

# **HIGH HEDGES (SCOTLAND) BILL**

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## **REVISED EXPLANATORY NOTES**

### **CONTENTS**

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the High Hedges (Scotland) Bill (introduced in the Scottish Parliament on 2 October 2012) as amended at Stage 2. Text has been added or amended as necessary to reflect amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

### **INTRODUCTION**

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or part of a section, does not seem to require any explanation or comment, none is given.

3. These Explanatory Notes have been prepared by Mark McDonald MSP, with the assistance of the Scottish Government, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

### **SUMMARY OF THE BILL**

4. The Bill provides for applications to be made to a relevant local authority where a high hedge on neighbouring land is considered to be having an adverse effect on the reasonable enjoyment of domestic property. The Bill gives the local authority powers to settle disputes between neighbours related to high hedges. If the local authority, having taken all views into account, finds that the hedge is having an adverse effect, it could issue a high hedge notice requiring the hedge owner to take action to remedy the problem and prevent it recurring. Failure to comply with such a notice would allow the authority to go in and do the work itself, recovering the costs from the hedge owner. There is a right of appeal to the Scottish Ministers against decisions of an authority and any high hedge notice issued by it.

### **COMMENTARY ON SECTIONS**

#### *Meaning of “high hedge”*

#### **Section 1 – Meaning of “high hedge”**

5. This section defines a “high hedge” as being one which is being formed wholly or mainly by a row of two or more evergreen or semi-evergreen trees or shrubs which exceed two metres in

height and which forms a barrier to light. Semi-evergreens are trees or shrubs which generally have some live foliage during the winter, depending on weather conditions.

6. Subsection (2), however, makes it clear that the density of the hedge is relevant. It provides that a hedge is not to be regarded as forming a barrier to light when the row of trees or shrubs contains gaps, which significantly reduce its overall effect as a barrier to light at heights of over two metres.

7. Subsection (3) makes it clear that the roots of the hedge are not relevant.

### *High hedge notices*

#### **Section 2 – Application for high hedge notice**

8. This provision allows an owner or occupier of a domestic property to apply to the relevant local authority for a high hedge notice, if that person feels that the occupier's reasonable enjoyment of the property has been adversely affected by the height of the hedge on land occupied by another person. This land does not necessarily need to share a boundary with the domestic property affected by the hedge, nor does it exclusively refer to other domestic properties.

#### **Section 3 – Pre-application requirements**

9. This section places a responsibility on a potential applicant to take all reasonable steps to resolve the high hedge dispute before making an application for a high hedge notice. It also provides that in doing so, applicants must have regard to any guidance published by the relevant local authority on this issue. Guidance issued by the relevant local authority may, for example, require applicants to have attempted to resolve matters through mediation before making an application.

#### **Section 4 – Fee for application**

10. This section gives the local authority the power to charge a fee for applications. It provides that applications must be accompanied by any fee set by the relevant local authority. The fee must not exceed an amount which the local authority considers represents the reasonable costs of deciding an application. This would include administration costs.

11. Subsection (2) allows different fees to be charged for different types of applications. This ensures that the local authority has the scope to alter any charging regime according to factors it considers appropriate other than simply amending the price of all applications. The local authority is given the power in subsection (4) to refund fees as it may determine and subsection (5) provides that it must publish details of the circumstances in which and the extent to which it is considered appropriate for refunds to be made. When publishing this information, the local authority must, under subsection (6), have regard to any guidance on the matter issued by Scottish Ministers.

## **Section 5 – Dismissal of application**

12. This section provides that the local authority must dismiss an application if it considers the applicant has not taken all reasonable steps to resolve the high hedge dispute without involving the authority, or if it considers that the application is frivolous or vexatious. Whether an application is frivolous or vexatious will turn on the particular circumstances, but may include the situation where someone has repeatedly applied (unsuccessfully) to the local authority without there being any change in circumstances which would affect the local authority's decision.

13. If the local authority dismisses an application it must, under subsection (2), inform the applicant as soon as is reasonably practicable, giving reasons for its decision.

## **Section 6 – Consideration of application**

14. This section applies where the local authority does not dismiss an application under section 5 and proceeds to consider the application. It must give a copy of the application to every owner and occupier of the neighbouring land. A notice must also be given informing such owners and occupiers of the matters set out in subsection (3).

15. Subsection (3) lists the matters that must be included in the notice provided in subsection (2)(b). These include informing such owners and occupiers of their right to make representations within a period of 28 days and letting them know that a copy of such representations will be given to the applicant.

