LOCAL GOVERNMENT AND REGENERATION COMMITTEE

AGENDA

30th Meeting, 2012 (Session 4)

Wednesday 19 December 2012

The Committee will meet at 10.00 am in Committee Room 1.

1. **Decision on taking business in private**: The Committee will decide whether to take item 5 in private.

2. **Subordinate legislation**: The Committee will consider the following negative instruments—
   

3. **Public services reform and local government: strand 2 – benchmarking and performance measurement**: The Committee will take evidence from—
   
   Derek Mackay, Minister for Local Government and Planning, and David Milne, Team Leader, Local Government Outcomes and Partnerships Unit, Scottish Government.

4. **High Hedges (Scotland) Bill**: The Committee will take evidence on the Bill at Stage 1 from—
   
   Derek Mackay, Minister for Local Government and Planning, Gery McLaughlin, Head of Community Safety Law and High Hedges Bill Team Leader, and Norman MacLeod, Senior Principal Legal Officer, Scottish Government Legal Directorate, Scottish Government;

   and then from—

   Mark McDonald, Member-in-Charge;

   John Brownlie, Policy Manager, Community Safety Unit, and Emma Thomson, Principal Legal Officer, Scottish Government Legal Directorate, Scottish Government.
5. **Regeneration inquiry**: The Committee will consider details for fact-finding visits, and the launch of its call for evidence, as part of the inquiry.

6. **High Hedges (Scotland) Bill (in private)**: The Committee will consider the evidence received.

7. **Scottish local government elections 2012 (in private)**: The Committee will consider the evidence received.

David Cullum  
Clerk to the Local Government and Regeneration Committee  
Room T3.60  
The Scottish Parliament  
Edinburgh  
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The papers for this meeting are as follows—

**Agenda item 2**

Note from the Clerk  
LGR/S4/12/30/1

**Agenda item 3**

PRIVATE PAPER  
LGR/S4/12/30/2 (P)

**Agenda item 4**

Report from the Subordinate Legislation Committee  
LGR/S4/12/30/3

Correspondence from the Finance Committee  
LGR/S4/12/30/4

Committee briefing  
LGR/S4/12/30/5

Paper from the Clerk  
LGR/S4/12/30/6

PRIVATE PAPER  
LGR/S4/12/30/7 (P)

**Agenda item 5**

PRIVATE PAPER  
LGR/S4/12/30/8 (P)

**Agenda item 6**

PRIVATE PAPER  
LGR/S4/12/30/9 (P)

**Agenda item 7**

PRIVATE PAPER  
LGR/S4/12/30/10 (P)
Local Government and Regeneration Committee

30th Meeting, 2012 (Session 4), Wednesday, 19 December 2012

SSI COVER NOTE

SSI title and number: Energy Performance of Buildings (Scotland) Amendment (No. 3) Regulations 2012 (SSI 2012/315)

Type of Instrument: Negative Instrument

40 day date: 16 January 2012

Local Government and Regeneration Committee deadline to consider SSI: 7 January 2012

SSI drawn to Parliament’s attention by Sub Leg Committee: Yes – see annexe

Purpose of Instrument:


2. This instrument supports the delivery of UK carbon and energy reduction policies by amending regulations 11 to 14 of the Energy Performance of Buildings (Scotland) Regulations 2008 to enable access, by a wider range of authorised parties, to energy performance data held on the Scottish EPC register. In doing so, it introduces a schedule (Schedule 1\(^1\)) which lists such parties, the purposes for which energy performance data can be sought and the conditions applicable to access to, and use of, the data.

3. Regulation 4 of this instrument also corrects a minor error in the Energy Performance of Buildings (Scotland) Amendment (No. 2) Regulations 2012 (SSI 2012 No. 208).

\(^1\) Although this schedule is currently the only schedule to the 2008 Regulations it is numbered as Schedule 1 in anticipation of the addition of a further schedule or schedules in relation to disclosure of information regarding the Green Deal. Section 10 of the Energy Act 2011 enables regulations to be made to amend the 2008 Regulations for this purpose.
ANNEXE

Energy Performance of Buildings (Scotland) Amendment (No. 3) Regulations 2012 (SSI 2012/315)

This instrument amends the Energy Performance of Buildings (Scotland) Regulations 2008 (“the principal Regulations”), principally to provide for disclosure of energy performance data in certain circumstances. It also revokes a number of provisions in the Energy Performance of Buildings (Scotland) Amendment Regulations 2012 and in the Energy Performance of Buildings (Scotland) Amendment (No. 2) Regulations 2012 which are redundant as a result of the amendments made by this instrument to the principal Regulations.

This instrument also corrects an error which was introduced into regulation 7 of the principal Regulations by the Energy Performance of Buildings (Scotland) Amendment (No. 2) Regulations 2012.

The instrument is subject to the negative procedure and comes into force on 21 December 2012.

In considering the instrument, the Committee asked the Scottish Government for clarification on certain points. The correspondence is reproduced in Appendix 1.

