

Joint Mitigation Protocol



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Preambles

The Protocol is intended to reflect the Ministry of Housing, Communities and Local Government (MHCLG) Tree Preservation Order Regulation's evidential requirements, the spirit of the Civil Procedure Rules and the statutory requirement in England only (Section 115 of the Environment Act 2021, Section 96A, Highways Act 1980) placed on Local Authorities for the Duty to Consult when removing healthy street trees.:

- Pre-action contact and exchange of information are encouraged without the need to commission engineering or arboricultural reports.
- Should initial mitigation proposed by the Tree controller be accepted by the insurer, the case can be closed. (Fast-Track)
- Improved quality of evidence and information is presented in support of the claim in order to inform decisions and to support Duty to Consult should street tree removal be proposed by the Tree Controller.
- The time period between notification and completion of cooperation or rejection of the claim is reduced.
- The issue of tree removal or crown reduction works are completed on a non-adversarial and ecologically sound basis.
- There is an opportunity for both parties to meet informally without prejudice to liability and resolve disputed cases.
- Requests for records of tree maintenance for up to ten years prior to the notification of damage will be considered reasonable and supplied by the Tree Controller.

Definitions

Reference is made throughout the Protocol to some key terms, which are defined as follows:

Duty to Consult – under s115 of Environment Act 2021, it has become a statutory duty that all local authorities in England are required to consult with residents on the felling of street trees where no exemptions apply. This became mandatory on 01/12/2023..

Heave – The expansion or swelling of clay soil beneath building foundations causing upward movement, or the opposite of subsidence.

Hortlink 212 – This refers to the report entitled *Controlling Water Use Of Trees To Alleviate Subsidence Damage, the Horticulture Link project 212* which was issued in May 2004 by the University of Cambridge and East Malling Research. Available at: [www.bre.co.uk/filelibrary/pdf/projects/HortLink_Project_Final_Report_\(2004\).pdf](http://www.bre.co.uk/filelibrary/pdf/projects/HortLink_Project_Final_Report_(2004).pdf) This report was updated in 2014 by the Hipps NA and Atkinson CJ. *Pilot study to determine the feasibility of using existing data to determine the impacts of tree pruning on subsidence incidents on swelling clay soils* (Beyond Hortlink 212). Available at: [www.subsidenceforum.org.uk/pdf_word/Full%20report%20V10%20\(secured\).pdf](http://www.subsidenceforum.org.uk/pdf_word/Full%20report%20V10%20(secured).pdf)

Insurer/Building Insurer – the buildings insurance company who has accepted a claim for damage to their insured property.

Loss Adjuster – a third party company, instructed by the insurer to manage and investigate the insurance claim.

Property – the domestic dwelling which is alleged to have suffered from tree root subsidence damage.

Protocol – The Joint Mitigation Protocol.

Submission of Evidence – the site investigation evidence gathered in support of the allegation that the tree has caused/continues to cause tree root subsidence damage to the property.

Subsidence damage – the crack damage to the Property which the Insurer alleges to have been caused by tree root subsidence.

Tree Controller – the party who owns and/or is responsible for the maintenance of the implicated tree. Usually the Local Authority.

Tree-related subsidence – the process by which damage occurs to a property built on a shrinkable soil where roots from trees encroach beneath the foundations, remove moisture, cause the soil volume to shrink, resulting in crack damage to the property.

Without Prejudice – without detriment to any existing legal right or claim.

Mediation – the without prejudice process where a neutral third party (the mediator) helps disputing parties reach a voluntary and mutually agreeable resolution to a dispute.

Protocol

First Notification

When the Insurer (or their Loss Adjuster on their behalf) first becomes aware of a potential claim for subsidence damage resulting from alleged tree root influence, they will within 28 days, notify the Tree Controller, (usually a Local Authority) and inform them of the situation by letter or email providing detail of the address of the Property and general identification of the subject tree(s) and a brief description of the building damage.