16. Subsection (4) requires the local authority to take any representations made into account when making a decision in relation to the high hedge.

17. Subsection (5) requires that, after the period of 28 days, the local authority must take a decision on the application. It must decide in the first place whether the height of the high hedge is adversely affecting the enjoyment of the property that an occupant of the property could reasonably expect to have. The test, therefore, is an objective occupier's enjoyment and not the enjoyment that the particular applicant has, or expects, if they were to live in the property. If the local authority concludes that there is an adverse effect, it must then decide what, if any, action should be required to be taken, and by when, in relation to the hedge in order to remedy the adverse effect or to prevent it recurring. This is referred to as "initial action".

18. If a local authority decides that initial action should be taken, subsection (6) requires it to decide a reasonable period of time for this action to be taken, the "compliance period". It must also decide whether or not any preventative action should be taken following the end of the compliance period so as to prevent the recurrence of the adverse effect. An example of "preventative action" would be annual maintenance of the hedge.

19. Subsection (7) makes it clear that in considering whether any action is required, the local authority must have regard to all the circumstances of the case, including in particular, the effect of the high hedge on the amenity of the area and whether the high hedge is of cultural or historical significance. This is to ensure protection for ancient trees and hedgerows, as well as any hedges that may have an effect on the amenity of the area.

20. Subsection (8) ensures that where a high hedge is situated on land which has been designated as a National Park, the local authority must, before making a decision under subsection (5)(b) consult the relevant National Park authority for that National Park, and take into account any representations made by that authority.

### **Section 7 – Notice of decision where no action to be taken**

21. This section requires that, as soon as reasonably practicable after deciding there is no adverse effect, or that no action should be taken in relation to the high hedge, the local authority must notify the applicant and every owner and occupier of the land on which the high hedge is situated of its decision, giving reasons and notifying the recipients of the right to appeal.

22. Subsection (4) provides that where a high hedge is situated on land which has been designated as a National Park and the local authority has decided under section 6(5)(b) that no action should be taken in relation to the high hedge it must also inform the relevant National Park Authority of its decision.

### **Section 8 – High hedge notice**

23. This section provides that where the local authority decides that initial action should be taken it must issue a high hedge notice. The high hedge notice should be issued as soon as reasonably practicable after the decision.

24. Subsection (2) lists what a high hedge notice must state. This includes identification of the hedge and the date on which the notice is to take effect. This must be at least 28 days after the date on which the notice is issued, so as to allow time for an appeal under section 12 to be made.

25. The notice must also specify the initial action and the compliance period for that action and any preventative action following that period required to be carried out.

26. The notice must also outline the right of appeal and the consequences of failure to comply with the notice. These are that the local authority has power to go in and take action itself, recovering the expenses of that action from the hedge owner.

27. Subsections (4) and (5) require the local authority to send a copy of the high hedge notice to the applicant and every owner and occupier of the neighbouring land, giving reasons for its decision.

28. Subsection (6) requires a local authority, where a high hedge is situated on land which has been designated as a National Park, to send a copy of the high hedge notice to the relevant National Park authority.

### **Section 9 – Effect of high hedge notice**

29. This section provides that a high hedge notice is binding on every person who is for the time being an owner of the neighbouring land specified in the notice. This provision makes it

clear that a notice is binding not only on whoever is the owner at the time it is issued but also on subsequent owners.

### **Section 10 – High hedge notice: withdrawal and variation**

30. This section provides that a local authority can, having regard to all the circumstances of the case, withdraw or vary a high hedge notice. “Vary” is defined in section 33(1). Before making any withdrawal or variation, regard must be had in particular to (a) whether, after the withdrawal or variation, the height of the high hedge would adversely affect the enjoyment of the domestic property that an occupant could reasonably expect to have and (b) all of the circumstances of the case, including the effect of the high hedge on the amenity of the area and whether it is of cultural or historical significance.

31. Under subsections (3) and (4), where a local authority withdraws a high hedge notice it must notify each owner and occupier of the domestic property identified in the notice and each owner and occupier of the neighbouring land of its action giving reasons for the decision and notifying the recipient of the right to appeal.

32. Subsection (5) allows the local authority to issue another high hedge notice if it has withdrawn a previous high hedge notice. A later application may be made in respect of the same hedge.

