The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

LOCAL GOVERNMENT AND REGENERATION COMMITTEE

Wednesday 6 March 2013

Session 4

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LOCAL GOVERNMENT AND REGENERATION COMMITTEE
7th Meeting 2013, Session 4

CONVENER

*Kevin Stewart (Aberdeen Central) (SNP)

DEPUTY CONVENER

*John Wilson (Central Scotland) (SNP)

COMMITTEE MEMBERS

*Stuart McMillan (West Scotland) (SNP)
*Anne McTaggart (Glasgow) (Lab)
*Margaret Mitchell (Central Scotland) (Con)
*John Pentland (Motherwell and Wishaw) (Lab)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Sam Anwar (Scottish Government)
Sarah Boyack (Lothian) (Lab)
Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)
Derek Mackay (Minister for Local Government and Planning)
Mark McDonald (North East Scotland) (SNP)

CLERK TO THE COMMITTEE

David Cullum

LOCATION

Committee Room 2

Scottish Parliament

Local Government and Regeneration Committee

Wednesday 6 March 2013

[The Convener *opened the meeting at 10:00*]

High Hedges (Scotland) Bill: Stage 2

The Convener (Kevin Stewart): Good morning. I welcome everyone to the seventh meeting in 2013 of the Local Government and Regeneration Committee. As usual, I ask everyone to ensure that they have switched off mobile phones and other electronic devices.

Item 1 is stage 2 consideration of the High Hedges (Scotland) Bill. I welcome Mark McDonald, the member in charge of the bill, Derek Mackay, Minister for Local Government and Planning, who has portfolio responsibility for the bill's subject matter, Christine Grahame, who will speak to and move an amendment in her name, and Sarah Boyack.

Before we consider the amendments, it might be helpful if I set out the procedure at stage 2. Everyone should have a copy of the bill as introduced, the marshalled list of amendments that was published on Monday and the groupings paper, which sets out the amendments in the order in which they will be debated.

There will be one debate on each group of amendments. I will call the member who lodged the first amendment in that group to speak to and move that amendment and to speak to all the other amendments in the group. Members who have not lodged amendments in the group but who wish to speak should indicate that by catching my attention in the usual way.

If they have not already spoken on the group, I will invite the minister and then the member in charge to contribute to the debate before I move to the winding-up speech. The debate on the group will be concluded by my inviting the member who moved the first amendment in the group to wind up.

Following the debate on each group, I will check whether the member who moved the first amendment in the group wants to press it to a vote or to withdraw it. If they wish to press the amendment, I will put the question on that amendment. If they want to withdraw their amendment after it has been moved, they must seek the committee's agreement to do so. If any committee member objects, the committee must immediately move to the vote on the amendment.

If a member does not want to move their amendment when I call it, they should say, "Not moved." Please remember that any other member may move the amendment. If no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Only committee members are allowed to vote at stage 2. Voting in a division is by show of hands. It is important that members keep their hands clearly raised until the clerk has recorded the vote.

The committee is required to indicate formally that it has considered and agreed each section of the bill, so I will put a question on each section at the appropriate point.

Section 1—Meaning of "high hedge"

The Convener: Amendment 1, in the name of Anne McTaggart, is grouped with amendments 2 and 19.

Anne McTaggart (Glasgow) (Lab): Thank you, convener. Although I welcome the bill, I am concerned that the exclusion of deciduous species will leave some of the worst long-standing disputes and many people who suffer from high hedges on a neighbouring property without a resolution. Scothedge conducted a survey in 2009, and almost a fifth—that is, 20 per cent—of respondents suffered from deciduous hedges such as beech or rows of deciduous trees.

The argument that deciduous species should not be included is unsatisfactory. In the months that we have light, the leaves are on, so views from neighbouring properties are blocked during summer. It was argued in evidence to the committee that cloud cover can be so dense in the west of Scotland that dry days can be dark even in March. What happens to the plant depends on the temperature and the wind, so we cannot be certain that deciduous trees will not be a problem in winter.

Evergreens can also lose their leaves in certain conditions. The difference between evergreen and deciduous species is minimal in practice, and it is not logical to offer remedies for evergreen but not deciduous species. To do so is merely a technicality, which will frustrate many innocent home owners who are suffering in neighbour disputes.

It would be grossly unfair if deciduous species were excluded from the protection in the bill. Where vindictive intent or delight in bullying is involved, an evergreen hedge could simply be replaced by a deciduous one to escape a remedial order requiring removal of the hedge. The English legislation that the committee studied was limited

to evergreen hedging in the belief that local authorities would be swamped by complaints about high hedges, but that has proved not to be the case. I therefore ask the member in charge of the bill to consider including deciduous species in the bill's intent.

I move amendment 1.

The Convener: I call Christine Grahame to speak to amendment 2 and other amendments in the group.

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): We appreciate that the genesis of the bill was the growth of leylandii and probably the fact that we have smaller gardens now, with more house units packed together, and a culture of people wanting their garden as an outdoor space. We have moved on from it just being about leylandii, which I am pleased about, but I have concerns about limiting the bill to "shrubs". I may bore the committee, but I will give the definition of "shrub", which is a woody perennial plant, smaller than a tree, with several major branches arising from near the base of the main stem.

I note that during the stage 1 proceedings on the bill in this committee, the word "plant" was frequently used, and I am not quite sure why that was ditched for the word "shrubs".

I can see that the committee is intensely interested in this; I feel as if I am on "Gardeners' World".

Members will note that the word "shrubs" does not deal with, for example, Russian vine, which is a very fast-growing plant that is, if I may say so, ugly; ivy, which has its moments; or clematis montana rubens. Those are all vigorous growers, and I have experience of the latter two. The ivy was not my fault, but it is now meandering through my garden and at least two or three gardens nearby; it can grow to some height, gets everywhere and is difficult to remove. It is dark, green and evergreen, but it is not covered by the bill. The clematis montana rubens is my fault. I planted it, but forgot to look at it for a couple of years and it is now in everybody's trees. Although it can lose its leaves, depending on the season, it is another very vigorous plant.

Those are just three examples. My point is that if someone had a neighbour—we know that there are neighbours like this, unfortunately—who was determined to defeat the provisions of the eventual act, they could plant ivy or any of the aforesaid plants. As I understand it, the key aspects of the legislation are the height of the plant—to an extent, it is also the purpose, although that is more inferred than stated—and deprivation of light. If that can be achieved by plants rather than just shrubs, evergreens or deciduous, I think that the issue should be considered, because the effect might be the same as that from the ubiquitous laurel, privet or leylandii.

Amendment 2 is a probing amendment. I am sure that the committee has discussed the issue that it addresses, but although I have come late to the matter, I think that it should be addressed by the member in charge of the bill.

I support Anne McTaggart's amendment 1. I said at stage 1 that I felt an amendment coming on, and Anne McTaggart obviously felt it coming on faster than me. I am very sympathetic to amendment 1. In the west or south-west of the country, such as in Dumfries and Galloway, beech does not lose its leaves. In fact, I know of a big beech hedge in Edinburgh that never lost its leaves and remained a great wall to the outside world. I think that the issue should be considered.

I am sympathetic to Margaret Mitchell's amendment 19. At stage 1, I was concerned about the power of ministers to vary the definition of "high hedge". I called that ultra vires, but I was informed that it was competent. However, I still have concerns in that regard, so I am sympathetic to making it clear that the bill's definition of "hedge"—the "2 or more" plants—cannot be tampered with and that what was intended was the mix of evergreen, deciduous, and, as I have said, plants.

The Convener: Thank you, Ms Grahame. When you started by talking about genesis, I thought that you were going to bring reptiles into the equation as well as plant life.

Christine Grahame: The tree of knowledge.

The Convener: It was a tree and a serpent, if I remember rightly.

I ask Margaret Mitchell to speak to amendment 19 and the other amendments in the group.

Margaret Mitchell (Central Scotland) (Con): Amendment 19 would restrict ministers' ability to exercise the power under section 34 to alter the definition of a high hedge. The amendment would specifically confine the power to allow regulations under section 34 to change only the content of the regulations under section 1(1) and not rewrite them completely.

The Subordinate Legislation Committee and the Local Government and Regeneration Committee both noted that the power that section 34 would confer on ministers is very wide ranging in its ambit—I would venture to say unusually so. In its report on the bill, the Subordinate Legislation Committee noted that the section 34 power could be used to amend the definition of a high hedge to such an extent that it would fall outside the clear purpose of the bill. It could also allow amendment by ministers that would contravene the powers

granted to the Government by the Parliament to make reasonable adjustment to the law without the need to return to the Parliament.