This instrument inserts a definition of the term “excluded building” into the principal Regulations. The term is then used so that the keeper of the register cannot disclose energy performance data which relates to an excluded building (regulation 12A), or data which includes information revealing the location of an excluded building (regulation 13). The definition extends to a “building owned, occupied or used from time to time by […] the Royal Family”. The Scottish Ministers have confirmed that this does not relate solely to official residences of the Royal Family in Scotland, i.e. the Palace of Holyroodhouse.

No definition of “the Royal Family” is provided in the instrument, and it does not appear to the Committee that there is a definition elsewhere in statute or customarily used which assists. Instead, the Royal Family appears to mean different things in different contexts. The Scottish Ministers have referred to the website of the British Monarchy by way of explanation. Differing definitions appear to be applied for differing purposes even within that website. It accordingly appears to the Committee that confusion may arise as to the scope of this exclusion.

A further difficulty arises in understanding what a building “used from time to time” is. The Scottish Ministers have advised that this is not supposed to relate to any sort of property right. They also commented that neither a single use nor mere attendance at an event held within a building would be sufficient. However, the Committee does not consider that this assists in ascertaining what would be sufficient for the purposes of this provision. It accordingly considers that the scope of this exclusion is unclear as a result.

This instrument inserts a new regulation 12A into the principal Regulations, and substitutes in its entirety regulation 13. These provisions are similar in form. Both relate to the disclosure of data, although regulation 12A concerns data relating to a particular
building or building unit, whereas regulation 13 concerns bulk access data. The conditions applicable before disclosure may be authorised differ slightly.

Both of these regulations contain provision, at paragraph (3), that “where an opt-out is in effect in respect of data relating to the building or building unit, the keeper must, when disclosing information under paragraph (1), inform the authorised recipient that an opt-out is in effect.” In relation to regulation 12A, it is clear what “the building or building unit” means in paragraph (3): it is the particular building or building unit about which the request has been made. It is less clear how this operates in relation to regulation 13. The request under regulation 13 is not for data relating to a particular building or building unit, but instead for “one or more specific descriptions of data”. It is accordingly not clear what is meant by “the building or building unit” for the purposes of paragraph (3): no building or building unit has been referred to elsewhere in the regulation.

The Scottish Ministers have indicated that the intention is that the benefit of the opt-out will still apply when applications are made under regulation 13, and they appear to suggest that paragraph (3) should be read as if it provided for the keeper to notify authorised recipients of any opt-outs in place in respect of any building or building unit which falls within the description of data sought. While this may have been the intention, it is not clear that the drafting delivers it adequately. The Committee accordingly considers that the form or meaning of regulation 13(3) could be clearer.

The Committee draws the instrument to the attention of the Parliament on reporting ground (h) in respect of the following two matters:

The form or meaning of the instrument could be clearer in that it is unclear who falls within the definition of “the Royal Family” for the purposes of the definition of “excluded building” and it is also unclear what “use from time to time” of a building entails, standing the Scottish Ministers’ explanation that this is not intended to refer to a property right, that single use would be insufficient and mere attendance at an event in a building would be insufficient.

The form or meaning of regulation 13(3) could be clearer, in that it is not clear from its drafting that the keeper must notify authorised recipients of the existence of any opt-outs in place in relation to buildings or building units about which information is being disclosed by virtue of a request under regulation 13(1), when that appears to be the Scottish Ministers’ policy intention.
APPENDIX 1

Energy Performance of Buildings (Scotland) Amendment (No. 3) Regulations 2012 (SSI 2012/315)

On 29 November the Scottish Government was asked:

1. The definition of “excluded building” inserted by regulation 3(c) provides that it means, among other things, “a building owned, occupied or used from time to time by… the Royal Family”.

a. Does this extend only to official residences of the Royal Family in Scotland (i.e. the Palace of Holyroodhouse)?

b. If it is not, and the term accordingly includes private residences, the term “Royal Family” does not appear to be defined. Does it include any person who is in the line of succession to the throne of the United Kingdom and Northern Ireland, or does some more limited definition (e.g. those entitled to be styled “Royal Highness” in virtue of the Letters Patent of King George V dated 30 November 1917) apply? Please explain the intended meaning of the term, and whether this is considered to be sufficiently clear for the purposes of identifying which buildings fall within the definition of “excluded building”.

c. Ownership and occupation of a building (the latter presumably under a lease or licence to occupy) may be relatively easily determined as matters of fact and law. However, the exclusion also extends to buildings “used from time to time”. What property right is intended to be encapsulated by this formulation, and what degree of use is necessary in order to establish the exclusion? Is repeated use of whatever nature necessary, and does it, for example, include buildings to which members of the Royal Family merely have resort on occasion?

