Local Government and Communities Committee

Post-Legislative Scrutiny of the High Hedges (Scotland) Act 2013

Submission from Robert MacIntyre

The High Hedges Act was overdue but welcome legislation for many people who suffered from the loss of reasonable enjoyment caused by trees. Now the Act has been in force for two years, it has become evident that the law has been administered in a way that has fallen well short of its intended objective. This is because Local Authorities and DPEA Reporters are misinterpreting the meaning of the term ‘high hedge’, leading to many High Hedge applications being dismissed. In the case of Local Authorities, this is without a right of appeal.

Local Authorities and DPEA Reporters often look for a way to dismiss cases by finding a description for the trees that does not include the word ‘hedge’, as in the following non-exhaustive examples:

- Windbreak
- Evenly spaced trees
- Shelterbelt
- Garden feature
- The trees have a ‘more natural like appearance’, so can’t be a hedge
- Narrow strip of woodland
- Mature line of trees
- Row of trees
- Avenue of trees

It is disappointing that in deciding whether a row of trees form a hedge, some Local Authorities and DPEA Reporters consider:

1. whether there was an intention to create a hedge at the time of planting.
2. if the trees have been maintained in the past or present as a hedge.

These two tests are irrelevant because the Local Authorities and DPEA Reporters should be focusing on the current effect the trees have on a neighbouring property and not trying to predict the intentions and actions of the hedge owner at some point in the past. In each of the defective situations where a Local Authority decides that the trees do not form a hedge, the High Hedge applicant suffers a further injustice as there is no right of appeal under the Act and therefore no chance of redress other than through expensive and difficult to obtain Judicial Review. The process of deciding whether trees form a hedge is interpreted differently by each Local Authority. These decisions are subjective and a major deciding factor in implementing the law and therefore should be open to appeal through the DPEA.

The Act is very clear on the meaning of a hedge and states:
Meaning of “high hedge”

(1) This Act applies in relation to a hedge (referred to in this Act as a “high hedge”) which—

(a) is formed wholly or mainly by a row of 2 or more trees or shrubs,  
(b) rises to a height of more than 2 metres above ground level, and  
(c) forms a barrier to light.

The Act makes no mention of the past or present management of the trees nor the intentions of the hedge owner when planting the trees. The Local Authorities and DPEA Reporters are needlessly complicating and misinterpreting the Act. To be a hedge under the Act all that is needed are 2 or more trees or shrubs, over 2 metres high and that block light. Nothing more and nothing less.

Although the Act is clear in describing what a hedge is, some Local Authorities instead choose to use the dictionary meaning of the word ‘hedge’ in deciding whether the trees forming a hedge are in fact a ‘hedge’. Many use the Oxford Dictionary meaning of a hedge: ‘A fence or boundary formed by closely growing bushes or shrubs’. This allows them to exclude the worst high hedge cases because a hedge containing large trees with wider spacing, but still blocking light, becomes exempt from the Act as the hedge is not formed by ‘closely growing bushes or shrubs’.

Using the term ‘closely growing’ in deciding whether trees form a hedge is further flawed because spacing is relative to the height and width. A hedge that is 30m high with trees 3m apart, has the same apparent spacing as a hedge 3m high with 30cm spacing. Both have a height to spacing ratio of 10%. One of the most famous hedges in the world, the Meikleour Beech Hedge on the A93 near Meikleour in Perth and Kinross follows this convention. At 30m high the spacing between the trees is around 3m. However according to the logic of many Local Authorities and DPEA Reporters, this cannot be a hedge because it is not ‘formed by closely growing bushes or shrubs’. Likewise, a hedge 30m high and 3m deep, formed by several parallel rows of trees, has a similar height to depth ratio as a 3m high single row hedge. All should be considered hedges under the Act.

The Act should therefore be dealing with the visual appearance of the trees and their effect on the amenity of neighbours and not trying analyse the management, spacing and depth composition of the hedge. Any line of trees that reduces the level of light to a neighbouring property should be subject to the scrutiny of the Act, but only if the neighbours believe the hedge affects the reasonable enjoyment of their home. This was the original intension of the Act. Unfortunately, many Local Authorities and DPEA Reporters are not administering the Act within the spirit of the law.

Many Local Authorities and DPEA Reporters only assess ‘loss of light’ when processing a high hedge application and do not consider loss of “reasonable enjoyment”. The objective of the Act is to provide a solution to the problem of high
hedges which interfere with the ‘reasonable enjoyment’ of a domestic property. This is stated in Section 5 of the Act:

(5) After the end of the period of 28 days referred to in subsection (3)(b), the authority must decide—

(a) whether the height of the high hedge adversely affects the enjoyment of the domestic property which an occupant of that property could reasonably expect to have, and

(b) if so, whether any action to remedy the adverse effect or to prevent the recurrence of the adverse effect (or both) should be taken by the owner in relation to the high hedge (any action that is to be taken being referred to in this Act as the “initial action”).