Both the minister and the member in charge said that that was not the intention of the power granted under section 34 and the minister gave the example of using it to change the height of a high hedge from 2m to 3m. I note that the member in charge said that he will include an explanatory note on that, but amendment 19 would go further and provide more clarity, in that the extent to which the power is intended to be used would be restricted.

I have some sympathy with Anne McTaggart's amendment 1, although I think that the bill will go far enough in addressing the problem of high hedges. Having said that, I will keep an open mind. It is a shame that we will not get the opportunity to hear what Stewart Stevenson—I mean Stuart McMillan—has to say before voting on amendment 1. The timing of the review is crucial. We will get on to that subject later and we need to make sure that the review will not be left too long. If it will be left too long, I would be inclined to support amendment 1.

Christine Grahame's amendment 2 makes a valid point and I am inclined to support it.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I listened carefully to what Anne McTaggart said and I was interested in it. However, it was slightly optimistic. I noted that she used the phrase "vindictive intent", which I recognise and associate with, because we are all likely to have had experience of neighbours using any excuse to pursue arguments.

I am slightly less optimistic that this measure, however narrowly or widely drawn, will end some of the most egregious examples of neighbour disputes. I am not persuaded that including "deciduous" will make a substantial difference. The English experience of restricting the definition in a way that excludes "deciduous" appears to be delivering the kind of value that was sought and is likely to be proportionate.

I await with interest the debate on amendment 12, which our colleague Stuart McMillan lodged, on the review. That debate will be the right time to think about whether we extend the definition.

Light is seasonal, just as leaves are seasonal. Excluding deciduous trees, which in general allow through a bigger proportion of available light in winter, compared with in the summer, is probably correct.

Christine Grahame's contribution to the debate was fascinating, but not necessarily persuasive.

I will listen carefully to what the member in charge and, perhaps, the minister say before coming to a final conclusion on Margaret Mitchell's amendment 19. I can see where Margaret Mitchell is coming from and amendment 19 certainly seems to make sense, but I would like assurance that it would not damage the intent of the act. If the debate shows that it would not, I certainly think that amendment 19 is perfectly supportable.

10:15

Stuart McMillan (West Scotland) (SNP): When we produced the stage 1 report, I was the only committee member who had reservations about the definition, so I am glad that the amendments have allowed that to be debated. Members will know my thoughts about the definition.

I am not sure whether what Christine Grahame proposes in amendment 2 would be so encompassing that all plants would be covered. If that was the case, how many additional houses would be affected? I seek a wee bit of clarification from her on that. I genuinely do not know how manageable her proposal would be.

Christine Grahame: Given that I will not sum up, because my amendment is not the first in the group, am I allowed to intervene to answer the question that Stuart McMillan has posed?

The Convener: You can do so if Mr McMillan agrees.

Stuart McMillan: Sure.

Christine Grahame: The word "plants" would not mean all plants; the plants would have to fulfil the other criteria of reaching the specified height and blocking light. The plants could not be pansies or forget-me-nots, for instance, because they do not grow tall enough—I am sure that you know that.

Stuart McMillan: Absolutely. That was a helpful comment from Christine Grahame.

I am keen to hear the views of the member in charge and the minister on Anne McTaggart's amendment 1, which would add the word "deciduous". If that amendment is not agreed to, it could come back at stage 3.

I genuinely think that Margaret Mitchell's amendment 19 is helpful. I am keen to hear the views of the member in charge and the minister on it.

John Wilson (Central Scotland) (SNP): We all await with interest Christine Grahame's appearance on "The Beechgrove Garden". She referred to ivy and other growers, such as clematis, which must grow against something. If they grow against a fence or tree, the difficulty is in dealing with that—would the tree or structure that the plant was growing against be taken down?

A favourite plant of mine is buddleia, which is known as the butterfly plant because it encourages butterflies to feed and lay their eggs. I know that I am getting into technical aspects, but the committee heard evidence from wildlife organisations that they were concerned that, if the bill's scope was too wide, it could have an impact on the ecology of areas.

Christine Grahame: I am sorry—can I intervene again? There was a mistake in what the member said.

The Convener: You can do so if Mr Wilson allows you to—and he does.

Christine Grahame: Buddleia is a shrub, so it already falls within the bill's ambit.

John Wilson: We will look at the definitions. I am sure that, when the bill becomes an act, there will be many interpretations. We will leave it to experts to interpret the legislation.

I have serious reservations about Anne McTaggart's amendment 1, because of the concern—which witnesses raised on a number of occasions—about the impact that including deciduous plants or trees in the definition could have.

Margaret Mitchell is correct to refer to the review period, which I await with interest. I am sure that local authorities and others will gather evidence in that period that will indicate whether the bill has succeeded in dealing with the majority of cases. The issues that Scothedge raised suggest that the bill will not address the majority of the issues that its members face—Scothedge talked about single trees and other problems involved in neighbour disputes.

The Convener: This is certainly a horticultural education for me. I call Sarah Boyack.

Sarah Boyack (Lothian) (Lab): I might not go into quite as much depth as previous speakers. The heart of the bill, which I think we all support, is to give residents the opportunity for dispute resolution. That does not automatically mean that the disputes will be resolved satisfactorily for the people who take them to the local authority, but the bill will at least let them have their say and allow for independent consideration of the circumstances.

Following the stage 1 debate, comments were made about whether we have the right definition. I have had quite a few representations from people who are concerned that, because the definition as it stands does not include deciduous hedges, many disputes will not come within the ambit of the bill, although I do not think that there are so many such disputes that the principle of the bill would be undermined. Scothedge has said that, of all the many long-term disputes that it is aware of, around 20 per cent would be covered by amendment 1. That does not mean that all those cases would be brought to a successful resolution, but at least they would come within the ambit of the bill.

My reason for supporting amendment 1 is that, if we do not change the bill in the way that Anne McTaggart suggests, we know that many people will not get the resolution that it is intended to deliver. Given the long campaign that there has been to get the bill, people will be left profoundly unhappy and disputes will continue to fester. There is a cost to that, as we all know from representing our constituents.

The arguments against change need to be weighed against the unintended consequences of not including deciduous hedges. If only some types of hedge are covered, it could leave people who are required to take down evergreen hedges with the option of replacing them with deciduous hedges. That would leave us in a worse position than where we started; it would be a real kick in the teeth. That potential unintended consequence of not acting now has been raised with me.

Amendment 1 is not disproportionate. The evidence from south of the border is not that it would lead to huge increases in cases. Scothedge, the campaign group behind this change in the law, has a reasonable estimate of the potential numbers from its own cases, which should guide us today.

If we decide not to change the bill today and to tell our constituents that a review would be happening at some point, I do not think that that will give them much comfort, because they will know that having a review two or five years hence basically means that there will be no change in the meantime and that they will have no right to ask somebody to take an objective view of the dispute between them and their neighbour, which has no prospect of resolution. That would be a disappointing outcome of a bill that the member in charge has been right to bring to the Parliament. He has put in a huge amount of work. The bill could be improved by amendment 1.

John Wilson: I am interested in Sarah Boyack's comments. This matter has been before the Parliament in various guises almost since 1999, and we are now proceeding with a bill that will, we hope, become an act. It is interesting that it has taken this long to get to where we are, given that both Scottish Executives between 1999 and 2007 rejected the bills that were proposed at that time. It is a bit disingenuous of Sarah Boyack to say that we need to amend the bill, because it has been around in various guises for a number of years and finally a Government has taken it on board. The minister is here today to support it.

We need to be careful about the numbers, because we will not know the numbers affected. We get estimates from Scothedge and perhaps, in her summing up, Anne McTaggart can put some figures on the 20 per cent of neighbour disputes that Scothedge claims will not be covered if the bill is enacted with the existing definition. We are considering how many people would be affected.

It was mentioned that vexatious individuals could decide to plant a deciduous hedge, but one of the reasons why action is being taken against leylandii is the speed at which it can grow. Deciduous hedging takes a lot longer to grow. As a colleague said to me earlier, the issue is that the time lapse between the rate at which a deciduous hedge grows and at which a leylandii grows can be many decades, never mind years.