This first notification should not include Engineering or Arboricultural reports and requests the following information from the Tree Controller within 28 days:

1. Contact details of the individual/department responsible for the control of the tree, along with any reference, to assist communication regarding tree management and liability.
2. Contact details of their liability Insurer if appropriate.
3. Any mitigation proposal the tree controller may have on a Without Prejudice basis / OR confirmation that Submission of Evidence is required.

It should be noted that Loss Adjusters or their representatives may have pre-established contacts within the Local Authority and this will negate the need for steps 1 and 2 above.

Without prejudice to rights at law, Insurers may waive rights of recovery if the response is the proposal of tree removal or proposed Hortlink 212 crown reduction works and a commitment to regular regime of management. This will be negotiated on a claim-by-claim basis and can negate the need for either Engineering or Arboricultural reports and expedite cases. (Fast-Track in Flowchart)

If Insurers do not wish to waive the rights of recovery and want to pursue a claim in nuisance/negligence for damages, a Submission of Evidence will be required.

Evidence

Following giving notice to the Tree Controller and receiving the response including proposed mitigation (if any), the Insurer (or their Loss Adjuster on their behalf) will submit either:

- a) A letter confirming withdrawal or deferral of the case if the mitigation proposed by the Tree Controller is accepted.
- b) A Submission of Evidence, see Appendix A. The Insurer may wish to submit an interim report by a Chartered Surveyor or Engineer, (not an arboricultural report) as lengthy data collection, level monitoring in particular, may prolong the case.

The Submission of Evidence should be conclusive with regard to causation, damage, and mitigation requested. This submission to be validated by the tree controller within 28 days of receipt. If the evidence is insufficient, it will not be validated and this is to be communicated to the Insurer.

Freedom of Information (FOI) or Environmental Information Regulation requests for historic records from a wider radius than that defined by the postcode format "SX1 5xx" will not be considered appropriate and be deemed to fall outside the remit and also the spirit of The Joint Mitigation Protocol.

The evidential documentation required will be based on Ministry of Housing, Communities and Local Government (MHCLG) evidential standards required (and any subsequent changes) when applying for works to trees covered by Tree Preservation Orders implicated in building damage claims and Evidential Requirements detailed in Appendix A.

Mitigation

Having been provided with the Evidence under the terms of the protocol, mitigation proposals should be communicated to the Insurer (removal or pruning as defined in the JMP's Tree Pruning Criteria) and should be carried out and completed within 13 weeks of the date of mutual agreement that the Evidence provides, on the balance of probability, proof the tree is implicated in the damage observed or that the tree can be removed for arboricultural reasons on a Without Prejudice basis.

Once agreed the mitigation will be undertaken on a Without Prejudice basis to avoid any delay created by debate over liability. If no pruning or removal works are considered to be necessary, this is to be communicated to the Insurer.

In the event it is decided to retain the implicated tree and mitigate any future risks through future pollarding and/or pruning works, the tree controller agrees to undertake any such future mitigation work regular regime of management.

Mediation

A joint site visit could assist in reaching an agreement on the mitigation, if this visit cannot resolve what action should be taken, then Mediation could be considered to avoid litigation.

In the event of a dispute between two parties following this Protocol, the parties agree to first attempt to resolve that dispute through mediation. This to be conducted by a mediator mutually agreed upon between the parties and with prior agreement on how to share that mediator's costs. The parties agree to attempt to resolve the dispute using mediation before any steps are taken to litigate a dispute.

Appendix A:

Joint Mitigation Protocol Evidential Requirements for Council Owned Trees

First Notification:

Building Insurer (or their Loss Adjuster on their behalf) visits the property and assesses if the cause of damage is subsidence and if a council tree or other factors are likely to be implicated.

If the tree is identified as a potential cause, then the Tree Controller/Risk Manager is identified and informed of the situation by letter or email providing detail of the address of the Property and general identification of the subject tree(s) and a brief description of the building damage.

This first notification should not include engineering or arboricultural reports, and requests the following information from the Tree Controller within 28 days:

- 1 Contact details of the individual/department responsible for control of the tree, along with any reference, to assist communication regarding tree management and liability.
- 2 Contact details of their liability Insurer if appropriate.
- 3 Any mitigation proposal the tree controller may have on a Without Prejudice basis / OR Request a Submission of Evidence.

