1 Summary

1.1 To enable members to decide whether or not to confirm the Tree Preservation Order (TPO) at Bores Hole and Trechmanns Wharf, North Halling, Rochester, Kent.

2 Decision issues

2.1 Decisions relating to the confirmation of Tree Preservation Orders fall within the remit of the Development Control Committee.

3 Site Description

3.1 The site consists of three areas of land adjacent to the A228 in North Halling. These areas comprise: Bores Hole, an old quarry adjacent to Pilgrims Way; land adjacent to the northern boundary of Bores Hole; and land known as Trechmanns Wharf adjacent to the west bank of the River Medway which is bounded to the west by the Strood to Maidstone railway line. The 3 parcels of land (W1, W2 and W3) covered by the Tree Preservation Order are shown on the site location plan within Appendix 1 to this report. Sites W1, W2 and W3 are identified as follows. The photographs in Appendix 2 show the trees on site from the opposite bank of the Medway.

3.2 Site (area) one: W1 Bores Hole is an old quarry adjacent to Pilgrims Way and containing a mixed mature and semi mature woodland.

3.3 Site (area) two: W2 Land adjacent to the Northern boundary of Bores Hole contains mature woodland.

3.4 Site (area) three: W3 Land known as Trechmanns Wharf contains a stretch of young woodland, adjacent to the west bank of the River Medway, some 550m long bounded on the west by the Strood to Maidstone railway line.

3.5 Sites W1 and W2 are within a Site of Scientific Special Interest.
3.5 Bores Hole and Trechmanns Wharf respectively were historically sites for: the extraction of chalk, used in cement manufacture; and the ancillary movement of other raw materials used in cement production and the movement of the finished cement by river. These activities were associated with the operation of a cement works adjacent to Trechmanns Wharf which appears to have ceased production in the late 1940s and was subsequently demolished.

4 Background

4.1 Following the receipt of a planning application made on the 28 January 2005 (MC2005/0263) for the “Reuse of land as wharf with: siting of prefabricated building and two cranes; installation of lighting; and formation of new access road to Rochester Road”, officers assessed the area with regard to the necessity for tree protection. It was considered expedient in the interests of amenity for the Council to make a Tree Preservation Order in respect of three areas of woodland in the area.

4.2 A provisional Tree Protection Order was made on 6 May 2005 in respect of 3 areas of woodland situated on land in and adjacent to Bores Hole and on land known as Trechmanns Wharf.

4.3 The Council received a request from the site owners’ representative on the 18th October 2005 requesting that Members consider the confirmation of this Tree Preservation Order. Given the nature of the representations made by the landowner’s representatives, officers acceded to this request. However, the protection given by the original provisional TPO would have expired on 5 November 2005 and it was not possible for the Development Control Committee to consider the Order before the protection expired. Accordingly a new provisional Order was issued to provide protection until a decision about whether or not to confirm the Order could be made by Members at Committee.

4.4 The second provisional Tree Protection Order was made on the 3rd November 2005 and the original provisional Order was withdrawn at the same time.

4.5 In the second provisional Order the woodland area identified as W3 has been reduced in extent because it was found that it covered a private garden where the trees are not considered to be under threat.

5 Representations

5.1 Notifications of the original provisional Tree Preservation Order were sent to the site owners and their representatives. Notification letters have were also sent to the following neighbours and interested parties: River House, 97 & 82 Station Road; 1, 2 & 3, The Cottages Whornes Place Rochester Road; 10, 12 Pilgrims Road and 5 to 45 (odds), Pilgrims Road, Halling; 7, 9, 10, 14 & 15 Rochester Road, Halling; Rugby Portland Cement Co Ltd; Medway Ports Authority; Network Rail Infrastructure Ltd; The Forestry Commission; Cuxton Parish Council; and Halling Parish Council.
5.1.1 Three letters have been received raising no objection to the Tree Preservation Order. On making the second provisional Order the Council confirmed to the landowner’s representatives that any objections to the first provisional Order would be considered in relation to the second Order. Two letters have been received objecting to the making of the first provisional TPO on the landowner’s behalf. There are therefore two objections to the second provisional Order and these are included in Appendix 3 to this report.

5.2 On the 6 June 2005 a letter was received from Quaife Woodlands, Arboricultural and Woodland consultants on behalf of the landowner (Palm Developments Ltd). The following objections to the Tree Preservation Order have been made.