There are real issues with including the word "deciduous" in the definition. As I said, I am minded not to include it until we get an opportunity to review the bill.

Sarah Boyack: I accept that the Parliament has not legislated on the issue. That is because it is tricky. It never got high enough up the agenda for legislation to be supported. That is why we should seize the day and try to get it right at this point.

I take John Wilson's point that this is our first chance to do that, but that is not an argument against Anne McTaggart's amendment 1. It is a good political argument, but it is not a technical argument against her proposal.

John Wilson: If we want to go into technical debate on the issue, the 10-year delay in introducing the bill has meant that some leylandii have grown 20 feet or more. The reality is that, if the review period for deciduous trees or bushes was within two to five years, it would allow us to address the issue in much less time than it has taken us to get to this stage. Deciduous trees and bushes would take a lot longer to reach 30 feet.

The Minister for Local Government and Planning (Derek Mackay): I am happy to continue the Government's support for the bill. John Wilson is correct that we should take the opportunity to get it right. Sarah Boyack is also correct that, given the lack of legislation, we start with a blank page. That is all the more reason why we should take the most consensual approach that we can.

Anne McTaggart's amendment 1, supported by Christine Grahame, proposes widening the definition of a high hedge to include deciduous trees and shrubs. Christine Grahame's amendment 2 proposes extending the definition of a high hedge beyond trees and shrubs to include all plants.

At stage 1, I said about the definition:

"The Government has taken quite a relaxed view on that. We have given evidence and given our position but have said that we will listen to what Parliament thinks is the appropriate way forward."

I went on to say:

"If we were to propose changing the definition substantially at this point, I would want to return to local government to consult it".—[*Official Report*, 5 February 2013; c 16391-2.]

Given the fact that amendments 1 and 2 propose such a change, I have written to local authorities to seek their views on the potential impact of widening the definition of a high hedge in the ways proposed. Although it is not possible to obtain local authorities' views in time to inform our discussions today, I have asked them for a response in good time for stage 3, when we can revisit the issue, so that it can be properly considered then.

I hope that the committee agrees that that is a sensible approach to take, given the fact that the bill imposes new obligations on local authorities. We are sympathetic to the desire to capture as many reasonable cases as possible, but I would not want to pre-empt local government.

Therefore, I ask Anne McTaggart to withdraw her amendment 1 and Christine Grahame not to move her amendment 2. I also ask them not to press the issue until we have had the views of local government.

Amendment 19, from Margaret Mitchell, also relates to the bill's definition of a high hedge. It appears to respond to the committee's concerns about the clarity of the powers provided by section 34 to alter that definition.

The Government's view is that section 34 does not require to be amended. It is clear that the modifying powers provided by the section could be used to modify the meaning of a high hedge only within the context of the bill. However, the Government accepts that amendment 19 may help to address some of the concerns that were raised at stage 1 and does not oppose it. Therefore, we are prepared to support it.

10:30

Mark McDonald (North East Scotland) (SNP): I am grateful to the members who have lodged amendments, which allow us to have some discussion and debate on this matter.

Anne McTaggart's amendment 1 seeks to widen the meaning of "high hedge" beyond

"evergreen or semi-evergreen trees or shrubs"

to include deciduous species.

Christine Grahame's amendment 2 would broaden the definition beyond trees and shrubs to

include other plants. Amendment 19 from Margaret Mitchell seeks to clarify the extent to which section 34 can be used to modify the meaning of "high hedge". Members raised that issue at stage 1.

On amendment 1, I have been convinced during our scrutiny of the bill that evergreen and semi-evergreen trees and shrubs are the main problem, and I think that the figures bear that out. However, I have heard what other members have said and I have received significant levels of correspondence and representations from members of the public. Many of them are happy with the current definition, which they believe will solve their problem. I accept, however, that other people have high hedge problems that the bill will not solve. By definition, those people who are least happy with a proposed piece of legislation are the most likely to contact members about it.

Amendment 2 would result in a significant broadening of the bill. It would cause problems with how the bill might be understood and interpreted, and there is a potential for loopholes and inconsistencies to emerge. We would require the views of the experts who would implement the legislation—and the committee did hear from a number of experts at stage 1.

I noted John Wilson's point about ivy with interest. If someone sets ivy against a fence and it reaches the height that is required for the provisions of the bill to come into effect, that fence would itself require planning permission and the planning process would be involved.

I am happy to learn that the Government has written to local authorities to consult them on the potential impact of the amendments. It is important that we all consider their responses before reaching a conclusion on the issue, as they are the bodies that will have to implement the provisions. I suggest that we revisit the issue at stage 3, so I ask Anne McTaggart to withdraw amendment 1 and I ask Christine Grahame not to move amendment 2. I continue to consider all aspects of the issue, and I would be happy to have further discussions with both those members on the matter following stage 2.

As regards amendment 19, I set out my view on section 34 at stage 1 and in my written response to the committee's stage 1 report. I made it clear in that response and in my parallel letter to the Subordinate Legislation Committee that I did not intend to lodge an amendment in respect of section 34. I remain of the view that the section as drafted is clear and that an amendment is not necessary. However, although I believe that the clarification that was sought by this committee could be provided by way of the explanatory notes, I do not intend to oppose Margaret Mitchell's amendment 19. The view of committee members is that the amendment is helpful, and I would be happy enough for the committee to accept it.

Anne McTaggart: Having heard the minister and the member in charge of the bill, I welcome the further consultation with local authorities and the request for their expert advice. It is hugely important for us to receive that. I am unclear, however, as to whether we are able to return to the matter before stage 3. Is that a possibility?

The Convener: I see the minister nodding.

Derek Mackay: Yes, it is possible.

Anne McTaggart: On the understanding that that will happen, I am willing to withdraw amendment 1, so that consultation can take place with the member in charge and the minister before stage 3.

Amendment 1, by agreement, withdrawn.

The Convener: Amendment 2, in the name of Christine Grahame, was debated with amendment 1. Christine, do you want to move or not move the amendment?

Christine Grahame: I note the minister's undertaking to the member in charge that the matters that we have been discussing will all be examined prior to stage 3, including horticultural advice, which I think is very relevant. People can put ivy up chicken netting and posts, which is not the same as a fence that requires planning permission. I put that on the record—any further advice will come after the meeting.

Given the minister's undertaking, I will not move the amendment.

Amendment 2 not moved.

Section 1 agreed to.

Sections 2 and 3 agreed to.

Section 4—Fee for application

The Convener: The next group is on refund of application fee. Amendment 13, in the name of Margaret Mitchell, is grouped with amendment 16.

Margaret Mitchell: Amendment 13 requires local authorities to publish guidance on the circumstances in which they would normally consider it appropriate to make a refund under section 4. At present, local authorities will have absolute discretion over whether to issue a refund to an applicant under section 4. In the interests of certainty and to ensure that refunds are awarded or not awarded consistently, it is highly desirable for councils to publish guidance to state the circumstances in which they would normally consider it appropriate to issue refunds. That will still leave councils with discretion, but it will ensure

that applicants know when they can or should receive a refund for their application fee.

Amendment 13 also requires local authorities to consider any guidance that is issued by ministers on when it might be appropriate or desirable to issue refunds under section 4, should the Government decide to issue such guidelines under the power in section 31 to issue guidelines on the legislation.

Amendment 16 would allow local authorities to recover from a hedge owner the amount of an application fee that has been refunded to an applicant when the local authority has exercised its power under section 22 to enter and enforce a high hedge notice. Under section 25, councils can recover, among other things, any expenses that have reasonably been incurred in taking action under section 22, which allows them to enter land and enforce high hedge notices. However, there is no provision in section 25 to allow councils to recover the applicant's application fee from a high hedge owner where a refund has been given. Amendment 16 would therefore expressly give that power to councils, but only where they have to enforce a high hedge notice.

As a matter of principle, if a hedge owner has been obstinate or persistently stubborn in complying with a high hedge notice, causing unnecessary additional distress and frustration to neighbours and requiring the council to enter the land and do the work, it is reasonable and appropriate that the applicant should be refunded their application fee and the hedge owner charged. Furthermore, the threat of an additional cost if a high hedge order is not implemented is a valuable additional tool to encourage swift compliance with decisions.

I move amendment 13.