Within 28 days of receiving the correspondence referred to above, the Tree Controller will respond to the Building Insurer (or their representative) giving responses to questions 1, 2 & 3 above.

Upon receiving the Council's responses to questions 1,2 & 3, the Building Insurer (or their representative) will submit either:

- a) A letter confirming mitigation proposed by the Tree Controller is accepted.
- b) A letter confirming mitigation proposed by the Tree Controller is not accepted and evidence detailed in Appendix A will be submitted once evidence has been gathered. The Insurer may wish to submit an interim report by a Chartered Surveyor or Engineer.
- c) A submission of evidence will be provided as requested and detailed in Appendix A. The Insurer may wish to submit an interim report by a Chartered Surveyor or Engineer.

Evidence:

If evidence is requested or the mitigation proposed is not accepted or and the claim is to be progressed.

A “**Submission of Evidence**” with the requested following evidence and documents, in line with MHCLG TPO evidential requirements.

An Engineer’s or Chartered Surveyor’s Report Including:

- 1 The Property and Damage Detail.** A description of the property, including a description and location of the damage, crack pattern and BRE 251 classification, date damage first occurred/noted and the geological strata for the site identified from the geological map.
- 2 Building Foundations.** Plan and profile of the building and foundations with details of any previous underpinning or building work.
- 3 Site Plan.** Plan of the site showing location of the building in relation to all trees and significant vegetation in vicinity of the site.
- 4 Repair Costs.** Proposals and estimated costs of options to repair the damage.
- 5 Trial Pits/Boreholes.** The profile of a trial pit/borehole excavated to identify foundation type and depth and soil characteristics.
- 6 Roots.** The location and identification of roots found including from beneath underside of foundation. When root identification is inconclusive or multiple trees of the same species are present, DNA testing should be considered.
- 7 Monitoring and Seasonal Movement.** Measurement of the extent and distribution of vertical movement using both crack monitoring and level monitoring that demonstrates seasonal movement and resultant continuing damage.

When level monitoring is not possible, state why and provide crack monitoring data that also demonstrates seasonal movement.

Data provided must be sufficient to show a pattern and frequency of movement consistent with the presence of the implicated tree(s) over a period of time sufficient to demonstrate seasonal movement.

- 8 Soil.** The sub-soil characteristics including soil type (particularly that on which the foundation rests), liquid limit, plastic limit and plasticity index.
- 9 Arboricultural Report.** A report from an Arboriculturist supporting the tree work proposals including arboricultural options for avoidance or remediation of indirect tree related damage.
- 10 Other Structural Damage.** Technical evidence in respect of other structural damage (e.g., garden walls, drains, paving, driveways etc.) should be provided by a relevant engineer, buildings/drainage surveyor or other appropriate expert.

Within 28 days of receipt of the Evidence, the tree controller will validate the Evidence, confirming this has adhered to MHCLG requirements or has not met these requirements.

Additional information

Heave Assessment. Where tree removal is proposed, a heave assessment should be submitted in the Engineer's or Chartered Surveyor's report.

Level distortion survey. A structural assessment used to measure deviations in the verticality of walls and variations in horizontal levels. It helps determine whether distortions may be caused by subsidence or structural defects.

- A** Once the tree controller has validated the Evidence and a decision on works has not been made by the tree controller within 56 days of submission of the "Evidence" then the case falls outside this Joint Mitigation Protocol.
- B** The tree controller has a Duty to Consult if street tree removal is proposed and has a minimum 56 day consultation period. If delay occurs, for example, public opposition to tree removal is received, this will be managed by the tree controller and communicated to the Insurer.
- C** Mitigation is to be completed within a maximum of 13 weeks of the date of agreement Submission of Evidence validation.
- D** If tree removal cannot be agreed without additional longer term level monitoring evidence, then the Tree Controller may arrange for pruning in line with guidance in Appendix B to be completed as soon as is practicable but no later than 13 weeks from date of Submission of Evidence.
- E** It is assumed the Insurer will arrange repairs within a reasonable period of time following mitigation works.
- F** By mutual agreement all the above timescales may be varied.