5.2.1 Objection: There is no specific assessment methodology indicated as to how the trees subject to TPO were assessed.

5.2.2 Response: As advised in government guidance a preliminary judgement on whether a TPO would be justified on amenity grounds was made at the time when planning application MC2005/0263 was being considered. A more detailed assessment has since been completed and is available as a background document to this report. This assessment was made prior to the making of the second provisional Order.

5.2.3 Objection: “…a Local Authority is clearly obliged to respect good arboricultural or silvicultural management’ (in determining whether to make a TPO).”

5.2.4 Response: This is of course a key consideration in deciding whether it is expedient to make a new Tree Preservation Order. In this instance no evidence of good arboricultural or silvicultural practice (ie. an English Nature or Forestry Commission approved management plan, as would be required under Site of Special Scientific Interest [SSSI] status) has been provided.

5.2.5 Objection: Why is it that the Council “should consider the designation of a SSSI might be regarded as inadequate in terms of tree protection?”

5.2.6 Response: An area may be designated a SSSI under the Wildlife and Countryside Act in order to conserve and protect special ecological features associated with the area. The features of interest given in English Nature’s citation for the Halling to Trottsiclle Escarmnet SSSI relate to insect and flora species associated with chalk grassland habitat along with species associated with beech woodland on chalk. A Tree Preservation Order is made in order to protect trees and woodlands that contribute to the amenity value of the local environment. Therefore decisions about making Tree Preservation Orders are based heavily, but not exclusively, on the aesthetic value of the affected trees, whereas decisions about designating sites as SSSIs are based on the ecological (and in some instances the geological) value of a particular area. The special features noted in the designation of this SSSI may possibly be unaffected by the removal of trees covered by the Tree Preservation Order, however the impact of tree removal on the visual...
amenity of the local environment and thus its enjoyment by the public is likely to be significant.

5.2.7 **Objection:** When serving the Tree Preservation Order there was ‘no indication of the use of any non-statutory procedures that are even-handed and open in manner as required at paragraph 3.38 of the blue book’

5.2.8 **Response:** The advice in “Tree Preservation Orders: A Guide to the Law and Good Practice” (the blue book) (which is the government’s guide on the making and enforcement of Tree Preservation Orders) gives good practice advice in the section ‘Considering Objections and Representations’ in the context of making a decision on whether or not to confirm the Order. Officers have acceded to the landowner’s request to bring this matter to Committee, which is part of the guidance. All Objections and representations concerning this preservation order have been detailed within this report to enable them to be considered in an even-handed and open in manner.

5.2.9 **Objection:** “The (development) proposal north of the A228 is a proportionally minor area and is clearly confined. The assumption of a negative impact and loss of habitat is a rather perfunctory reaction and has not taken account of the far reaching context of the application as a whole.”

5.2.10 **Response:** The Council in making a Tree Preservation Order is required to consider whether the loss of trees would have a significant affect on the local environment and the enjoyment of it by the public. The assumption that the development proposal will have a negative impact on the amenity, ecological and landscape value of the woodland is derived from the officer’s considered opinion of the impact that the removal of an area of established woodland associated with the formation of an industrial road junction would have.

5.2.11 **Objection:** “The purpose of a TPO is most distinctly not to merely frustrate development”

5.2.12 **Response:** A Tree Preservation Order should not be used to merely frustrate development, however the presence of trees within an application site are a material consideration and Local Planning Authorities are placed under a duty to protect trees as part of the planning process. Local Planning Authorities are also advised that it is expedient to protect trees considered to be ‘at risk generally from development pressures’. The proposals the subject of planning application MC2005/0263 for the re-establishment of the Wharf and improved road access to the A228 Rochester Road clearly demonstrated an increased risk to the woodland. In any event, a Tree Preservation Order would not prevent the removal of trees where such removal is demonstrated to be necessary to enable the implementation of a planning permission.

5.2.13 **Objection:** “There is some ambiguity as to the land ownership at the northern end’ of the Trechmanns Wharf site”.

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5.2.14 **Response:** A Land Registry check has been carried out and all relevant parties have been informed of the making of the provisional Tree Preservation Order.

5.2.15 **Objection:** “The making of a woodland TPO is a very distinct form of protection. In effect, although there is no conclusive description of what constitutes a woodland in British and European legislation or guidance, my own personal view is that it is actually a defined land use.”