Stewart Stevenson: I have a little technical point about amendment 16. I am slightly uncertain why it would be necessary for the council to recover the money only when it has been refunded to the applicant. I am sympathetic to what the member seeks to achieve, but I just wonder why it is necessary for the money actually to have been refunded for that to be included in the expenses under section 25(1) that

"A relevant local authority may recover from any person".

In other words, it seems to me that the member's intention is that the council should be able to retain the money as well as recover it when it has not been refunded, and to apply it. I might be misunderstanding, so perhaps the member could address that in summing up. I am broadly sympathetic to the intention. The member might want to intervene now, if the convener allows.

The Convener: Ms Mitchell, you can address that point now.

Margaret Mitchell: Thank you, convener. Clearly, if the application fee has been paid, the council has received that money. If the council refunds the application fee to the applicant, it is out of pocket by that amount. The amendment seeks to allow the council to recoup that money if the owner is not complying and is being obstinate and the council has to go in and do the work itself.

Stewart Stevenson: Convener, I might be making a mountain out of a molehill. The circumstance that I envisage is where the council has determined that the correct circumstances for a refund exist but it has not yet exercised that refund, and the circumstances that are sought to be caught of entry to the grounds exist. In other parts of the bill, the requirement to refund exists. I am simply concerned to ensure that there is not a little gap in the provisions.

I would be comfortable were we to agree to the amendment today, subject to what the member in charge and the minister say, but I suspect that we might have to look at the matter further to ensure that we are not creating a wee gap that might reduce the intended effect. I will consider the matter further.

John Wilson: I ask Margaret Mitchell to clarify when she sums up how amendment 16 differs from section 25(1)(a) and 25(1)(b), on the recovery of expenses by local authorities. How does the amendment materially alter those provisions? Section 25(1)(a) mentions

"any expenses reasonably incurred by the authority in taking action under section 22".

I seek clarification of what difference amendment 16 would make to the powers that are already in the bill for local authorities to recover any costs associated with action that they take. I assume that that would include the repayment of any fees that were originally charged.

Derek Mackay: Amendment 13 requires local authorities to publish information on the circumstances in which application fees for high hedge notices will be refunded and it requires them to have regard to any guidance that ministers issue on the matter. That is a helpful addition to the bill's provisions and the Government is happy to support the amendment.

Amendment 16 would enable hedge owners to be charged any amount of an application fee for a high hedge notice that a local authority has decided to refund to an applicant. During the stage 1 debate, I said that we were interested to hear the committee's views but that we were content with the current position. I also noted that there might be issues about fairness in that, having

taken appropriate action, someone might still be charged. It is clear from the experience in England and Wales that the system in which the applicant pays the fee works well and serves as a deterrent. For those reasons, I urge the committee to oppose amendment 16. Mark McMillan—sorry, Mark McDonald will go into greater depth.

The Government supports amendment 13 but opposes amendment 16.

Mark McDonald: We appear to be rotating surnames this morning, having had Stuart McMillan incorrectly identified as Stewart Stevenson earlier.

I agree with Margaret Mitchell that transparency in issues relating to fees is important, so I am grateful to her for lodging amendment 13. It is helpful and I am happy to encourage the committee to support it.

The purpose of amendment 16 appears to be to enable a fee transfer mechanism that is akin to that which operates in Northern Ireland. I said at stage 1 that I had issues with the effectiveness of such provisions, as local authorities could pursue hedge owners for small amounts even when they have complied with a high hedge notice. I note that Ms Mitchell talks about the issue in terms of those hedge owners who are obstinate and stubborn and who do not comply with a notice. However, the amendment makes no reference to that. I assume that Ms Mitchell hopes that that would be reflected in guidance. Also, in the evidence from local authorities south of the border, we can find only one example in all the time for which the legislation has been in place in which action has had to be taken by a local authority. I therefore question the scale of the problem that Ms Mitchell seeks to address.

It remains my view that when a hedge owner has complied with a high hedge notice at their own expense, it is neither fair nor cost effective for the local authority to send them a bill for an amount that the applicant paid originally. It is important to remember that the bill is not about punishing owners of high hedges but about resolving disputes between individuals. Amendment 16 errs too far in the direction of punishment rather than dispute resolution.

10:45

We will discuss amendment 12, which would insert a review clause, later. I do not want to prejudge what the committee might decide on amendment 12, but I suggest that the issue that gave rise to amendment 16 might be better dealt with as part of a review, when we are in a better position to assess the effectiveness of such a provision in Northern Ireland, where the system is still very much in its infancy.

For those reasons, I urge the committee to oppose amendment 16. I am happy to support amendment 13.

Margaret Mitchell: I welcome the comments on amendment 13, which I hope will improve the bill by adding certainty and consistency to the guidance that follows the bill.

On Stewart Stevenson's point about refunding the fee, it is all a question of timing. As he said, there might be a gap, depending on how long it takes for the council crew to come in and do the work, if the applicant has been refunded—if there has been no refund, there is no issue.

On John Wilson's point, section 25 covers recovery of the cost of work that is undertaken by the local authority under section 22, but the application fee at the beginning of the process is a separate issue. I understand that section 22 is about what the council must do to make good the notice, should the hedge owner be obstinate. However, I take on board what he said about spelling out the circumstances in amendment 16.

I do not agree that amendment 16 is too punitive; I think that it might aid compliance. However, I am happy to reflect on the comments of members and the minister and not move the amendment at this stage. I might bring the issue back at stage 3 if I consider that there is merit in doing so. I press amendment 13.

Amendment 13 agreed to.

Section 4, as amended, agreed to.

Section 5—Dismissal of application

The Convener: Amendment 14, in the name of Margaret Mitchell, is in a group on its own.

Margaret Mitchell: Amendment 14 would amend section 5 by adding to the reasons for dismissal of a high hedge notice. Under section 5, an application for a high hedge notice can be dismissed if it is considered that the applicant has not complied with pre-application requirements in section 3 or that

"the application is frivolous or vexatious."

However, some applications that are without merit might not fall into either category. An application might not be frivolous, that is, not serious, and it might not be vexatious, that is, raised habitually or persistently without reasonable grounds. Amendment 14 therefore would ensure that applications that are neither frivolous nor vexatious but which are without merit could be rejected.

Stewart Stevenson: Can you give an example of such an application?

Margaret Mitchell: I cannot give you an example off the cuff. However, there is precedent for the approach in the Legal Profession and Legal Aid (Scotland) Act 2007, section 2(4) of which contains provision for dismissal of a complaint that is "without merit". The bill would be improved if that precedent were followed.

I need time to think about an application that might be without merit as opposed to frivolous or vexatious. Clearly, a one-off application is not an habitual application, so it cannot be vexatious, and frivolousness is perhaps subjective to an extent, so it might help to include "without merit".

I move amendment 14.

Derek Mackay: The Scottish Government does not support amendment 14. In relation to the sifting of applications for a high hedge notice, a balance is struck in section 5, which contains appropriate provision for the dismissal of applications at a preliminary stage without the local authority being required to investigate further. I expect that Mark McDonald will give more detail on the issue and, if Margaret Mitchell is persuaded by what he says, I ask her to withdraw amendment 14. The Government is content with the existing provisions.

Mark McDonald: Amendment 14 is similar to an amendment that the Law Society of Scotland suggested. I was happy to meet the Law Society before stage 2 and I am grateful to it for the interest that it has taken in the bill. The Law Society suggested that it would be helpful to include an application being "totally without merit" as a reason for a local authority dismissing an application, in addition to an application being frivolous or vexatious.

I have had the opportunity to consider the proposal, and my view is that such amendment is not necessary. "Frivolous" covers cases that are totally without merit. Section 5 is drafted in a way that is similar to the drafting of provisions in many Scottish acts and will give local authorities the opportunity, at a preliminary stage, to sift out applications that do not deserve full consideration.

The word "frivolous" gives a low threshold for applicants to overcome, as would the words "totally without merit". However, amendment 14 would allow summary dismissal of an application that was "without merit", rather than "totally without merit". I am concerned that such a provision would give applicants a much higher hurdle to get over before their case could be considered on its merits under section 6.

Section 5 also allows for dismissal of an application at the preliminary stage if the applicant has not complied with the pre-application requirements. I think that the balance is appropriately struck in section 5. I ask Margaret Mitchell to withdraw amendment 14; if she is not minded to do so, I ask the committee to vote against it.