Appendix B:

Tree Pruning Criteria for Use in Conjunction with the Joint Mitigation Protocol

Summary

The following pruning criteria have been produced by the arboricultural subgroup of the Joint Mitigation Protocol. The principal aim of the group was to produce an agreed approach to tree pruning that could be implemented in respect of producing a specification when tree removal was deemed inappropriate or undesirable in the context of a tree related insurance claims.

Essential to this aim was the requirement to be able to specify pruning works to the tree that resulted in the trees' crown volume being reduced to a pre damage state, then subsequently maintained at this scale by instigating a regular regime of management.

Within this aim it was also important that the pruning work achieves a reduction in the tree's water uptake in line with the findings of the Hortlink 212 Project's research. Research that was qualified and added to by BRE IP7/06 Pruning Trees to Reduce Water Use and in Hortlink 212 published in 2004 report to determine the efficacy of tree pruning on water use.

In seeking to balance the requirements of BS:3998 and undertaking sufficient pruning to reduce water uptake, it should be noted that Crown Reduction in the order of 30% to 50% equates to a reduction in crown volume of 70% to 90% thereby complying with BRE IP7/06. The supplementary report to Hortlink 212 published in 2014 confirms that these reduction percentages in crown volume are effective in reducing water uptake.

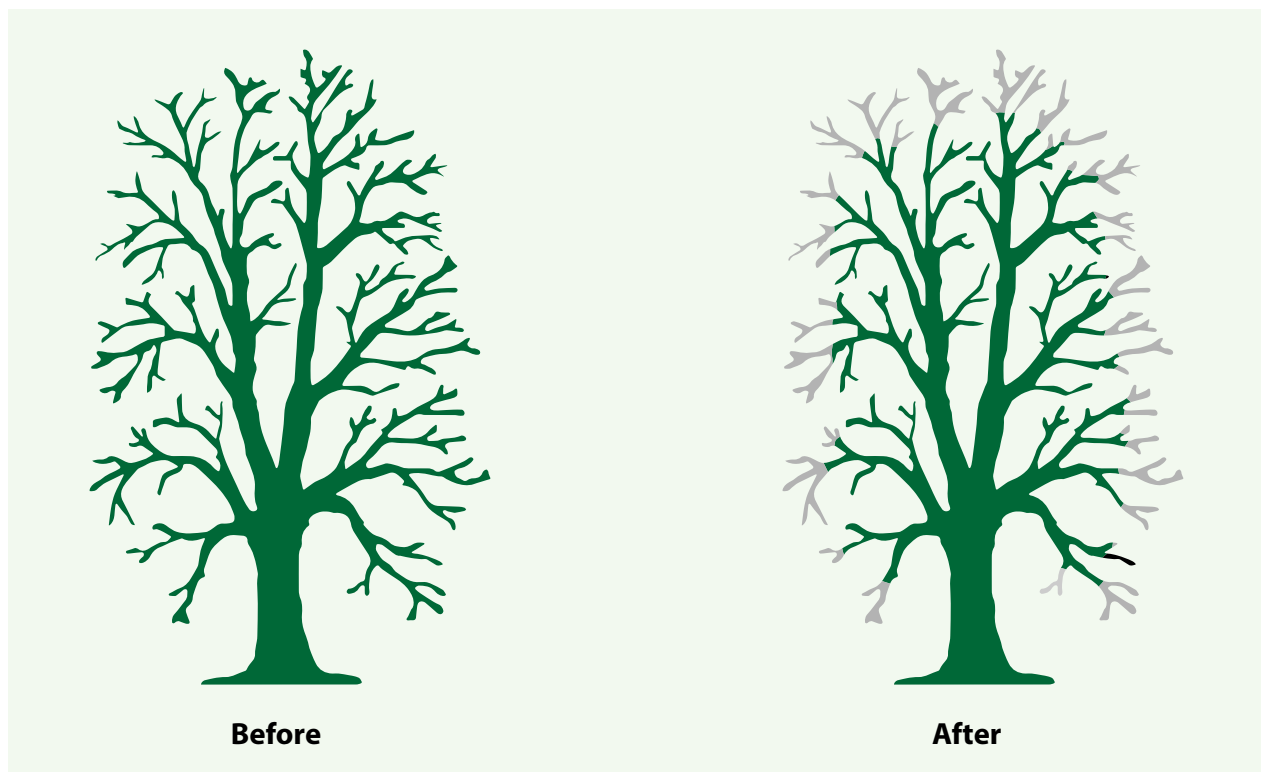


Figure 1. 30% Crown reduction equivalent to 70% foliar reduction (taken from Institution of Structural Engineer's publication 'Subsidence' 2023)

Criteria

The following criteria represent the groups' considered view on the best way forward to reach a consensus on the scale and type of pruning required to be able to retain a tree rather than remove it.

1. Selection of tree pruning proposals to mitigate subsidence damage

Considerations

- **Species characteristics**

Growth pattern and physiological response to pruning of a particular species of tree.

- **Age, vigour & health**

Vigour of tree based on its previous shoot extension growth, leaf size etc. prior to initial pruning, assessed on inspection by a qualified arboriculturist.

- **Size (crown volume)**

Gives a relative indication of how much water the tree could potentially use. With respect to the JMP this will be determined by assessment by a qualified arboriculturist (i.e. professional judgement).