33. Subsections (6) to (8) relate to the issuing of a revised high hedge notice. Where a local authority varies a notice, it must issue a revised notice containing the date on which it is to take effect. This must be at least 28 days after the date on which the revised notice is given, so as to allow time for an appeal under section 12 to be made. The same notification requirements apply as in respect of a withdrawal of a notice. A revised notice can be withdrawn or further varied. Subsection (7A) provides that where a high hedge is situated on land designated as a National Park the local authority must, where it withdraws or varies a high hedge notice, give notice of such withdrawal or variation to the relevant National Park authority.

### **Section 11 – Tree preservation orders**

34. This section applies where a high hedge notice relates to a high hedge which includes a tree or forms part of a group of trees subject to a tree preservation order. Section 33(1) provides that a tree preservation order has the meaning given by section 160(1) of the Town and Country Planning Act 1997. Such an order can be made by a planning authority providing for the preservation of trees or groups of trees or woodlands where it is expedient in the interests of amenity or that the trees, groups of trees or woodlands are of cultural or historical significance.

35. Subsection (2) provides that a tree preservation order has no effect in relation to any initial or preventative action done to any tree or group of trees specified in a high hedge notice. However, under section 6(7) the local authority must have regard (amongst other things) to the effect of the high hedge on the amenity of the area and whether the high hedge is of cultural significance in determining an application for a high hedge notice.

## *Appeals*

### **Section 12 – Appeals**

36. This section provides rights of appeal to Scottish Ministers against decisions made by local authorities.

37. Under subsection (1), applicants may appeal against decisions made by the local authority that there is no adverse effect or that no action should be taken on the hedge.

38. Under subsections (2) and (3), owners and occupiers of the domestic property and owners and occupiers of the neighbouring land may appeal against the issue of a high hedge notice or a withdrawal or variation of a high hedge notice.

39. Subsection (4) provides that any appeal must be made before the end of the period of 28 days, beginning with the date of the notification by the local authority of the decision or the high hedge notice or the withdrawal of the notice or the revised high hedge notice as the case may be.

### **Section 13 – Effect of appeal**

40. This section provides that, where an appeal has been made against a high hedge notice, the notice has no effect until the appeal is either determined, withdrawn or abandoned. The section also provides that where an appeal has been made against the withdrawal or variation of a notice, the withdrawal or variation has no effect until the appeal is either determined, withdrawn or abandoned.

### **Section 14 – Determination of appeal**

41. This section sets out how Scottish Ministers may determine an appeal. It allows Scottish Ministers to confirm the decision or high hedge notice, quash the decision or high hedge notice, vary a notice or issue a high hedge notice, depending on circumstances.

### **Section 15 – Person appointed to determine appeal**

42. As with appeals under the Town and Country Planning (Scotland) Act 1997, this section enables Scottish Ministers to appoint a person to hear and determine an appeal. Under subsection (2), the appointed person will have, in relation to the appeal, the same powers and duties provided for Scottish Ministers under the Bill. Under subsection (3), the decision of the appointed person is to be treated as that of the Scottish Ministers.

### **Section 16 – Notice of determination**

43. This section sets out the notification requirements once an appeal has been determined.

### **Section 17 – Period for taking initial action following appeal**

44. This section sets out the relevant time period in which the initial action must be taken (“the compliance period”), following appeals.

*Powers of entry*

**Section 18 – Power to enter neighbouring land**

45. Subsection (1) gives local authorities the power to enter neighbouring land for the purpose of obtaining information required to consider an application for a high hedge notice, or required to consider the withdrawal or variation of a notice or for determining whether a high hedge notice has been complied with.

46. The Scottish Ministers and any person appointed to determine an appeal under section 15 have a similar power under subsection (2) for the purpose of obtaining information required in relation to an appeal.

47. The power to enter land includes a power to enter buildings (including houses) by virtue of the definition of “land” in the Interpretation and Legislative Reform (Scotland) Act 2010, which includes buildings and other structures. This power may be used for entry where the building is occupied as a residence only if there is no other reasonably practicable means of access to the high hedge.

**Section 19 – Supplementary powers**

48. This section sets out what additional persons, materials and equipment can be taken onto the land in question and allows certain samples of trees or shrubs to be taken. It requires 14 days’ notice of intended entry to be given and requires unoccupied land to be left secured against unauthorised entry. Notice must be given, by either the local authority, the Scottish Ministers or the person appointed to determine an appeal under section 15, depending on who authorised the person to enter the land under section 18.

**Section 20 – Warrant authorising entry**

49. This section enables a sheriff or justice of the peace to grant a warrant to any person entitled to exercise a power of entry under section 18 to do so. A warrant allows the person authorised to use reasonable force if necessary but does not allow the use of force against individuals (see subsections (1) and (3)).