Margaret Mitchell: In many ways amendment 14 was a probing amendment, and it has been useful to hear the comments of members and the minister. I realise that an example of an application that is without merit but not frivolous or vexatious would help us to ascertain whether amendment 14 is necessary. I am happy to withdraw the amendment and consider whether there would be merit in lodging a similar amendment at stage 3.

Amendment 14, by agreement, withdrawn.

Section 5 agreed to.

Section 6—Consideration of application

The Convener: The next group of amendments relates to the procedure in applications and notices when a hedge is in a national park. Amendment 3, in the name of Mark McDonald, is grouped with amendments 4 to 7.

Mark McDonald: Amendments 3 to 7 relate to hedges that are within the boundary of a national park. In its written submission to the committee, the Loch Lomond and the Trossachs National Park Authority proposed that national park authorities should be statutory consultees in relation to proposed high hedge notices that relate to hedges in their areas. The Scottish tree officers group supported the proposal.

I am grateful to the Loch Lomond and the Trossachs National Park Authority for raising the issue. As I said during the stage 1 debate, I am happy to agree with the Local Government and Regeneration Committee's recommendation that

"the Bill be amended to include reference to National Park Authorities as statutory consultees"

when a local authority is considering issuing a high hedge notice that relates to a hedge in a national park. Amendment 3 will ensure that national park authorities are consulted in that regard and that local authorities take account of their representations in considering whether action should be taken to address the adverse effect of a high hedge.

Amendments 4 to 6 ensure that national park authorities are informed of the outcome of local authorities' decisions on hedges in their area and provided with a copy of newly issued or varied high hedge notices, as well as being informed when a notice was withdrawn. Amendment 7 is consequential on amendment 6 and ensures that the new consultation requirement applies to any withdrawal or variation of a revised high hedge notice.

I move amendment 3.

Stewart Stevenson: This is a simple point. Can you assure us that the amendments adequately cover hedges that are on ground that is owned or controlled by a national park authority?

The Convener: Mr McDonald can deal with that just now, if he wishes.

Mark McDonald: I will save it for my summing up, if that is okay.

The Convener: Okay. I invite the minister to respond.

Derek Mackay: The Government is happy to support amendments 3 to 7, which are not totally without merit. The Government agrees that the amendments are a useful addition in response to concerns that were raised in written evidence at stage 1. It is right that the relevant national park authority should be notified of decisions that affect high hedges that are situated on land within its area and be able to make representations in relation to such decisions.

Mark McDonald: On Stewart Stevenson's point, a similar situation would arise when a local authority owned land and would be adjudicating on itself. I believe that the conflict of interest test that would apply in that context, with which the committee is satisfied, would apply equally in the circumstances to which Stewart Stevenson referred. In any case, were it considered that the conflict of interest had caused an issue, there would be the right to appeal. I therefore believe that the safeguard that Mr Stevenson raised has been factored in.

Stewart Stevenson: Can the member confirm that a national park would not be a decision maker on the matter but merely a consultee?

Mark McDonald: I am happy to confirm that the decision would rest with the local authority and that a national park would merely be a consultee.

Amendment 3 agreed to.

Section 6, as amended, agreed to.

Section 7—Notice of decision where no action to be taken

Amendment 4 moved—[Mark McDonald]—and agreed to.

Section 7, as amended, agreed to.

Section 8—High hedge notice

Amendment 5 moved—[Mark McDonald]—and agreed to.

Section 8, as amended, agreed to.

Section 9 agreed to.

Section 10—High hedge notice: withdrawal and variation

Amendments 6 and 7 moved—[Mark McDonald]—and agreed to.

Section 10, as amended, agreed to.

Sections 11 to 14 agreed to.

Section 15—Person appointed to determine appeal

The Convener: Amendment 15, in the name of Margaret Mitchell, is in a group on its own.

Margaret Mitchell: Section 15 will empower Scottish ministers to appoint a person to determine an appeal under section 12. Amendment 15 would give guidance on what kind of person ministers should appoint. The rights of appeal in the bill are of considerable importance to applicants, so any appeal must be determined by properly qualified persons who are trained in the law and have adequate experience of dealing with disputes and of hearing appeals. Amendment 15 simply seeks to ensure that the person appointed by ministers to hear an appeal has such qualifications.

I move amendment 15.

Stewart Stevenson: Can Margaret Mitchell say in her summing up—or now, if she wishes—how many people in Scotland might meet amendment 15's very specific set of requirements? The amendment would require someone to have

"experience of hearing and deciding appeals",

coupled with

"experience of dealing with land boundary disputes"

and "knowledge of the law". That seems to be extremely constraining.

11:00

Margaret Mitchell: I think that Stewart Stevenson knows that he is asking the impossible. However, it is entirely reasonable that we should consider people with necessary experience, which they might have gathered through working in planning, horticulture or a number of fields. It would not be impossible to get people with the relevant experience, as indicated in amendment 15.

Stewart Stevenson: I will consider the issue in the light of the rest of the debate.

Derek Mackay: I am just reflecting on the fact that the only person whom I know who is qualified to cover all three areas is the member who has left the room, Christine Grahame; she has experience of the law and of horticulture. I am not entirely sure about her planning prowess, although she touched

on that in her contribution. However, I expect that she is the exception and not the norm.

Amendment 15 relates to the knowledge and experience of people who would be appointed by ministers to undertake appeals on high hedges. The Government intends that the directorate for planning and environmental appeals will deal with such appeals. Of course, it has considerable experience of dealing with planning and other appeals, but I know that there are, under planning law, no statutory requirements that set out required knowledge or experience for dealing with planning appeals. The amendment is therefore unnecessary. It would be disproportionate to impose such requirements in relation to high-hedge appeals, which is something that we should seek to avoid. All necessary guidance should be in place, and professionalism should be exercised.

Amendment 15 is unnecessary and is not proportionate, so I urge the committee to resist it. Mark McDonald will explain further.

Mark McDonald: Amendment 15, in the name of Margaret Mitchell, seeks to require a person who is appointed by Scottish ministers to have specific knowledge of Scots law and experience of other specified matters. Although I agree with Margaret Mitchell that persons who are appointed to deal with the appeals process should have appropriate experience, I believe that that is already covered by the fact that appeals will be dealt with on behalf of ministers by the directorate for planning and environmental appeals, which will appoint a reporter to deal with each individual case.

The directorate's reporters already deal with planning appeals, which can, of course, be massively complex, and the impact of developments under such appeals are often enormous—certainly much further-reaching than a dispute between neighbours over a high hedge. All of the directorate's reporters are experienced in dealing with many types of analogous cases. They have the relevant knowledge and experience. There is no need to impose a statutory requirement. Indeed, there is no statutory requirement relating to the knowledge and experience of reporters who are considering planning appeals. I therefore suggest to the committee that it would be disproportionate to impose such requirements in respect of people who will deal with high-hedge appeals.

I note that amendment 15 would require that it "appears" to ministers that those who are appointed to deal with appeals

"have—knowledge of the law of Scotland".

I presume that some legal qualification would be required in order for them to demonstrate that. However, reporters who deal with the complex landscape of planning law do not usually have legal qualifications but are, normally, professional town planners. It would be odd potentially to exclude them from dealing with high-hedge appeals.

The requirements could raise a risk of challenge on procedural, rather than substantive, grounds, on the basis that there is a question about whether the person who would hear an appeal would have the specified knowledge or experience. On that basis, I urge the committee to resist amendment 15.

Margaret Mitchell: As I said, amendment 15 is a probing amendment; the comments that it has elicited have been useful. There is still an important issue, which I will not dismiss as easily as the minister and the member in charge of the bill appear to have done. However, I shall reflect on their comments and see whether the amendment can be improved so that it can address what I think is still an issue around the need to ensure that a properly qualified or experienced person is put in charge of an appeal. I therefore seek to withdraw the amendment.

Amendment 15, by agreement, withdrawn.

Section 15 agreed to.

Section 16 agreed to.

Section 17—Period for taking initial action following appeal

The Convener: Amendment 8, in the name of Mark McDonald, is grouped with amendments 9 to 11.

Mark McDonald: Amendments 8 and 9 are minor technical amendments that will ensure consistency in the terminology that is used in sections 10, 16, 17, 20 and 23.