N.B. Using mature species future climax height as a factor is irrelevant and misleading (see Institution of Structural Engineer's (ISE) document Subsidence 2023 Chapter 8. 8.1.1). Presupposing a regular management regime is agreed, the maximum species height for a tree contained by crown reduction works should not be a consideration.

- **Distance of tree from the site of damage**

Proximity of a tree from building damage is a factor and dependant on distance, tree species and type of building, tree management options are regularly considered and implemented (see London Tree Officers Association (LTOA) Risk Management Strategy for Tree Root Claims www.ltoa.org.uk)

The information from the Kew Tree Root survey (Cutler and Richardson, 1989) in conjunction with the information in ISE's document Subsidence, Chapter 8, Table 8.1 and David Cutler's qualifications in 8.2.3 needs careful consideration in relation to trees and distance to buildings.

The term "within a tree's influencing distance" is theoretical and a decision on removal should not be based on this criteria when an assessment is made. However, there will be occasions when a tree is extremely close to a property on a proven clay soil where greater consideration should be given to its removal or management.

- **Level of damage**

On the basis that the lower the category of damage the less the soil has to recover for damage to stabilise. When damage is listed as BRE category 1 & 2 early pruning and instigation of an agreed management regime should be considered. However, all other factors must also be considered before any agreement is reached.

- **Other vegetation control works**

The removal or pruning of other vegetation will also result in soil recovery and building stabilisation and therefore needs to be considered as a measure for mitigation alongside any proposed work to local authority owned trees.

2. Extent and frequency of pruning works proposed

With respect to new claims, when a tree is implicated and it is considered that cyclical pruning may provide a remedy to building damage, the specification for the initial crown reduction works should be agreed in line with current research and available data.

The final specification for initial crown reduction will be dependent on the criteria summarised above but may vary between approximately 30% to 50% crown reduction which equates to 70% to 90% foliar reduction (subject to species). This is on the basis that the completed works will reduce the tree's leaf transpiration volume to a pre-damage scale and create a crown architecture that reduces transpiration.