5.2.16 **Response:** Woodland is not defined by the Town & Country Planning Act 1990 or the blue book guidance. Officers are satisfied that there are sufficient trees, as opposed to bushes and scrub, within the areas covered by the Tree Preservation Order to justify the use of the Woodland category of TPO. The designation of a woodland Tree Preservation Order has not been used here to effect a land use change, but has been used as the most valid category for tree protection. To protect W3 for example using the single, group or area TPO categories would be inappropriate and unenforceable. The purpose of a woodland Tree Preservation Order is to safeguard the woodland unit as a whole which depends on regeneration or new planting.

5.2.17 **Objection:** “The correct procedure...is for an Area TPO to be made. An area TPO can be made in the absence of a formal assessment and ...it’s use is encouraged to provide control in these circumstances.”

5.2.18 **Response:** The ‘Blue book’ advises that it is the Secretary of State’s view that ‘the area classification should only be used in emergencies’ and the definition for the use of an ‘area order’ is as ‘an alternative way of specifying scattered individual trees’. By their nature the majority of Tree Preservation Orders are assessed and served promptly. In this particular situation emergency action was not required at the time of serving the Tree Preservation Order.

5.2.19 Area W3 contains more than a scattering of individual trees, indeed a young woodland of very diverse tree species has become established. In this instance the appropriate form of protection is under the woodland order classification. An assessment of area W3 was carried out at the time of making the Order, when species, age range, number of trees and overall character were considered. It is officers’ view that it would be inappropriate and unenforceable to use any other category of Tree Preservation Order in this instance.

5.2.20 **Objection:** “The areas W1 and W2 to the north of the A228 have not been formally assessed and are already designated as a SSSI and therefore the TPO is superfluous.”

5.2.21 **Response:** A considered assessment of the woodland has been completed. The assessment concluded that a TPO was appropriate for this site. As stated above SSSI designations protect the ecology of an area, a TPO protects the amenity value of trees and woodlands. It is very common for SSSI woodland to also be protected by TPOs, indeed the majority of the surrounding and
adjacent woodland in the North Kent Downs Area of Outstanding Natural Beauty is protected under both forms of legislation

5.2.22 Objection: “The area W3 to the south of the A228 has not been formally assessed and should more properly be protected by an area category TPO.”

5.2.23 Response: A considered assessment of the woodland has been carried out. As stated above Government advice indicates that area TPOs should be used as emergency measures only in order to protect scattered individual trees, and therefore officers do not believe that area W3 is of the character that warrants the making of an area TPO. In addition the circumstances of this case were such that the need for emergency action, which might otherwise warrant the making of an area TPO, did not arise.

5.3 A letter of objection was received from Kingsley Smith (solicitors for the landowner) dated 18 October 2005. This asked that the order should not be confirmed until all procedures for confirmation of the order had been carried out. It also included a report covering objecting to the TPO on the following grounds:

5.3.1 Objection: “… area W1 should be divided between the area in the base of Bores Hole and the peripheral areas”

5.3.2 Response: Following an assessment of the entire area identified as area W1, this area is considered to comprise woodland that can clearly be defined as a single area within the TPO. This in no way prevents any application being made to undertake works to any trees within different parts of W1.

5.3.3 Objection: Confirmation of the Order should be made at the Development Control Committee and the landowner and the Councils Tree Officers should be able to make their case at the committee meeting and the Committee Members should undertake a site visit.

5.3.4 Response: The decision whether to confirm the TPO has referred to the Development Control Committee. It is open to Members of the Committee to decide whether they consider it necessary to undertake a site visit before making a decision as to whether or not the provisional TPO should be confirmed.

5.3.5 Objection: The order was made without any prior consultation or proper assessment by officers. The application has nothing to do with area W2 and only affects a tiny part of area W1.

5.3.6 Response: Due to the risk of trees being removed, provisional Tree Preservation Orders may be may made without consultation with landowners following a preliminary assessment by a Tree Officer. A full consultation and considered assessment is completed prior to making a decision as to whether a provisional TPO should be confirmed. In this case as a second provisional Order has been made and the full assessment was undertaken prior to the making of the second order.
5.3.7 **Objection:** The Owners are disappointed that the order was made without any prior consultation or proper assessment by officers.