2. Regulation 6 substitutes in its entirety regulation 13. The new regulation 13(3) provides that the keeper of a register must inform the authorised recipient that an opt-out is in effect “[w]here an opt-out is in effect in respect of data relating to the building or building unit”. Standing the requirement in regulation 13(2)(a) that the authorised recipient has made a request for one or more specific descriptions of energy performance data, and the requirement in 13(2)(e) that the disclosure may be made only where the data does not relate only to a particular building or building unit, what building or building unit is being referred to in regulation 13(3)? While this expression may readily be understood in the context of the equivalent subsection of new regulation 12A (which relates to requests relating to a particular building or building unit), it is not clear what this means when the request is for energy performance data of one or more specific descriptions, instead of a request relating to a particular building or building unit.

The Scottish Government responded as follows:

1(a) the definition of excluded buildings does not only extend to official residences of the Royal Family.
Agenda Item 2  

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1(b) The term “Royal Family” is not defined. This is not unusual and the term is used without further definition in various other enactments including for example, section 41 of the Freedom of Information (Scotland) Act 2002 (asp 13) and section 7(6) of the Requirements of Writing (Scotland) Act 1995 (c. 7). It is considered that the meaning of the terms is sufficiently clear without further definition. Information is available on this matter from the official website of the British Monarchy: http://www.royal.gov.uk/ThecurrentRoyalFamily/Overview.aspx

1(c) The formulation of ‘used from time to time’ is not intended to refer to or be related to a property right. This formulation would include regular or repeated occasional use. Use on a single occasion would not be within the ambit of the definition nor, for example, would mere attendance at an event held in a building be sufficient.

2 An opt-out is in effect where the owner or occupier of a building or building unit has given notice (and not withdrawn that notice) to the keeper of a register that data is not to be disclosed so as to enable the contact to be made with the owner or occupier. The keeper of a register may disclose bulk data under regulation 13 provided (among other things) that that data does not relate to a particular building or building unit. The fact that the data may not relate to a particular building does not remove the benefit of the opt-out. It is possible for a request for data to be made and dealt with under regulation 13 which would be sufficient to enable the recipient to contact the owners or occupier of properties. It is envisaged that regulation 13 will be used to support and inform energy and carbon saving initiatives. These may, for example, involve the identification of areas where the buildings have a low energy efficiency rating so as to target the promotion of energy efficiency initiatives. If the owner or occupier of a building or building unit in such an area has given notice that an opt-out is in effect in relation to the building or building this information is to be given to the recipient in terms of regulation 13(3). It is not considered that there is any ambiguity as to the meaning of regulation 13(3) in its context.
Local Government and Regeneration Committee

High Hedges (Scotland) Bill

Evidence session 19 December 2012

Report from Subordinate Legislation Committee

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 27 November and 11 December 2012, the Subordinate Legislation Committee considered the delegated powers provisions in the High Hedges (Scotland) Bill at Stage 1 (“the Bill”)\(^1\). The Committee submits this report to the Local Government and Regeneration Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The High Hedges (Scotland) Bill is a Member’s Bill introduced by Mark McDonald MSP on 2 October 2012. Mr McDonald was assisted in introducing the Bill by the Scottish Government.

3. The Bill introduces a dispute resolution mechanism in relation to high hedges.

4. Mr McDonald has provided a Delegated Powers Memorandum (“DPM”)\(^2\) setting out the need for the delegated powers, how they may be exercised and the choice of procedure applicable to their exercise.

5. In the consideration of the memorandum at its meeting on 27 November, the Committee agreed to write to Mr McDonald to raise questions on the delegated powers. This correspondence is reproduced in the Annex.

DELEGATED POWERS PROVISIONS

6. The Committee considered each of the delegated powers provisions in the Bill.

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\(^1\) High Hedges (Scotland) Bill available at: [http://www.scottish.parliament.uk/parliamentarybusiness/Bills/55315.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/55315.aspx)

7. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in sections 31 (Guidance) and 35 (Ancillary provision).

8. The Committee’s comments and, where appropriate, recommendations on the other delegated powers are detailed below.

**Section 34 – Power to modify meaning of “high hedge”**

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>regulations</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>affirmative procedure</td>
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**Background**

9. Section 34(1) enables the Scottish Ministers to make regulations which modify the meaning of “high hedge”, as set out in section 1 of the Bill. As the Bill will only apply to hedges which are high hedges within the meaning of section 1, this power enables the Scottish Ministers to vary the applicability of the Bill by making subordinate legislation.

**Comment**

10. The Committee was concerned about the breadth of the power being conferred by this section, particularly as modifying the meaning of “high hedge” will modify the scope of the entire Bill. It appeared to the Committee that the examples of possible modification mentioned in paragraph 9 of the DPM could all be achieved by means of a less-expansive power simply to vary the conditions in paragraphs (a) to (c) of subsection (1) of section 1. It accordingly asked the Member to explain why the wider power to modify section 1 as a whole was considered necessary.

