *

Leptospermum (Manuka) *

Leucothoe (Doghobble)

Leycesteria (Leycesteria)

Ligustrum (Privet) *

Lindera (Spicebush) *

Linnaea (Twinflower)

Lonicera (Honeysuckle)

Lupinus (Tree Lupin)

Lycium (Boxthorn)

M

Magnolia (Magnolia)

Mahonia (Mahonia)

Malpighia (Acerola)

Menispermum (Moonseed)

Menziesia (Menziesia)

Mespilus (Medlar) *

Microcachrys (Microcachrys)

Myrica (Bayberry) *

Myricaria (Myricaria)

Myrtus and allied genera (Myrtle) *

N

Neillia (Neillia)

Nerium (Oleander)

O

Olearia (Daisy bush) *

Osmanthus (Osmanthus)

P

Pachysandra (Pachysandra)
Paeonia (Tree-peony)
Perovskia (Russian Sage)
Persoonia (Geebung)
Philadelphus (Mock orange) *
Phlomis (Jerusalem Sage)
Photinia (Photinia) *
Physocarpus (Ninebark) *
Pieris (Pieris)
Pistacia (Pistachio, Mastic) *
Pittosporum (Pittosporum) *
Plumbago (Leadwort)
Polygala (Milkwort)
Poncirus *
Prunus (Cherry) *
Purshia (Antelope Bush)
Pyracantha (Firethorn)

Q

Quassia (Quassia) *
Quercus (Oak) *
Quillaja (Quillay)
Quintinia (Tawheowheo) *

R

Rhamnus (Buckthorn) *
Rhododendron (Rhododendron, Azalea) *
Rhus (Sumac) *
Ribes (Currant)
Romneya (Tree poppy)
Rosa (Rose)
Rosmarinus (Rosemary)
Rubus (Bramble)
Ruta (Rue)

S

Sabia *
Salix (Willow) *
Salvia (Sage)
Sambucus (Elder) *
Santolina (Lavender Cotton)
Sapindus (Soapberry) *
Senecio (Senecio)
Simmondsia (Jojoba)

Skimmia (Skimmia)
Smilax (Smilax)
Sophora (Kowhai) *
Sorbaria (Sorbaria)
Spartium (Spanish Broom)
Spiraea (Spiraea) *
Staphylea (Bladdernut) *
Stephanandra (Stephanandra)
Styrax *
Symphoricarpos (Snowberry)
Syringa (Lilac) *

T

Tamarix (Tamarix) *
Taxus (Yew) *
Telopea (Waratah) *
Thuja cvs. (Arborvitae) *
Thymelaea
Thymus (Thyme)
Trochodendron *

U

Ulex (Gorse)
Ulmus pumila celer (Turkestan elm – Wonder Hedge)]
Ungnadia (Mexican Buckeye)

V

Vaccinium (Bilberry, Blueberry, Cranberry)
Verbena (Vervain)
Viburnum (Viburnum) *
Vinca (Periwinkle)
Viscum (Mistletoe)

W

Weigela (Weigela)

X

Xanthoceras
Xanthorrhiza (Yellowroot)
Xylosma

Y

Yucca (Yucca, Joshua tree) *

Z

Zanthoxylum *
Zauschneria
Zenobia
Ziziphus *

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