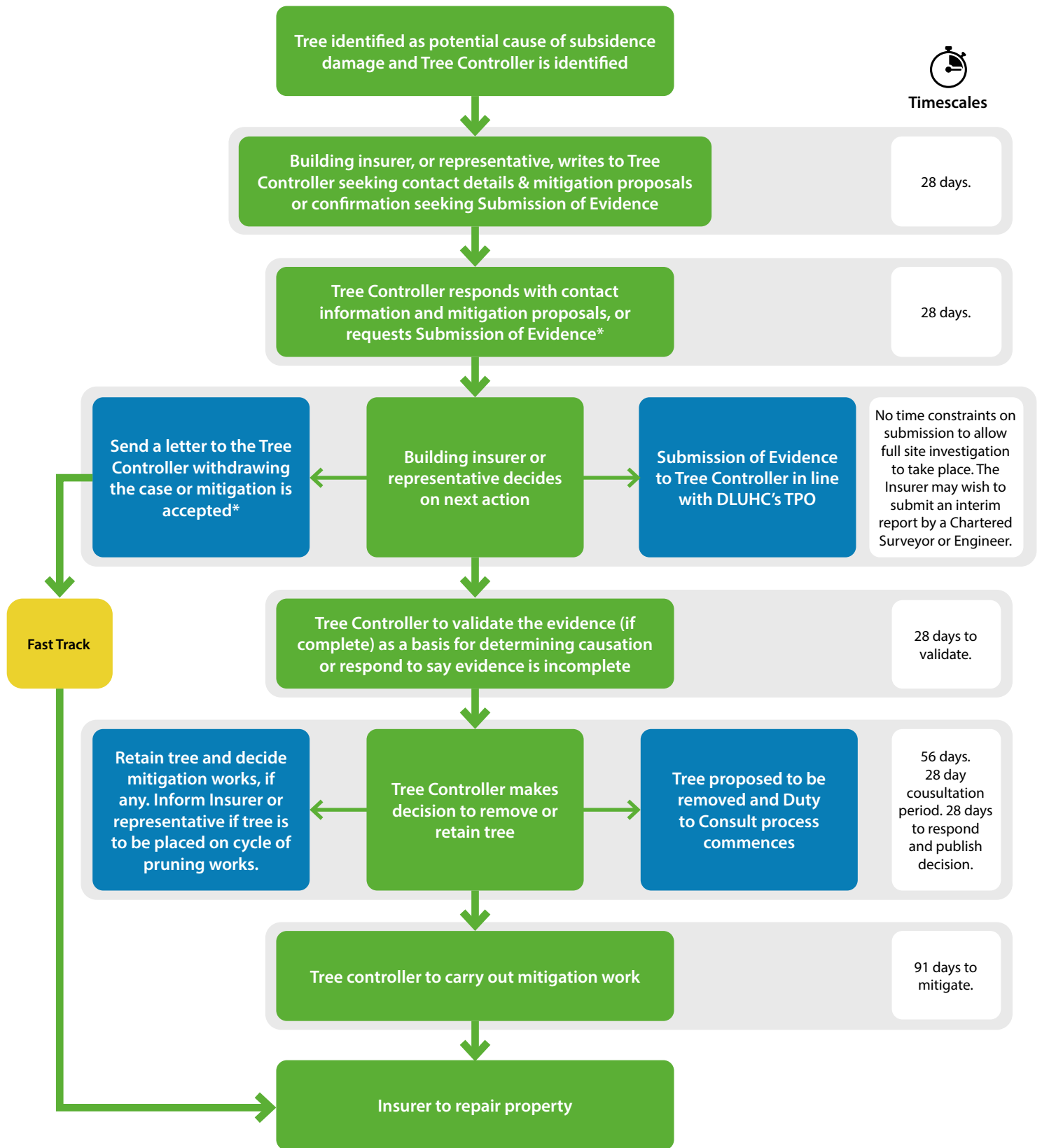
N.B. It should be noted that initial crown reduction that goes beyond 30% of a previously unpruned tree is defined in BS 3998 as being severe pruning and should only be undertaken where extenuating circumstances warrant a heavier initial reduction.

The frequency of agreed pruning should also take account of all other factors; however it is generally accepted that pruning every two to three years is likely to be acceptable.

Following the initial pruning, the tree's assessed volume should be less than at the time the damage occurred. The objective is then to maintain building stability by a regime of pruning that keeps the tree volume to pre-damage levels.

Appendix C:

Flowchart of processes and actions



* Without prejudice to rights at law, Insurers may waive rights of recovery if the response is the proposal of tree removal. This may also apply to proposed Hortlink 212 crown reduction works and a commitment to regular regime of management.