5.3.8 **Response:** Due to the risk of trees being removed prior to an order being made and served, provisional Tree Preservation Orders are normally made without consultation with landowners. Plenty of time is however set aside for detailed consultation to be undertaken prior to provisional TPOs being confirmed.

5.3.9 **Objection:** Officers motive appears to have been to support an objection to a planning application to provide an improved road access to the Wharf.

5.3.10 **Response:** A Tree Preservation Order should not be used to merely frustrate development, however trees are a material consideration and a Local Planning Authority is placed under a duty to protect trees as part of the planning process.

5.3.11 The Local Planning Authority are also advised that it is expedient to protect trees considered to be ‘at risk generally from development pressures’. The proposals contained within planning application MC2005/0263 clearly demonstrated an increased risk to the woodland.

5.3.12 **Objection:** Information as to the benefits of providing the road junction that was submitted with the planning application should be considered.

5.3.13 **Response:** The wider benefits of providing the proposed new road junction were considered as part of the determination of planning application MC2005/0263 and are not relevant to the making of the Tree Preservation Order. The local authority’s duty with regard to TPOs is to make an order where it considers it expedient to do so in the interests of safeguarding the amenity of the affected area and to thus to make provision for the preservation of trees or woodlands. In any event any works to protected trees required to implement development the subject of full planning permission does not require Medway Council’s consent under the provisions of a TPO, with the effect of the proposed development on any such protected trees falling to be considered as part of the determination of the planning application.

5.3.14 **Objection:** W2 is a discrete area and it is not expedient to make an order on that site.

5.3.15 **Response:** This site has recently changed ownership and is considered by Officers to be at an increased risk.

5.3.16 **Objection:** Trees within Bores Hole are not observable from any public vantage point with the possible exception of the steep public footpath along the northern boundary.
5.3.17 Response: The trees growing within Bores Hole are visible from public footpath RS210 and have potential to become more valuable in amenity terms as they mature.

5.3.18 Objection: The trees on the edge of Bores Hole can be viewed from many public vantage points but few would be affected by the proposed development and the assessment says nothing about this aspect.

5.3.19 Response: Although the majority of the trees within Bores Hole are not shown as being affected by the proposals the subject of application MC2005/0263, these trees are considered to be generally at risk from possible future development.

5.3.20 Objection: There are fundamental flaws with the TPO in respect of area W3. As a matter of both fact and law, there is no woodland on this area and so confirmation would be unlawful.

5.3.21 Response: Area W3 as shown on the attached photographs (See Appendix 2) is considered to be a Woodland containing a broad mix of young tree species that cover almost the entire site. Area W3 has also been detailed on the Forestry Commission’s Inventory of Woodland. Officers do not therefore agree with either the landowner’s representative’s definition of woodland or its assertion that there are insufficient numbers of trees within area W3 to be enable it to be referred to as woodland.

5.3.22 Objection: A TPO can only be made in respect of trees. Area W3 primarily comprises scrub, regeneration and shrubs (refer to paragraph 44 of Circular 36/78). There are some trees (eg. along the railway boundary) but even if the order is confirmed, our clients would clear most of the site to permit the safe commercial operation of their wharf.

5.3.23 Response: The section referred to in Circular 36/78 (Trees and Forestry) has been replaced by Tree Preservation Orders a Guide to the Law and Good Practice. However the entire site referred to as W3 contains many tree species identified through: an ecological survey carried out by ESL Ecological Services in connection with the submission of planning application MC2005/0263; and the Tree Officer’s site visits and Arboricultural assessment. The trees within area W3 include: Ash, Cherry, Elm, Birch, Field Maple, Hawthorn, Holly, Oak, Sycamore, and Yew

5.3.24 Objection: Those trees, which exist in W3, do not make the area woodland. There is no TPO definition of woodland. The complex inter-relation between plants, insects and mammals which form the essential characteristic of a woodland does not exist here.

5.3.25 Response: Tree Preservation Orders: a Guide to the Law and Good Practice confirms that the Town and Country Planning Act 1990 (as amended) does not define the term woodland. This guidance also does not define woodland. However from inspection and assessment of the area officers consider that
the most appropriate Tree Preservation designation for the collection of trees within area W3 is woodland.

5.3.26 Objection: The making of a woodland Order where land has laid idle these days renders it almost impossible to resume its original use.