11. The Member, in his response, indicates that in his view a power simply to modify paragraphs (a) to (c) would be insufficient to achieve all of the changes which might be necessary. He suggests that it might be necessary to add further conditions. The Member indicates that he does not envisage the power being used to remove in its entirety any of the conditions in paragraphs (a) to (c). While this explanation is helpful, the Committee observes that neither the Member nor the present administration is in a position to bind any future administration as to how these powers would be exercised. It has made this point in relation to a number of Bills recently, for example the Social Care (Self-directed Support) (Scotland) Bill.

12. In principle, the Committee accepts that it is reasonable to delegate power to modify the meaning of high hedge given the competing views on just how far the Bill should extend. In doing so, however, it recognises that this is potentially a matter of substantial interest to stakeholders. It continues to have concerns over the conferral of power to modify the definition without any real restriction on the terms of that modification. That wide discretion could allow a future administration to amend the definition and so to alter the scope of the Bill very substantially, so that it would operate in a manner which was quite different to the one which the Parliament agreed to (assuming that the Bill successfully completes its Parliamentary passage).
13. The Committee notes that the exercise of this power will be subject to the affirmative procedure. It considers that, as the exercise of this power is likely substantively to affect the application of the Bill, the affirmative procedure provides an appropriate opportunity for Parliamentary scrutiny, given that the Parliament will have expressly to approve any draft regulations made under this power.

14. The Committee draws the power in section 34 to modify the definition of high hedge in section 1 to the attention of the lead Committee as it considers it to be particularly broad in its scope, and observes that it appears to be possible for that power to be used in the future so as significantly to alter the scope of the Bill (either by narrowing the definition to the point that it defeats the ends of the Bill, or by widening the definition so that it extends beyond anything that may have been considered by the Parliament).

15. The Committee is content that the exercise of the power in section 34 is subject to the affirmative procedure.

Section 37 – Commencement
Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: laid in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

Background

16. Section 37(2) allows the Scottish Ministers to appoint a day for the coming into force of certain provisions of the Act. By virtue of section 37(3), such an order may contain transitional, transitory or savings provisions.

Comment

17. The Committee observes that it is not unusual for powers to be conferred so that the Scottish Ministers may by order appoint a day for the coming into force of a new enactment. Nor is it unusual for powers to be conferred so that such an order may contain transitional, transitory or savings provisions. The Committee is in principle content that it is appropriate to confer the powers found in section 37 of the Bill. In principle, it is also content that orders made using the section 37 power be laid before the Parliament, but are not subject to any further Parliamentary procedure.

18. However, the DPM indicates at paragraph 25 that “[i]t is intended to use the power in subsection (3) to make the necessary transitory provision amending section 12 of the Land Registration (Scotland) Act 1979 […]”. It appeared to the Committee to be unusual that a power which is not subject to any Parliamentary procedure apart from laying could be used to amend primary legislation. The Committee accordingly asked the Member to explain whether he considered that the section 37(3) power permitted the modification, and the basis for that view.
19. The Member’s response shortly indicates that it is not intended to use this power in order to textually amend section 12 of the Land Registration (Scotland) Act 1979. He advises that stand-alone provision would instead be made which would modify the application of legislation for a limited period. He states that this is considered to be within the scope of section 37.

20. The Committee accepts that it may be possible to achieve the intended modification to section 12 of the Land Registration (Scotland) Act 1979 without textual amendment. However, it seems clear to the Committee that this will necessarily involve the disapplication in part of that section. It is concerned by the suggestion that the modification of primary legislation would only attract Parliamentary scrutiny were it to require textual amendment. The Committee considers that the effect to be achieved – disapplication of section 12 – is the same regardless of what drafting technique is used to achieve it. It does not consider that adequate Parliamentary scrutiny can be given to an instrument modifying primary legislation when it is laid but not subject to further Parliamentary scrutiny. The Parliament would not have to agree to such an order, and it would have no power to annul it.

21. In consequence, the Committee does not consider that it is appropriate for the power in section 37 to be used in the way which is suggested in paragraph 25 of the DPM. It observes that, if provision of this nature were made using the stand-alone ancillary powers provision in section 35 of the Bill, it would be subject to the negative procedure, and to the affirmative procedure if it textually amended primary legislation. It considers that this would be a more appropriate route to achieved the intentions specified in paragraph 25 of the DPM.

22. Subject to the following recommendation, the Committee finds the powers in section 37 to be acceptable in principle, and is content that they are laid in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 but are not subject to any further Parliamentary scrutiny.

23. So far as the proposed modification of section 12 of the Land Registration (Scotland) Act 1979 is concerned, the Committee does not consider that it would be appropriate to exercise the powers in section 37(3) for this purpose, given that this entails the modification of primary legislation. It observes that such provision would more appropriately be made under the powers in section 35 of the Bill, in order that the resulting instrument would be subject either to the negative procedure or (if it textually amends that Act) the affirmative procedure.
Correspondence with the Scottish Government

On 27 November 2012, the Subordinate Legislation Committee wrote to Mark McDonald MSP as follows:

High Hedges (Scotland) Bill at Stage 1

1. The Subordinate Legislation Committee considered the above Bill on Tuesday 27 November and seeks an explanation of the following matters:

Section 34 – Power to modify meaning of “high hedge”
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

2. Section 34(1) enables the Scottish Ministers to make regulations which modify the meaning of “high hedge”, as set out in section 1 of the Bill. As the Bill will only apply to hedges which are high hedges within the meaning of section 1, this power enables the Scottish Ministers to vary the applicability of the Bill by making subordinate legislation.