Amendments 10 and 11 are also minor technical amendments to sections 26 and 29 of the bill, which deal with registration of notices in the register of sasines. The register of sasines includes all properties that have changed hands since 1617, but a very small number of properties are likely to be unregistered, such as properties that are owned by Scotland's ancient universities. The amendments will, as a result of discussions with Registers of Scotland, make technical changes. They will, because some property exists that has not been registered, remove the general requirement, in relation to notices to be recorded in the general register of sasines, to identify land by reference to a deed that is recorded in the general register of sasines. The amendments will also ensure that notices of liability and discharge can be registered in the general register of sasines in respect of land containing a high hedge where that land is part of a larger property, the title to

which is recorded in the general register of sasines.

I move amendment 8.

Derek Mackay: Amendments 8 to 11 are minor technical amendments. The Government agrees that it is helpful that amendments 8 and 9 will ensure that the wording of sections 10, 16, 17, 20 and 23 is consistent. The Government also agrees that the bill should make provision to enable notices of liability of expenses and notices of discharge to be recorded in the general register of sasines in relation to properties that have not changed hands since the time of the act of union. The Government is therefore happy to agree to amendment 10 and to amendment 11, which provides clarification in relation to larger plots of land.

Amendment 8 agreed to.

Section 17, as amended, agreed to.

Sections 18 and 19 agreed to.

Section 20—Warrant authorising entry

Amendment 9 moved—[Mark McDonald]—and agreed to.

Section 20, as amended, agreed to.

Sections 21 to 24 agreed to.

Section 25—Recovery of expenses from owner of land

Amendment 16 not moved.

Section 25 agreed to.

Section 26—Notice of liability for expense of local authority action

Amendment 10 moved—[Mark McDonald]—and agreed to.

Section 26, as amended, agreed to.

Sections 27 and 28 agreed to.

Section 29—Notice of discharge

Amendment 11 moved—[Mark McDonald]—and agreed to.

Section 29, as amended, agreed to.

Section 30 agreed to.

Section 31—Guidance

The Convener: Amendment 17, in the name of Margaret Mitchell, is grouped with amendment 18.

Margaret Mitchell: Amendments 17 and 18 would require the Scottish ministers to consult on guidance that will be issued under section 31, which will enable the Scottish ministers to issue guidance on the eventual act. Any guidance that they issue will have an impact on the way in which property owners, local authorities, solicitors, advisers in a high-hedge dispute and persons appointed to hear appeals will interpret the legislation. Therefore, the guidance will be very important and should be consulted on widely prior to its publication, so that stakeholders can comment on what is proposed. The amendments would ensure that such consultation takes place.

I move amendment 17.

Derek Mackay: Amendment 17 would place on the Government an obligation to consult relevant persons before issuing any guidance on the eventual act. That is our normal practice for such guidance, which aims to ensure that the proper professionals are consulted and that the guidance is as informed as it can be. We therefore do not regard the amendment as being strictly necessary. However, given that it is our usual practice, the Government has no strong objections to the bill's placing the requirement on the Government. The Government is therefore happy to support amendment 17 and amendment 18, which would place a similar obligation on local authorities.

Mark McDonald: Like the minister, I have no strong objections to either amendment 17 or amendment 18, and I am therefore happy to support both of them.

Margaret Mitchell: I thank the minister and the member in charge for their comments.

Amendment 17 agreed to.

Amendment 18 moved—[Margaret Mitchell]—and agreed to.

Section 31, as amended, agreed to.

After section 31

The Convener: We move to the group of amendments that is headed "Report on operation of Act". Amendment 12, in the name of Stuart McMillan, is the only amendment in the group.

Stuart McMillan: Amendment 12 will add a new section. In its stage 1 report, the committee agreed in principle to have a review, and the matter was discussed during the stage 1 debate. The committee suggested that the review period last no more than five years, and we were unanimous on the matter. The committee was keen to ensure that any review process that took place under the eventual legislation would be measured. The committee noted, however, that it was not possible to be too prescriptive regarding future actions—whether responsibility would lie with the Government or with a committee during a future parliamentary session.

I will explain the difference between what was suggested by the committee in its stage 1 report and the proposal under amendment 12. I think that it would be better if a committee or sub-committee of the Parliament, rather than the Government, were to undertake a review. That allows the potential for a wider review, and it would be very much a cross-party operation, rather than its being carried out by the Government of the day, whoever that may be. A wider review that involved more people through a committee or sub-committee would be beneficial.

The purpose of the review is simply to determine whether the eventual act is operating as it should. I imagine that the review would provide an opportunity for outside interests to have their say as to whether or not they thought that the act was fully operational and was doing what it should in helping our constituents and our communities.

There is another reason for lodging amendment 12 and inserting an additional section. An issue that has been raised in Parliament time and again is the lack of post-legislative scrutiny; such a review being written into the bill would allow that to happen. There is no criticism here against parliamentarians, the Government or the Parliament regarding the lack of post-legislative scrutiny, which is due to time constraints, as we fully appreciate, but inclusion in the bill of the provision in the amendment would ensure that the eventual act will not drop off the political agenda and that it will return to Parliament in the future.

I move amendment 12.

Stewart Stevenson: I very much support amendment 12. Perhaps Stuart McMillan can comment on this when summing up—the minister and member in charge may also wish to comment—but the amendment makes no provision for a minimum period for the review. Would it be appropriate to consider a minimum period, so that there is sufficient evidence of the operation of the eventual act for the review to be meaningful? The absence of that will not cause me to consider that I should not support amendment 12, but it is a matter that we might consider further.

11:15

The Convener: I think that subsection (2)(b) in the amendment covers that issue.

Stuart McMillan: I am happy to deal with the point in summing up.

Margaret Mitchell: I would be grateful if Stuart McMillan would clarify whether amendment 12 means that it could be six and a half years after the act's implementation before a report about the review period was forthcoming.

John Wilson: I welcome Stuart McMillan's amendment 12. I agree with its aim—of ensuring parliamentary scrutiny of the act's operation—but I hope that ministers will keep the act under constant review, to assess its importance and effect. That relates particularly to our earlier discussion about issuing guidance to local authorities and others that might implement the eventual act's provisions day to day. Any decision by a committee to incorporate a review period in legislation does not remove the Government's responsibility to keep that legislation under constant review and to update it when appropriate.

Derek Mackay: I will answer Mr Wilson's point straight off. He is absolutely correct: it is the duty of the Government and all parliamentarians to monitor the impact of legislation. If further action is required, it should be taken in good time. Amendment 12 provides a device to reflect on the views of committee members and others and to ensure that we get the definition and other matters right and return to them if they are not right.

Timescales are entirely a matter for the committee—we just have to be pragmatic. I imagine that the committee would not want to be bound by a timescale that provided no flexibility.

Amendment 12 is unprecedented. Despite what I said, post-legislative scrutiny is not necessary for every piece of legislation that we produce. If it was, that would suggest that we did not have confidence in the legislation that we considered and enacted. However, it is important to get legislation right. We have discussed returning to the definition and other issues at stage 3.

Stuart McMillan's amendment 12 responds to the committee's recommendation that a review provision be included in the bill. I do not believe that a mandatory review provision is a necessary feature of legislation, but I note the committee's recommendation and I am aware that Mark McDonald has said that he will support the amendment. In the circumstances, the Government is prepared to support it, too.

Mark McDonald: Amendment 12 requires that a review of the bill's operation be undertaken no later than five years after the substantive provisions are commenced—and earlier if Parliament so decides. It is important to state on the record that five years would be the maximum period.

I will respond to Stewart Stevenson's comments about a minimum period. A degree of pragmatism needs to be applied. How long after the act comes into force would it be reasonable to expect to have lessons that could be learned and applied? Rather than stipulate a minimum period, it would be far better to take a pragmatic approach.

In the stage 1 debate on 5 February, Stuart McMillan asked me whether I would support an amendment to add a review provision, based on the recommendation in the committee's stage 1 report, and I said that I would be happy to do so. Amendment 12 meets the committee's recommendation

"that the Bill include a mechanism for a review"

and that

"Such a review should take place within a reasonable timeframe".

Stuart McMillan's comments about Parliament rather than the Government reviewing the situation were well founded. That will allow a wider range of inputs than might be the case if the Government—of whatever colour—were to review the legislation.

Amendment 12 will ensure that we actively learn from local authorities' experience of implementing the act, and the provision will be vital in order to inform Parliament's consideration of how the act should operate in the future. It will also provide the opportunity to draw on examples from elsewhere.