5.3.27 Response: The presence of a TPO does not prevent planning applications being submitted for the re-use of sites. Should full planning permission be granted for development on this site, any tree removal necessary to implement that permission could then be completed as an exemption to the provisions of the Order.

5.3.28 Objection: An understandable desire to safeguard an area having both amenity value and potential to mature into woodland, cannot lawfully be achieved by a Tree Preservation Order which can only lawfully be made in respect of extant trees or woodland.

5.3.29 Response: Section 198(1) of the Town & Country Planning Act 1990 gives the Council the power to make an Order with respect to such “trees, groups of trees or woodlands as may be specified in the order”. The Act does not define “woodland”. Officers disagree that there are few trees within area W3. Much of the area referred to by the objector as “scrub, regeneration and shrubs” are in the opinion of the Tree Officer young trees. In the Council’s opinion the complex inter-relation between plants, insects and mammals referred to in the landowner’s representations add something to the meaning of “woodland” that is not found in either the Act or the Good Practice Guide.

6 Officer Appraisal

6.1 The woodlands included within the provisional TPO are in a good condition and contain a valuable mix of species and age classes that should continue to provide significant public benefit in the future.

6.2 The woodlands are visible from the following rights of way: - MR1, MR2, MR3 and RS210, as well as Wouldham Road and Burnham Road and contribute significantly to the character of the local landscape.

6.3 The woodlands are considered to be a valuable part of the Area of Outstanding Natural Beauty and are suited to their setting within the Medway Gap and river valley.

6.4 Having regard to the position of these woodlands and their high amenity value, Officers consider the trees to be worthy of protection by means of a Tree Preservation Order and it is recommended that the Order should be confirmed.

7 Financial implications

7.1 None
8 Legal implications


9 Recommendations

9.1 For the reasons stated above it is recommended that the provisional Tree Preservation Order made on 3 November 2005 should be confirmed.

10 Background papers

10.1 Location of Tree preservation Order plan 1:10000
10.2 Tree Preservation Order plan 1:2500
10.3 Revocation Notice –
10.4 Site Assessment
10.5 Site Photographs
10.6 Tree Preservation Order
10.7 Letters of representation and response
Appendix 1

Site Plan
Appendix 2

Photographs
View of trees on Trechmann’s Wharf from the opposite side of the River Medway

View of Bores Hole and Trachmann’s Wharf from the opposite side of the River Medway
Appendix 3

Copies of representations received
Mr. D. M. Bowen,
Assistant Director Legal and Contract Services,
Medway Council,
Civic Offices,
Strood,
Rochester,
Kent, ME2 4AU


Dear Mr. Bowen,

Could you please accept this letter as being a formal objection to the Tree Preservation Order referred to above. Talking account of the date of your notice of the making of this TPO you have indicated that representations should be received at the Council by Tuesday the 7th June and this has been sent by Special Delivery to reach you on the 8th June. I would be grateful if you could confirm your receipt of this letter on the 6th by fax to this office.

The TPO comprises three areas described as woodlands, designated W1, W2 and W3 as listed in Schedule 1 of the TPO. Yesterday Mr. Brier kindly faxed me the file notes of Mr. Barkel dated the 13th April 2005 requesting that a TPO be made.

Areas W1 and W2 are situated to the north-west of Pilgrims Road and Rochester Road (A228) on ground known as Bores Hole Quarry. As I understand it this land has a Site of Special Scientific Interest designation (reference unknown). The list of notifiable operations pertaining to a SSSI is very extensive, and not only includes work to trees, but also to the under-storey and ground flora. It is fair to say that this is one of the stricter instruments of control that may be exercised upon a site and that in order to secure consent for any of the notifiable actions a rigorous test of justification must be undertaken.

In Mr. Barkel’s memo, other than a general citing of the amenity, ecological and landscape value of these woodland areas there is no specific assessment methodology indicated. With reference to the DTER TPO Guide to the Law and Good Practice (the “Blue Book”), at paragraph 3.4 a Local Authority is clearly obliged to respect good arboricultural or silvicultural management and in these circumstances the Council has not advanced any reasons why it should consider the designation of a SSSI might be regarded as inadequate in terms of tree protection. In fact the management obligations of an owner are far more onerous for a SSSI than a TPO.