3. The Committee asks for an explanation as to:
   - why it is considered necessary to take a power to modify section 1 as a whole? This appears to include the possibility of removing entirely the conditions in paragraphs (a) to (c) of subsection (1), when a power simply to modify those conditions would appear to be sufficient to achieve the changes envisaged in the DPM; and
   - whether the power could be used to modify the definition of “high hedge” in such a way that it extends to include individual trees or shrubs, and – if so – why this is considered to be appropriate in a Bill relating to hedges?

Section 37 – Commencement
Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: laid in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

4. Section 37(2) allows the Scottish Ministers to appoint a day for the coming into force of certain provisions of the Act. By virtue of section 37(3), such an order may contain transitional, transitory or savings provisions.

5. In relation to the power in section 37(3) to make transitional, transitory or saving provision in consequence of that commencement, the Committee asks for clarification on:
• whether – standing the example in paragraph 25 of the delegated powers memorandum – it is considered that the power in section 37(3) permits the modification of primary legislation?;

• if so, the basis for that view?; and

• if not, how it is proposed to deliver the amendment to the Land Registration (Scotland) Act 1979 referred to in that paragraph of the delegated powers memorandum?

Mark McDonald MSP responded as follows:

Section 34 – Power to modify meaning of “high hedge”

You ask why it is considered necessary to take a power to modify section 1 as a whole and whether a power simply to modify the conditions in paragraphs (a) to (c) of subsection 1 would be sufficient to achieve the changes envisaged in the Delegated Powers Memorandum. My view is that a power simply to modify conditions (a) to (c) is not sufficient to achieve the changes envisaged.

Section 1 is all about what the meaning of a high hedge is. Therefore the power taken to modify is the power to modify the meaning of a high hedge. For example, it may be that other conditions require to be added - for example, to include a high hedge which forms a barrier to access. While that power could be used to add to the list of conditions or modify them, it is not envisaged that it would be used to remove entirely the conditions in paragraphs (a) to (c) of subsection (1).

You also ask whether the power could be used to modify the meaning of “high hedge” in such a way that it extends to include individual trees or shrubs. My view, is that it does not. The power is to amend the meaning of a high hedge. The power would only be capable of capturing hedges, not single trees.

Section 37 – Commencement

You ask whether these powers permit the modification of primary legislation. The power in section 37 will not be used to modify primary legislation by textual amendment but rather the power will be used to make stand-alone provision which would modify the application of legislation for a limited period. The view taken is that this is within the scope of the power in section 37 to make transitory and transitional provisions.
Dear Kevin,

The Finance Committee took oral evidence from Mark McDonald MSP and Scottish Government officials on the Financial Memorandum (FM) on the High Hedges (Scotland) Bill at our meeting on 12 December 2012. The Committee raised a number of issues in relation to the FM and agreed to refer the Official Report of the evidence session and the submissions which we received to the lead Committee for your consideration. The Official Report is due to be published on 13 December and the submissions are attached.

Yours sincerely

Kenneth Gibson MSP, Convener
Local Government and Regeneration Committee
High Hedges (Scotland) Bill
Planning Issues

Following the Committee’s meeting on 12 December 2012, Members requested information pertaining to planning processes in relation to new developments and the planting and preservation of trees/hedges where new developments are proposed. This request followed evidence from Tree Officer Robert Paterson who referred to the recently amended version of British Standard BS5837:2012 – Trees in relation to design, demolition and construction.

This briefing provides information on relevant planning legislation and the recently amended British Standard. It also includes information on previous consideration as to whether high hedges should come within the scope of planning provisions.

For the purposes of planning applications, developments are put into one of three categories: local, major or national. The different types allow councils to treat developments in a way which is suited to their size, complexity and the issues they are likely to raise.

Local developments include changes to individual houses and, for example, smaller developments for new housing and retail. Most applications for planning permission will be for local developments. Major developments include developments of 50 or more homes, certain waste, water, transport and energy-related developments, and larger retail developments. It should be noted that some developments, for example changes to existing developments such as certain house extensions, are classed as “permitted development” and may not need planning permission from the local authority.

Applications for smaller, local developments will normally be decided by a local authority planning officer in conjunction with other officials deemed to be necessary depending on the nature of the application (e.g. tree officers, environmental officers, etc). As such, it is important to point out that tree officers (and other officials) will not be required to comment or make.

1 National developments are mainly large public works (for example, the replacement Forth crossing) and are identified in the National Planning Framework.
assessments on every planning application which is lodged. More complex or controversial proposals are likely to be decided by councillors.