Earlier, I mentioned the fee-transfer mechanism in Northern Ireland, which is very much in its infancy. The review period might allow for more detailed consideration of the operation of that mechanism in Northern Ireland and whether such a system could be applied readily in Scotland. It will ensure that any proposed changes are informed by evidence of the realities of implementing high hedges legislation in Scotland and elsewhere.

Stuart McMillan's amendment 12 will give effect to the committee's recommendation on a review provision and I hope that the committee will support it.

Stuart McMillan: I will go through the points that have been raised.

Stewart Stevenson raised the issue of specifying a minimum period. Although his point might well be valid, I do not think that it is necessary to specify a minimum period. I do not think that parliamentarians on the future committee or sub-committee that reviews the operation of the bill will want to do so in—for argument's sake—two years' time rather than in three or four years' time. We must allow the bill to pass, to be implemented and then to bed in. At that point, we can start to gather information. A minimum period might not allow a full and thorough review to take place at some point in the future, so I do not think that there is a requirement for that.

In relation to Margaret Mitchell's point, there is the potential for it to take up to six and a half years for a report to be produced, but the review would have to take place no later than five years after the day on which section 2 comes into force. Depending on its workload, the committee concerned might want to start the review period a wee bit later, but I do not envisage that being the case. We all fully appreciate that the issue is one that affects many people across Scotland and on which there is no legislation at the moment. Given the bill's importance, I do not envisage what Margaret Mitchell suggests being the case.

The minister answered John Wilson's point. It is absolutely correct that the ministers and the Government need to keep an eye on what happens. The minister dealt with post-legislative scrutiny. I whole-heartedly agreed that there is no need to have a post-legislative scrutiny provision written into every bill, because I do not think that that would be efficient or effective. However, having such a provision written into the High Hedges (Scotland) Bill represents a measured approach to an issue on which there is, at present, no legislation. High hedges are a highly contentious issue across the country, so having a post-legislative scrutiny provision written into the bill is worth while.

Mark McDonald spoke about reviewing operations elsewhere. By allowing Parliament to hold a review in the future, we will certainly allow the experiences in other parts of these islands and the expertise of people there to be fully considered. Enabling the Parliament to review the bill will be beneficial for the bill and for the country.

I press amendment 12.

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McMillan, Stuart (West Scotland) (SNP)
McTaggart, Anne (Glasgow) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Wilson, John (Central Scotland) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 12 agreed to.

Sections 32 and 33 agreed to.

Section 34—Power to modify meaning of "high hedge"

Amendment 19 moved—[Margaret Mitchell]—and agreed to.

Section 34, as amended, agreed to.

Sections 35 to 38 agreed to.

Long title agreed to.

The Convener: That ends stage 2. I do not know whether members believe in the luck of ladybirds, but I note that one has been flying around this room all morning.

Members should note that the bill will now be reprinted as amended and will be available on Parliament's website tomorrow morning. Although Parliament has not yet determined when stage 3 will take place, members can lodge stage 3 amendments with the legislation team at any time and will be informed of the deadline for amendments once that date has been determined. I thank members for their participation and suspend the meeting.

11:25

Meeting suspended.

11:31

On resuming—

Subordinate Legislation

Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2013 [Draft]

The Convener: Agenda item 2 is subordinate legislation. We will take oral evidence on an affirmative instrument.

Members have a covering paper from the clerk, which sets out the background to the instrument. Minister Derek Mackay is still with us for this item, and he is joined by Sam Anwar, head of planning legislation at the planning and architecture division of the Scottish Government.

Minister, do you have any opening remarks on the Scottish Statutory Instrument?

Derek Mackay: I do. Thank you once again, convener.

The regulations will introduce new levels of planning fees, which, if the committee approves them, will come into effect on 6 April. The charging of fees for planning applications has been law since 1981. The regulations do not seek to change that principle; they will set the level of fee that we now consider appropriate for planning applications.

I should make it clear that fees relate only to the processing of planning applications. The wider resourcing of the planning service is a matter for each local authority. In September 2011, Audit Scotland reported that the funding model for processing planning applications was becoming unsustainable. To address that, in March 2012 we published a consultation paper on new regulations for planning application fees, which would have led to substantial increases. Many respondents to the consultation paper—with the exception of planning authorities—strongly opposed the proposed fee increases.

Following discussions with Convention of Scottish Local Authorities leaders and other key stakeholders, in December 2012 I announced that we would make regulations to increase planning fees and the fee maximum by approximately 20 per cent. I believe that an increase of 20 per cent will strike the right balance between supporting sustainable economic growth and strengthening the resources of planning authorities.

It will be the first increase in planning fees since April 2010. Taking into account the increase proposed in the regulations, planning application fee levels will continue to represent a modest

proportion of developers' overall costs. For users and potential beneficiaries of the development management system, fee levels should meet the costs incurred when determining planning applications, which would otherwise fall to be met by council tax and business rates payers generally.

Moving towards full cost recovery has to be done in partnership with all the various partners and stakeholders to ensure that the process reflects where we are in the current economic cycle and that those who pay the fees can expect a high-quality, efficient service for their money. To that end, we have formed a high-level group with COSLA to review planning performance and drive improvement over the next 12 to 15 months.

I welcome the opportunity to answer any questions that the committee may have on the regulations.

Stewart Stevenson: I remember the joy of making the last instrument in April 2010, which the minister referred to.

The business and regulatory impact assessment refers to the link between increased fees and improved performance, which the minister mentioned in his opening remarks. That is something that many in the development industry, and applicants generally, are looking for. Will the minister enlighten us as to what actions might be taken, either globally across all 34 planning authorities or locally in particular cases, if performance is not improved in the way that the Government and the wider community want? In particular, I am talking about guaranteed performance in relation to major applications.

Derek Mackay: On the link with performance, the high-level group has an aspiration to move towards full cost recovery. We will put in place a range of measures to improve the performance of the planning system, working in partnership with Heads of Planning Scotland, Planning Aid for Scotland and others.

I like to think of it as a carrot-and-stick approach. The carrot is the extra resources for planning authorities through the proposed 20 per cent increase in fees. We have allocated new resources to local authorities on a one-off basis in relation to renewables, as well as resources for Heads of Planning Scotland and Planning Aid. There is a range of simplification, streamlining, performance improvement and other measures, as well as the next steps work that I announced in Parliament and which was helpfully and positively received by members in the recent debate on planning.

That shows that we are taking a range of actions to improve performance. That is the quid pro quo for the 20 per cent increase. Obviously, we are focused on planning performance statistics and we will continue to monitor them. That includes examining particular legacy cases, which I think have skewed some of the performance statistics.

I have mentioned the carrot, which is the incentivisation, the resources and the action plan; the stick is the measure that I propose to support my colleague Mr Ewing, the minister in charge of the proposed better regulation bill. That is a penalty mechanism, under which planning authorities that consistently underperform and do not respond to the challenges could have their planning fees reduced. The measure will come to Parliament in due course as part of that bill.

That said, I would much rather have positive engagement, partnership and a range of actions to link fee increase with improved performance. As planning minister, I am absolutely determined to see improved performance.

John Pentland (Motherwell and Wishaw) (Lab): To me, it is not surprising that those who were most supportive of the planning increase were local authorities, which are planning authorities. We should bear it in mind that the fees that are associated with some planning applications by no means meet the cost of dealing with those applications. For example, my local authority, North Lanarkshire Council, had to subsidise fees to the tune of nearly £2 million to progress planning applications.

I am heartened to hear the minister talk about full cost recovery at some point in future. Is it possible to give us a timescale for that? In times of austerity when local authorities are having to make cuts, I am getting a wee bit concerned that the better planning service that we hope to promote might again be diminished because resources will have to be found to subsidise application fees.

Derek Mackay: I absolutely cannot give a timescale because—to refer back to Mr Stevenson's point—I am completely dependent on local authorities to improve their performance to give me the justification for increasing planning fees further. In all honesty, therefore, I cannot give a timescale, but we will certainly be focused on full cost recovery.

In probing the issue, we need a full understanding of what each application would cost on an authority-by-authority and case-by-case basis. Mr Pentland might take a more sympathetic view on a householder application than he would, for example, on an application for a large supermarket. In that case, he might take a different view as to whether a subsidy is relevant, appropriate or justifiable.

We therefore need a full understanding of the costs that are associated with each planning

application. We will do further probing work on that, because I am not convinced that the data that we have is sufficient to allow us to get real figures. We are therefore doing further cost analysis.