In addition there is no indication of the use of any non-statutory procedures that are even-handed and open in manner as required at paragraph 3.38 of the Blue Book.
The Medway Council (Land at Bore's Hole and Trechmanns Wharf, North Halling) TPO 2005

There is mention in Mr. Barkel's comments in respect of these two woodland areas of there being a development potential, which might threaten the SSSI. The actuality is that the proposal north of the A228 is a proportionally minor area and is clearly confined. The assumption of a negative impact and loss of habitat is on the face of it a rather perfunctory reaction and has clearly not taken account of the far reaching context of the application as a whole.

Irrespective of all this, absolutely nothing can take place without a consent in SSSI terms. On this basis, as it fails to meet the requirements of TPO guidance, I fail to see why a TPO should be necessary. The purpose of a TPO is most distinctly not to merely frustrate development.

The Trechmanns Wharf site is designated as woodland area W3. There is some ambiguity as to the land ownership at the northern end and the Council will need to check that the neighbouring landowner has been notified in terms if the TPO actually applies to his land.

I note that the designation of this land in the Medway Local Plan (policy BNE 31) does not actually exclude the very specific type of development proposed. The making of a woodland TPO is a very distinct form of protection. In effect, although there is no conclusive description of what constitutes a woodland in British and European legislation or guidance, my own personal view is that it is actually a defined land use. The reason I believe this to be so is that a woodland need not necessarily have any trees on it at any one time, as it may have been recently clear-felled or coppiced. Whilst the selective modification or removal of woodland may still be appropriate within a woodland TPO, the fundamental point is that this designation should not be employed lightly and should not be employed to effect a change of land use category independently of the formal planning process.

There is no formal TPO assessment in the terms required in the Blue Book and certainly no justification for a change of land use. The correct procedure, given that the expressed concern of the Council is in respect of development potential, is for an Area TPO to be made. An Area TPO can be made in the absence of a formal assessment and indeed its use is encouraged to provide control in these circumstances by a Local Authority.

In conclusion I am registering a formal objection to this TPO for the reasons discussed above in the following terms.

1. The areas W1 and W2 to the north of the A228 have not been formally assessed and are already designated as a SSSI and therefore the TPO is superfluous.

2. The area W3 to the south of the A228 has not been formally assessed and should more properly be protected by an area category TPO.

You will note that this objection is not attempting to remove the controls upon the site but to ensure that the instrument of the TPO is used correctly in accord with government guidance. As is also encouraged within the Blue Book at paragraph 3.37 I would welcome further discussion and would be pleased to accompany the Council's Tree Officer on the required further site visit.

Yours sincerely,

Jim Quaife
Dip Arb (RFS), F Arbor A.
AA Registered Consultant
Director's office
Development and Environment
Medway Council
Compass Centre, Chatham Maritime
Chatham, Kent ME 4 4YH

Dear Sir,

Medway Tree Preservation Order 2005

We refer to your letter of 13th October addressed to our clients arboriculturalist Mr. Quaife and confirm that we are instructed by Palm Developments Limited. We attach representations on behalf of our clients receipt of which please acknowledge. Please also confirm that neither you nor any other officer of Medway Council will confirm the Order until the proper procedures have been carried out as set out at paragraphs 3.32 to 3.43 of the April 2000 Guide. Not only have those procedures not yet been followed but you have in any event precluded yourself from exercising any local delegated authority since you state that you have already decided to confirm the order.

Kindly confirm what procedure your Council will now take.

Yours Faithfully

Kingsley Smith Solicitors LLP

Enc
Tree Preservation Order 2005
Bores Hole and Trechmans Wharf

Owners’ Representations on Confirmation

1. In these representations, the areas are identified according to the designations on the plan attached to the Order. However area W1 should be divided between the area in the base of Bores Hole (here described as Area W1a) and the peripheral areas (here described as Area W1b). For the purposes of identification W1a is edged red on the annexed plan Marked “O1”. It may be necessary for the parties to attempt to agree before the confirmation hearing an appropriate plan. Mr. Barkel said on pages two and four of his letter dated 12th August that he would contact Mr. Quaife to arrange a site visit. He has not done so yet you require our clients to comment on your latest letter by Thursday.