When making a decision about an application, the council can:

• grant planning permission without conditions
• grant planning permission with conditions
• refuse planning permission

It is generally accepted that trees, woodlands and other plants contribute significantly to the environmental quality of both the countryside and urban environments. They can be key features of both local amenity and the historic environment. They also benefit biodiversity by providing food and shelter for wildlife and have a pivotal role in mitigating the effects of climate change. They may also be significant local landmarks and have strong associations with historic characters and events. Scotland also has a significant number of “heritage trees”.

Mature and maturing trees and woodlands can be found within, or immediately adjacent to, the boundaries of development sites, whether it is a house extension or single house plot to more substantial residential, commercial and infrastructure projects. Planning applications may need an Environmental Impact Assessment where there is likely to be a significant effect on the environment.

The Town and Country Planning (Scotland) Act 1997 places a specific duty on local authorities to ensure, when granting planning permission for any development, that adequate provision is made for the preservation and planting of trees. Local authorities also have various powers to promote Tree Preservation Orders (TPOs).

British Standard BS5837 (2012) which came into effect on 30 April 2012, provides guidance to applicants or their agents setting out advice on:

• tree surveys
• deciding which trees, as well as shrubs and hedges, are appropriate for retention
• the effects of trees on design considerations
• the means of protecting trees and roots during development

A tree survey is required on any development sites with existing trees, shrubs and hedges and where there are trees outwith the site boundary but within 20 metres of building works. Planning Officers and Tree Officers are normally consulted to provide pre-application advice to developers. Tree Officers can also advise whether trees within and/or adjacent to a site are legally protected by TPOs, Conservation Area status or conditions attached to previous planning permissions.
In relation to BS5837:2012, the British Standards Institution states:

Where tree retention or planting is proposed in conjunction with nearby construction, the objective should be to achieve a harmonious relationship between trees and structures that can be sustained in the long term. The good practice recommended in this British Standard is intended to assist in achieving this objective. BS 5837:2012 is applicable whether or not planning permission is required.

BS 5837:2012 follows a logical sequence of events that has tree care at the heart of the process. The full sequence of events might not be applicable in all instances; for example, a planning application for a conservatory might not require the level of detail that needs to accompany a planning application for the development of a site with one or more dwellings.

Planning provisions have been considered previously as a potential mechanism for resolving high hedge disputes. During the consideration of the Planning etc (Scotland) Bill (which became the Planning etc (Scotland) Act 2006), amendments relating to high hedges were lodged at Stage 2 by John Home Robertson MSP (amendment 129) and by Dave Petrie MSP (amendment 156). Amendment 129 aimed to introduce similar planning controls to high hedges as applies to garden walls. Amendment 156 aimed to introduce local authority powers to tackle problem high hedges, modelled on those which were in existence in England and Wales. These were debated by the Communities Committee on 13 September 2006 and were not agreed to as it was determined that the issue of high hedges related to nuisance and not regulation of new development.

Another planning avenue that has been considered previously is the use of section 179 of the Town and Country Planning (Scotland) Act 1997. This section relates to land that adversely affects the amenity of the neighbourhood. Specifically it states that "if it appears to a planning authority that the amenity of any part of their district, or an adjoining district, is adversely affected by the condition of any land in their district they may serve on the owner, lessee and occupier of the land a notice under this section requiring such steps for abating the adverse effect as may be specified in the notice to be taken within such period as may be so specified."

A private members' bill - the Hedge (Control) Bill - introduced by Lady Gardner at Westminster in 1999 attempted to insert specific provisions into section 179 of the 1997 Act introducing notices requiring proper maintenance of high boundary hedges but was unsuccessful.

Graham Ross

SPICe Research

14 December 2012
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Local Government and Regeneration Committee

High Hedges (Scotland) Bill

Paper on Supplementary Evidence

Introduction

1. Following oral evidence sessions with witnesses on the High Hedges (Scotland) Bill on 5 and 12 December, supplementary written evidence has been received in relation to issues raised.

2. In response to evidence on 5 December, COSLA has emailed the Committee clerks setting out its views on the Bill. This email is attached at Annexe A.

3. In follow up to evidence he provided on 12 December, Eric Hamilton of Dundee City Council has emailed the Committee setting out his views on the implications of tree officers in Scottish local authorities under the proposals set out in the Bill. This email is attached at Annexe B.

4. During evidence on 5 December, Derek Park from Scothedge referred to a document featuring football pitches and statistics. This is attached for your information at Annexe C.

Seán Wixted
Assistant Clerk
14 December 2012
Supplementary evidence from COSLA

From: Anil Gupta [mailto:Anil@cosla.gov.uk]
Sent: Thursday, December 13, 2012 11:52 AM
To: Cullum DJ (David); Wixted S (Seán)
Cc: john.morrison@ced.glasgow.gov.uk; James Fowlie; John.Brownlie@scotland.gsi.gov.uk
Subject: Local Government Committee - COSLA views

David and Sean

John Brownlie has been in contact over the evidence given by ScotHedge in connection with the High Hedges Bill at your Committee. I think there has been a misunderstanding, which I can’t identify the source of.