For example, a hedge that is left unmaintained can block long established views from a neighbouring property. DPEA Notice ‘Guidance Note GN19 High Hedge Appeals’ dated October 2015, clearly states that long establish views from a property should be taken into account, and states: “The key test, however, is whether the high hedge has an adverse effect on the reasonable enjoyment of the property affected, and this can go beyond the issue of loss of light alone (e.g. the height of the hedge might affect long-established views from a house which can now be taken as part of the reasonable enjoyment of the property; or it might affect how the garden can be used).” However, loss of reasonable enjoyment is being ignored by many Local Authorities and DPEA Reporters.

It appears too easy for Local Authorities and DPEA Reporters to dismiss a case, with no regard to the anxiety and loss of amenity caused to the High Hedge Applicant. This decision often place the rights of the hedge owner above the rights of the neighbour. Also by discharging a case, the Local Authorities and DPEA Reporters are inadvertently giving their commendation to the hedge owner, to allow the hedge to continue growing unchecked with the law now on the hedge owner’s side.

Where appropriate, Local Authorities and DPEA Reporters have under the Act, the power to remove trees when this is deemed to be the most appropriate course of action. The Scottish Government issued ‘High Hedges (Scotland) Act 2013, Revised Guidance to Local Authorities, May 2016’ clearly states “The Act does not prevent local authorities from deciding that a hedge should be removed completely if they consider that to be the most appropriate way to deal with the negative effect”. Many Local Authorities and DPEA Reporters are unaware that this is the case and in some or the worst high hedge cases, refuse to order the appropriate remedial action in the fear that this could harm the hedge. However, it is often the situation that a hedge that has grown out of control is best removed and replanted with more suitable hedging.

Some Local Authorities and DPEA Reporters only consider a row of trees to be a hedge when growing on the boundary with the neighbour. Nevertheless, this is not the case as the same Guidance states: “The Act states that the hedge must be on
land that is owned by someone other than the applicant. There are no other restrictions on where the hedge must be located. It is the effect the hedge has on a domestic property that is important, rather than where the hedge is located.” A hedge can block the same amount of light many metres in from a boundary as it can on the boundary itself.

Hedge owners have exploited a loophole to avoid complying with a High Hedge Notice. This evasion involves removing every other tree in a hedge to leave gaps. The overall effect of the hedge is the same as it still reduced light levels because the gaps are only apparent when viewed at right angles to the hedge. At any other angle the hedge still appears as a solid wall of trees. Within short period the trees grow back together, filling the gaps, and creating a solid hedge once again. When a hedge owner has taken this course of action many Local Authorities and DPEA Reporters preclude the hedge owner from further compliance with the High Hedge Notice, saying that the remaining trees are no longer a hedge. The Act needs strengthening to prevent this loophole and should state: “When a High Hedge Notice has been issued, all trees in the hedge are covered by the Notice in perpetuity. If the hedge owner alters the hedge by removing trees, any remaining trees forming the original hedge are still subject to the Notice. The Notice can only be annulled once every tree that formed the original hedge have been removed.”

The way in which the Act has been implemented by many Local Authorities and DPEA Reporters has fallen well short of expectations and is not how the Scottish Parliament intended the law to be administered when the High Hedges Act was formed. The Act is certainly not being administered within the spirit of the law and has left many parties aggrieved. I hope the Local Government and Communities Committee can strengthen the legislation and transform the way in which Local Authorities and DPEA Reporters enact the High Hedge law, to the benefit of Scotland.

Recommendations:

1. Amend the legislation to make it clearer that any line of trees or shrubs over 2 metres high, that reduce the level of light to a neighbouring property can be subject to the scrutiny of the Act.

2. A right of appeal should be allowed when a Local Authority rejects a case, because in their opinion, the trees or shrubs do not form a hedge. This will give the applicant redress in the situation of an unjustified dismissal of an application.

3. Ensure ‘reasonable enjoyment’ as specified in Section 5 of the Act is taken into account when assessing the action required to remedy the adverse effects of a hedge.

4. Close the loophole that allows a hedge owner to evade a High Hedge Notice by removing trees from the hedge to form gaps.
5. Issue stronger Guidance to Local Authorities to prevent misinterpretation of the High Hedges Act.

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