On full cost recovery, I make the point that planning fee income has increased. In the most recent figures, which are for 2011-12, the figure is more than £23.5 million, which is higher than both the figure for the previous year and the figure for 2008-09.

It is a valid question to ask what exactly those who pay for planning applications are paying for. I would not want them to be paying for a bureaucracy that does not relate to their applications, considering that planning fee income has gone up and the number of planning applications has gone down. I want to ensure that if we move to full cost recovery—which is an aspiration that I share—it is robust and fair to people who pay for applications.

I understand that local government is under financial pressure. I am sure that the member will therefore welcome, as he did in the debate, that the increase is the highest single increase since the Scottish Parliament was created.

Margaret Mitchell: Good morning again, minister. Will you confirm what the current funding gap is between expenditure and income and say what the gap will be when the new fees have been put in place?

Derek Mackay: From memory, I think that Audit Scotland identified a gap of about £20 million. It is estimated that, given the current level of planning applications, the 20 per cent increase could generate between £4 million and £5 million a year. That is the rough estimate that I have. However, to return to Mr Pentland's point, I would like to probe the figures further to ensure that the cost analysis that we have identified is accurate.

Margaret Mitchell: Therefore, there will still be a gap of £15 million to £16 million between the actual cost of processing applications and the income that is generated. In those circumstances, is it realistic to achieve the increase in efficiency and effectiveness that many people seek from an increase in the fees?

I entirely take on board the point that these are difficult times and the majority of the respondents were against any increase. That is reflected in the sensible approach for lower-end applications. However, did the Government look at the fees that are charged in other jurisdictions for supermarkets and superstores? What caps exist elsewhere and how do they compare with what the Scottish Government proposes?

Derek Mackay: I see the irony in Mrs Mitchell challenging me on supermarkets given that she opposed or supported the annulment of the public health supplement, which is a fund raised from that sector.

Of course we carried out an analysis of the different applications in the devolved jurisdictions in the United Kingdom. The point remains that planning fees in Scotland are generally at the same level as or lower than those of our counterparts in England. That said, they will be considering their forward look for planning fee increases as well.

I am happy to give the committee more detail on the cost of individual applications and the equivalent costs in other parts of the UK if you would find that information helpful, but generally speaking the costs are not disproportionate. The maximum fee is higher in England, but we have kept the 20 per cent increase as standard for the maximum fee. If you like, I can give you some of the figures now.

Margaret Mitchell: I am really interested in the upper level for the very big applications that are, as John Pentland pointed out, so costly for local authorities to process. My understanding was that the cost would be hundreds of thousands of pounds as opposed to £19,000 or £20,000, as proposed under the regulations.

Derek Mackay: I will make two points. First, when we consulted the individual sectors, we did not want to upset any investment decisions that might be made in Scotland or give the impression that we are not open for business, which we most clearly are.

Secondly, I am sure that you, as a Conservative, will agree that it is important not to raise taxation or raise charges to fund a service without looking at what people are paying for. There is a lot of room for reductions in bureaucracy and more streamlining and simplification so that, as well as raising income to pay for the service, we can reduce the cost of the service.

Last time I was at the committee, or the time before that, we discussed a planning change by way of regulations. That change will take some cost out of the system. I hope that reform will take out some of the costs, and I think that between the increase in planning fees and the reductions in costs, which we can probe further, we can get closer to full cost recovery.

11:45

As I am sure the committee does, I see the planning service as a public service—after all, it is all about putting the right development in the right place—and the public would not necessarily object to a subsidy for some types of development. Of

course, that brings us back to the question of who should assume the burden of full cost recovery.

Finally, the planning system is only one element in a development viability appraisal. A planning application might cost a maximum of £24,000, but the costs of assessments or appraisals might run into hundreds of thousands of pounds. As a result, we need to take a more proportionate approach, which will form part of my next steps action plan. I am very much focused on the needs of the planning service, the communities and indeed the applicants who put a great deal of money into their proposals.

Margaret Mitchell: Thank you for those comments, but I think that a balance has to be struck. Big companies locating here do not want to lose out through having to pay disproportionate costs, but if we have not funded the system sufficiently well to make improvements, are they really gaining in the long run from what seem to be top-end fees that are very much less than those elsewhere in the UK? I wonder whether you could reflect on the matter but, in the meantime, it would be useful if you could tell me the upper level of fees for very big developments elsewhere.

Sam Anwar (Scottish Government): After the regulations come into force, a 5,000m^2 supermarket in Scotland will pay £19,100; in England, the fee would be £21,000.

Margaret Mitchell: And what are the upper limits?

Sam Anwar: The upper limits are £19,100 in Scotland and £250,000 in England. However, not all applications for large supermarkets will necessarily pay the maximum.

Margaret Mitchell: Why has such a restriction been made? Why did you not consider an upper limit to take cognisance of the circumstances and complexity of an application and to try to get it through the system smoothly and efficiently?

Derek Mackay: It has been some time since our original consultation paper but, from memory, I believe that we proposed a £100,000 cap compared with the UK cap of £250,000. Although that sounds attractive and although the fee is still less expensive than that in England, the fact is that, as the sector was keen to make clear to us, the size of new developments in Scotland means that the measure would have had a disproportionate impact on the scale of developments. With this 20 per cent increase, we are being consistent; indeed, the planning fee increase and the maximum fee are easy to understand across the board.

That said, I am open to the committee's views. I was surprised that, in the parliamentary debate on planning, no one criticised the planning fee increase, so perhaps we should go further. I do not want to increase it to the extent that it deters investment in Scotland, which is why I consulted on it so comprehensively when I took the bold step of suggesting an increase from £19,000 to £100,000. Analysis suggested that, with such a move, we would almost immediately become more expensive, simply because of the scale of supermarkets in Scotland. I was quite sympathetic to that view and kept the increase at 20 per cent.

Of course, this is just the beginning of our consideration of future planning fee increases. If the member or indeed the committee has particular views on how I should direct that matter with local government, I am certainly willing to engage in that discussion.

Margaret Mitchell: Those comments were very helpful, minister.

The Convener: Is there much difference between the service that applicants get here and the service they get south of the border?

Derek Mackay: The service is not only different between Scotland and England; it varies from local authority to local authority from the very good to the not very good—hence my support for a fee mechanism that can reflect that and which we will be debate in the future.

I like to think that the planning service is improving. Homes for Scotland and other key stakeholders were aware of the original consultation, so they warmly welcomed the 20 per cent increase as a compromise in the knowledge that it went hand in hand with an improvement plan. I cannot generalise and say that the planning service in Scotland is better than that in England—as Scotland's answer to Eric Pickles, I like to think that it is—but I think that our approach to planning reform is much more harmonious. Instead of bashing planners over the head, which is not something that I would encourage, we are seeking partnership with them.

The situation across the country is varied. However, I believe that it is getting better and that our action plan and the range of actions that we are taking will continue to make a difference.

The Convener: Along with bringing into play the stick of fees reduction, will you also roll out good practice across Scotland? In my experience, I have seen some planning services that have a huge number of processes that seem a little unnecessary and which are, in some cases, downright risk-averse.

Derek Mackay: That is an excellent point. Actually, we are sharing best practice right now.

Obviously, we have an opportunity here. After all, if we know that certain practice works, why has it not been mainstreamed in the 32 local

authorities and the two national park authorities? We have to mainstream and roll out best practice and ensure that it is complied with.

I am sure that the committee will not want me to, but I could go on at some length about our national planning and performance frameworks and how we are encouraging planning authorities to emulate best practice. However, I think that the fee mechanism will be a useful tool for what I shall call the more uninterested planning authorities that are missing some of the clear opportunities that exist.

We can discuss the mechanism in much greater detail, but the committee will be interested to hear that experience in local government is that the director of planning, the head of planning and the convener of the planning committee take a great interest in the service. I am not sure that the same can always be said of the director, the chief executive and the leader of every council. I think that, when those people discover that my mechanism could reduce a local authority's income on the basis of poor performance, they will suddenly take a great deal of interest in their planning service.

The Convener: Thank you, minister.

We now move to the debate on the motion to approve the regulations.

Motion moved,

That the Local Government and Regeneration Committee recommends that the Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2013 [draft] be approved.—[*Derek Mackay.*]

Motion agreed to.

The Convener: I thank the minister and Mr Anwar for their evidence. We now move into private session.

11:52

Meeting continued in private until 12:12.

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