All COSLA has been asked about is if it was in favour of the bill, which we had confirmed that we were. COSLA supports the Bill as it was proposed, and was only concerned about the proportionality of it, and the fees and enforcement arrangements. My recollection is that Cllr Harry McGuigan has been neutral on the scope of the Bill with respect to Deciduous vs Evergreen, and believed that the approach being taken by Mark McDonald MSP is proportionate and correct. In our spoken discussions with the Bill sponsor the possibility of extending the current Bill at a later stage was always there, but we agreed that it doesn’t need to be entertained at this stage.

As far as I know there hasn’t been any written communications between us and any others on the Deciduous vs Evergreen since I took up post on May 2011. I have no idea about where the attributed policy position(s) to COSLA have come from. Executive Group Reports since I have been in post, only offer updates on where the Bill’s progress had got to and were approved with little comment, and were principally about the intention of the Bill and the fee structure.

As far as extending the Bill to go beyond evergreens, we would have to consult our members as we don’t have a position, and have not been asked for one in the past. It would not be possible to give you a position before late February.

Regards

Anil GUPTA | Chief Officer | Communities Team | COSLA

From the 15 March 2012 meeting.

High Hedges (Scotland) Bill.

2. One of the legislative proposals from the Scottish Government was to bring forward measures providing a framework to deal with complaints about ‘high hedges’. These are being progressed by Mark McDonald MSP as a non-executive Bill. It will enable fees to be charged by local authorities in investigating these and for remedial action costs to be recovered.
3. The Local Government and Regeneration Committee has considered and approved the MSPs Statement of Reasons over why no further consultation is required in advance of the High Hedges (Scotland) Bill.

4. A concern from those pushing for the Bill has been that there is a potential for local authorities to use fee income as a “revenue raising” provision, or to put people off using the new arrangements. To prevent this, the fee charged for progressing a complaint would be limited on the face of the Bill to meet the costs of essentially providing that service. Given the experience in England and Wales with a small number of complaints this would at worst only ever have been a theoretical possibility. The draft Bill approach to charging is likely to reflect the fee provisions for registering properties in the Houses in Multiple Occupation (HMO) legislation. It is a combination of primary legislation, regulations and statutory guidance.

5. Another matter is the recovery of costs that are incurred in enforcing a remedial notice. The Scottish Government are looking into the detail and how charges are recorded, to make sure that the owner is liable, what happens when ownership changes.

6. Lastly a meeting is taking place between the MSP and the Scottish Tree Officers Group on 14 March, to update them on current thinking and the progress being made on the draft Bill and to get their views. A factual briefing on the current position is being prepared. If Executive Group members are interested in receiving a copy, please let the COSLA Community Resourcing Team know.

From the August 2012 meeting

**The High Hedges (Scotland) Bill**

46. The Bill is a Members Bill that has Scottish Government support. The final proposal for the Bill was lodged in March 2012 and gained the support of 30 MSPs. The detail of the proposals can be found here. The next step is the introduction of the Bill, expected shortly, and it should conclude the Parliamentary processes next year. There has been ongoing engagement with COSLA through Anil Gupta, Chief Officer, Community Resourcing, and John Morrison, Legal Manager at Glasgow City Council. Recently the Scottish Government have sought advice on the Financial Memorandum with a note being prepared and circulated to local authority Finance Directors.

47. The Bill will enable individuals to apply to the local authority for a high hedge notice, to address the interference caused by certain high hedges. A fee will be payable by the applicant for the cost to the authority of making the decision. A high hedge notice, if issued, will advise what action is to be taken. This will be at the hedge owners cost. If this is not done, the local authority can do the work and recover costs from the owner. Despite the level of correspondence the issue of high hedges might generate, experience shows this translates into only a small number of applications and very few enforcement actions.
Supplementary evidence from Eric Hamilton, Dundee City Council

From: eric.hamilton@dundeecity.gov.uk [mailto:eric.hamilton@dundeecity.gov.uk]
Sent: Thursday, December 13, 2012 9:40 AM
To: Wixted S (Seán)
Cc: Cullum DJ (David); Mullen FJ (Fiona); Sinclair F (Fiona); Ross G (Graham); rpaterson@clacks.gov.uk; Ian Edwards; Steve Milne; Elspeth Forsyth
Subject: tree legislation

Morning Sean,

All three witnesses yesterday were in agreement that separate tree issues should be left out any High Hedge Bill including references to TPO’s. While our resources will be stretched initially to deal with high hedges, to include nuisance trees would increase our workload ten plus fold and cause a huge burden on local authority budgets and resources. The Parliament needs to remember it is a tree officers job to ensure the safety of public trees and we can’t spend the majority of time mediating with feuding neighbours over falling leaves etc, nuisance trees can be dealt with in civil law. Let Councils deal with worst hedges that come forward first over 10 years, then review.