2. It is presumed that Medway Council will follow government advice in the April 2000 Guide to the Law and Good Practice, particularly adopting a non-statutory procedure to demonstrate that decisions will be taken in an even-handed and open manner by the appointment of a members’ committee or sub-committee, the need for those members to visit the sites and then to conduct a hearing and inquiry at which our clients and the Council’s Tree Officer/s have the opportunity to state their case.

3. The owners are disappointed that the Order was made without any prior consultation or proper assessment by officers. Their motive appears to have been to support an objection to a planning application to provide an improved road access to the wharf. The application resulted in numerous (misconceived) local objections that the re-activated wharf will result in an unacceptable increase in traffic movements on the A228. It has since been refused. The application had nothing to do with W2, and affected only a tiny part of W1.

4. On page two of his letter dated 12th August 2005, Mr. Barkel (under the heading “5. Para6.”) referred to his “considered opinion on the removal of an area of established woodland in order to make way for an industrial road junction.” He requested submission “of any additional information on the positive far reaching context of the application which would be considered in the decision whether or not to confirm the TPO.” All of that material is in the planning application file with the planning department. It includes support from Sea & Water (Department for Transport), SEEDA Marine Division, The River Medway Business Users Association and Medway Ports Authority. It seems for your letter and enclosure of 13th October that this has not been considered yet you say that you intend the confirm the order.

5. Turning now to consider the various areas individually, Area W2 does have amenity value and can be seen from public vantage points. This discrete area at the
top of cliff is within the SSSI and entirely discrete and remote from the other areas. There cannot ever have been any reason for the Council to consider it “expedient” to make the Order.

6. Area W1(a) in the foot of Bore’s Hole is not capable of observation from any public vantage point with the slight possibility of a short distance when climbing the steep footpath along the northern boundary. The trees cannot possibly have been “expedient in the interests of amenity” to make the order and it certainly should not be confirmed. In any event it lies within the SSSI. The planning application would hardly (if at all) affect this area and if the requisite approvals are forthcoming, some trees (a relatively modest number) would be removed.

7. Trees with Area W1(b) can be viewed from many public vantage points but again few would be affected by the application and the effect on public amenity should be judged against what would remain if permission is granted. It follows that Mr. Barkel was correct in the section to which we have already referred but your purported “Assessment” says nothing about this aspect.

8. There are fundamental flaws with the TPO in respect of Area W3. Mr. Barkel observes on the third page of his letter that protection of this area cannot be achieved by use of a single, group or area TPO and thus the only other option is a Woodland Order as made. As a matter of both fact and law, there is no woodland on this area and so confirmation would be unlawful. There are several reasons for this.

9. First a TPO can only be made in respect of trees. This area W3 primarily comprises scrub, regeneration and shrubs (please refer to paragraph 44 of Circular 38/78). There are some trees (e.g. along part of the railway boundary) but even if the Order is confirmed, our clients will clear most of the site to permit the safe and commercial operation of their wharf.

10. Second those trees which exist do not make the area Woodland. There is TPO definition of woodland.

11. You know from the correspondence why Mr. Quaife advises that the making of a woodland order where land has laid idle these days renders it almost impossible to resume the original use.

12. Mr. Quaife also suggests that it is relevant to assess the scientific circumstances to determine whether woodland exists. In short, the essential environmental elements of woodland are absent here. The complex inter-relation between plants, insects and mammals which form the essential characteristic of a woodland does not exist here. We shall ask the confirming authority to hear Mr. Quaife’s evidence.
13. Our clients rely on the fact that this area does not constitute woodland. Careful consideration of the definition of "woodland" was given by Mr. Andrew Roberts on 2nd July 2004 during a three day public inquiry into a series of appeals involving the Countryside Agency and the Ramblers Association. He was referred to numerous authorities. He determined that in considering "whether naturally regenerated trees (as opposed to plantations) should be classified as woodland rather than open country, it seems to me that the criterion should be that of whether trees are present in such numbers that the canopy covers 20% or more of the land at the time of my decision". Whilst that decision was not on a TPO confirmation, it accords with common sense as well as all the definitions and issues put to him. On any showing W3 does not comprise trees (as distinct from scrub, regeneration and shrubs) having any significant cover and certainly not 20%.

14. An understandable desire to safeguard an area having both amenity value and the potential to mature into woodland, cannot lawfully be achieved by a Tree Preservation Order which can only lawfully be made in respect of extant trees or woodland.

Kingsley Smith Solicitors LLP
18th October 2005