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Convener
Local Government and Communities Committee
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31 January 2019

Dear James

I attach a copy of the letter that I have issued to all MSPs today to advise them that updated guidance for local authorities relating to the High Hedges (Scotland) Act 2013 has now been published. In developing this guidance, the Scottish Government has listened to key stakeholders, including local authorities and campaigners, as well as considering the views of the Committee. We believe that the revised guidance represents the most practical and workable way of ensuring that the legislation can be used effectively.

I fully recognise that there will be those who feel that the guidance does not go far enough, but it is my view that we need to work within the scope of the legislation as passed by the Scottish Parliament, and allow time for this to bed in further before considering whether the legislation itself should be revisited.

I hope the Committee finds this information helpful.

Kind regards

KEVIN STEWART

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Dear Colleague

I am writing to advise all MSPs that revised 'High Hedges (Scotland) Act 2013 – Guidance to Local Authorities' was published today. The guidance can be accessed online via the following link: <http://www.gov.scot/ISBN/9781787814943>. I am aware that many of you will have constituents who are affected by this issue and I feel that it is important for the Scottish Government to set out its position on this issue.

The negative impact that high hedges can have on homeowners and tenants across Scotland is something that has been recognised by the Scottish Government, and it is right that we have legislation in place that offers some protection to those who feel high hedges have a detrimental impact on their lives. However, it is unpractical and unworkable for that legislation to be so broad and so far-reaching that it encompasses every form of vegetation as this runs the risk of allowing the natural environment to be damaged through, for example, well-established single trees being destroyed.

That is why I read the report of the Local Government and Communities Committee on the operation of the High Hedges (Scotland) Act 2013, published on 10 September 2017, with great interest and instructed my officials to consult on, and investigate, whether the guidance to local authorities relating to the 2013 Act needed to be revised or amended. In particular, I asked my officials to engage with COSLA, the Scottish Tree Officers Group (STOG), specific local authorities with a strong interest in this issue, and Scothedge to understand the full range of views relating to the 2013 Act, and specifically, to identify what was realistically achievable through the legislation as passed by the Scottish Parliament.

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Following this engagement, my officials identified a number of changes and amendments that could be made to the guidance. The aim of these changes is to make the guidance clearer in order to encourage a more consistent approach to dealing with high hedges across local authorities in Scotland.

The main changes to the guidance include:

- a revised introduction to give fuller background on how the 2013 Act came into being, including the scrutiny carried out by the Committee;
- strengthening the language around fees and timescales in accordance with the Committee's recommendations; and
- adding a definition of a 'hedge'.

In taking forward the Committee's recommendations, we were aware that we needed to act within the scope of the legislation as it stands and this meant that it was not possible to take forward all of the Committee's recommendations or all of the suggestions that had been gathered from the engagement process. Rather, the process of identifying changes was undertaken by comparing all proposals with what was realistically achievable within the scope of the existing legislation.

Specifically, proposals given to my officials identified that there was a need to develop a definition of a hedge for the guidance and this has been taken forward. However, proposals also suggested that revised guidance should set out that applications should be considered in terms of the impact of the vegetation rather than whether or not the barrier was planted as a hedge, and such a change is not possible as the legislation is clear that the subject of the application has to be a high hedge.

Consideration of the impact of the vegetation on the neighbour's enjoyment of their property, and, therefore, the health and wellbeing of the individuals involved, is something that local authorities, as the bodies responsible for taking forward high hedge applications, already do as part of their considerations. However, the impact of vegetation is not a test of whether an application can be made. Therefore, the application system already allows for such considerations, but the subject of the application has to be a high hedge, as defined by the legislation, for these considerations to be made. The legislation was designed to tackle issues in relation to hedges and not to be a panacea for all issues relating to vegetation.

As such, and in line with the legislation, a high hedge can only be a high hedge if it is, first and foremost, a hedge. Changing this position would require primary legislation and we do not have any plans to make such an amendment. Such a change would mean that any scenario where there were two or more trees or shrubs rising to a height of two metres, and that were a barrier to light, would be captured. This could include, for example, two individual trees or a small group of apple trees, things that would not currently be classed as a hedge. The legislation was never designed to deal with such vegetation and making this amendment would go against the intended purpose of the 2013 Act.

To provide some further clarification, let me also explain that there are limited powers available to change the definition of a 'high hedge' under section 35 of the 2013 Act without primary legislation. Section 35(1)(a) gives the power to add specific types of trees or shrubs to the legislation. However, by defining that a high hedge "is formed wholly or mainly by a row of 2 or more trees or shrubs" in section 1(1)(a), the definition is already as wide as it

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could realistically be – in other words, all types of trees and shrubs that form a hedge (as opposed to all types of vegetation) are already included and it is not possible to add anything more to this.

The powers in section 35(1)(a) also allow the definition to be reduced by excluding types of tree or shrub and, as there is no real scope for expanding the definition, the powers in this section could only effectively be used to narrow the definition, which I am not supportive of.

Guidance cannot direct those tasked with enacting the law to take actions that are outwith the scope of the legislation they are responding to. The focus of the 2013 Act could only be changed through primary legislation and, as I have already said, as the Scottish Government is satisfied that the 2013 Act is about dealing with high hedges, we do not have any plans to amend the legislation. The revised guidance, therefore, can only provide additional clarity to explain the existing scope of the 2013 Act.

The feedback on the revised guidance from those local authorities involved in the updating process, and from STOG, has been very positive, with comments suggesting the guidance has been significantly improved; that it is much clearer and addresses a number of the areas where there has previously been uncertainty; and is more reflective of the experience of applying the 2013 Act. Local authorities have particularly welcomed the addition of a clear definition of a hedge in the revised guidance.

Scothedge has raised concerns that the definition of a hedge narrows the focus of the legislation and will lead to a decrease in the number of successful cases. Local authorities have intimated that the guidance now better reflects how they have been applying the legislation since it was introduced and I am therefore unconvinced by this assertion.

The 2013 Act, which is still a relatively new piece of legislation, was designed to tackle a specific problem and its scope is limited. I hope that the legislation will continue to provide a solution to many of the long-standing disputes between neighbours in relation to high hedges.

Kind regards

KEVIN STEWART

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