During this period we could look at new legislation to deal with hazardous/dangerous trees on private land. In England, the Miscellaneous Powers Act,¹ allows Local Authorities powers to intervene on private land to remove not only dangerous trees, but buildings other structures and items, this has been in statute for very many years and appears to work well. In Scotland we have legislation to deal with dangerous buildings but this act excludes trees perhaps this could be amended?

These are only my views and I am sure STOG could not reply formally by your deadline of tomorrow, and ask for more time in the New Year.

Regards Eric

Eric Hamilton
Forestry Officer
Environment Department
Dundee City Council

¹ Footnote from the Clerk: we have clarified with Mr Hamilton that he is referring to the Section 23 of the Local Government (Miscellaneous Provisions) Act 1976.
1. The following information is an extract from a House of Commons Library briefing paper entitled *Dealing with nuisance trees and hedges* (21 October 2012) SN/SC/2999:

**Local government powers**

The *Local Government (Miscellaneous Provisions) Act 1976* gives local authorities powers to take action in respect of trees which are thought to be dangerous. The following notes made available by Lewes District Council give a brief explanation of the Act and apply equally to other local authorities:

**Responsibility for Trees**

Trees are the responsibility of the person who owns the land on which they are growing, but this Act gives a local Council powers to deal with dangerous trees not owned by them. It is normally used as a last resort if the owner appears not to be doing anything about a dangerous tree, which might cause harm to someone else or their property. The Act is intended for use where there is imminent danger – it is not intended for use where the danger might be long term or where it is only a vague possibility (such as “it might fall down if we get a strong wind”!)

**The Council’s Responsibility**

If a Council receives a written request from an adjoining landowner to make a tree safe then it can use the Act to investigate and if necessary take appropriate action. Under normal circumstances the Council’s Tree Officer will want to make a site visit to inspect the tree(s).

**Notice To Make A Tree Safe**

In the event that the Council believes that the tree(s) are indeed imminently dangerous, we can then serve a Notice on the tree owner or the occupier of the land. The Notice will tell the owner/occupier of the land about the condition of the tree and why action is needed. It will also state the minimum amount of work that is necessary to make the tree safe. It will also state when the work needs to be done by – this cannot be less than 21 days from the date of the Notice. It finally states that if the works are not undertaken, the Council can come and do it and charge you for doing so.

**Appealing Against the Notice**

You can appeal against the Notice to the County Court within 21 days of the date of it being served. The Notice will specify the grounds for appeal.

**Failure to Comply With the Notice**

If the works are not completed within the time specified, (and you have not appealed) then the Act authorises the Council to employ a contractor to do the work in default. It also authorises us to recover costs from the owner/occupier of the land. Because we will charge administrative costs, as well as the contractors fees, it will almost certainly be cheaper for you to arrange the work yourself.²

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² Dangerous trees, Lewes District Council
Statistics

The 6 English local authorities for which we have complete data have approx. one quarter of Scotland’s population.

- In the first seven years they experienced 1,220 enquiries which became 100 formal complaints. This means that 92% were cleared without formal complaints.
- In Scotland this would represent approx. 4,800 enquiries and 391 formal complaints over 7 years. (690 enquiries, 56 formal per year)
- For the average Scottish LA this is 150 enquiries and 12 formal complaints in 7 years.
- Uplifted by 50% to include deciduous and single trees this represents 225 enquiries and 18 formal complaints over 7 years for the average LA.

This is average of between 2 and 3 formal complaints per year for the average LA

Position of RSPB, Scottish Wildlife Trust & Woodland Trust

We estimate that there are 1.65 million ground level properties in Scotland. Assuming 1 in 3 has a hedge or tree this is 550,000 properties. The number of enquiries (4,800 over 7 years) represents 0.9% of the total Scottish domestic hedge stock. Again assuming 50% uplift (i.e. 0.45% for inclusion of deciduous & single trees) this means 1.4% of the total Scottish hedge and tree stock will be affected by the legislation.

By trying to exclude deciduous and single trees, these bodies are denying relief to some of the worst sufferers and supporting some of the worst human behaviour. This for the sake of a habitat which represents less than one half of one percent of the Scottish domestic hedge and tree stock.
How Cases Will ‘Dissolve’ Once Legislation Is In Place

Total Pitch Area Represents Scottish Enquiries Expected Per Year

Effect on Local Authorities of Adding Deciduous Cases

Evergreen Cases Needing Local Authority Action Per Year

Where Is The Justification for Exclusion of Deciduous Species?
The Likely Impact Of the Bill on the Entire Scottish Domestic Hedge & Tree Stock

Total Pitch Area Represents Scottish Domestic Hedge Stock – currently Trimmed And Well Looked After

Untrimmed Deciduous Stock

Untrimmed Evergreen Stock

These Two Areas Represent Scottish Hedge Stock Likely To Be Affected By The Bill

Where Is The Justification for Exclusion of Deciduous Species?