50. Subsection (2) describes the circumstances in which a warrant may be granted. These are (a) that there are reasonable grounds for exercising the right of entry, (b) that entry to the land has been refused or a refusal is reasonably expected or the land is unoccupied, and (c) that the local authority has complied with the 14 day notice requirements imposed under section 19(2). The warrant must not authorise entry to a building being occupied as a residence unless there is no other reasonably practicable means of access to the high hedge.

**Section 21 – Offence**

51. Subsection (1) makes it an offence for a person to intentionally obstruct or prevent an authorised person from doing anything which that person is authorised to do by virtue of the Bill. The offence is punishable on summary conviction up to a maximum fine of level 3 (currently £1000) on the standard scale.

*Local authority enforcement action*

**Section 22 – Power to take action**

52. This section gives the local authority the power to enter neighbouring land and take the action specified in the high hedge notice, where the owner or occupier of the land fails to comply with the notice. The costs of this work can be recovered from the owner under section 25.

53. The section also sets out what additional persons, materials and equipment can be taken onto the land in question. When exercising these powers the local authority must give 14 days' notice of its intended entry on to the land and must leave unoccupied land secured against unauthorised entry. This power may be used for entry where the building is occupied as a residence only if there is no other reasonably practicable means of access to the high hedge.

**Section 23 – Warrant authorising entry by local authority**

54. This section contains similar provisions to those found in section 20, but relates to the right of the local authority to enter land to take action. The warrant must not authorise entry to a building being occupied as a residence unless there is no other reasonably practicable means of access to the high hedge.

**Section 24 – Local authority action: offence**

55. This section creates a similar obstruction offence (punishable in the same way) to that created in section 21 except it relates to the power to enter neighbouring property for the purpose of the local authority taking initial or preventative action required under a high hedge notice.

*Expenses of enforcement*

**Section 25 – Recovery of expenses from owner of land**

56. Subsection (1) enables the local authority to recover expenses incurred in taking the action required under a high hedge notice from the owner of the neighbouring land. The expenses can also be recovered from subsequent owners. Associated reasonable administrative expenses may also be recovered. Interest is also recoverable.

57. Subsection (2) provides that each owner of the neighbouring land is jointly and severally liable for the expenses. Each owner is equally liable for the full amount with a right of relief against the other owners.

**Section 26 – Notice of liability for expense of local authority action**

58. This section enables a notice of liability for expenses to be registered in the appropriate property register against neighbouring land. Subsection (2) sets out the information the notice must contain.

**Section 27 – Recovery of expenses from new owner of land**

59. This section deals with the liability of an incoming or “new” owner of the neighbouring land. It provides that a new owner, as well as the former owner, is liable for any expenses and

interest for which the former owner is liable, under the terms of section 25. However, this is only the case where subsection (2) applies.

60. Subsection (2) provides that a new owner is liable only if a notice of liability for expenses is registered in the property registers (on or before a date 14 days prior to the new owner becoming the owner). If no such notice is registered then the new owner is not liable.

### **Section 28 – Continuing liability of former owner**

61. This section provides that an owner of the neighbouring land does not cease to be liable if they are no longer the owner of that land. If the new owner has paid the expenses and interest to the local authority, the new owner may recover that amount paid from the former owner, if the former owner is liable. This remains the case even if another person takes ownership of the land.

### **Section 29 – Notice of discharge**

62. This section applies where the expenses and interest to which a registered notice of liability for expenses relates has been discharged. It states that the relevant local authority must register a notice (“a notice of discharge”) in the appropriate property register. Subsection (3) sets out the information the notice must contain.

63. Subsection (5) provides that the notice of liability for expenses is discharged as soon as the notice of discharge has been registered.

### **Section 30 – Receipt of notices by the Keeper**

64. This section makes it clear that the Keeper of the Registers of Scotland is not required to investigate or determine whether or not the information contained in either a notice of liability for expenses or a notice of discharge is accurate.

## *General*

### **Section 31 – Guidance**

65. This section places a duty on local authorities to have regard to any guidance issued by the Scottish Ministers when carrying out their functions under the Act and when issuing guidance on the duty imposed under section 3 (relating to pre-application requirements) and any other provision of the Act. Both the Scottish Ministers and the local authority must consult such persons as considered appropriate before issuing guidance under this section.

### **Section 31A – Report on operation of Act**

66. This section places a duty on the Parliament to make arrangements for a committee or sub-committee of the Parliament to report to the Parliament on the operation of the Act during the review period.

67. Subsection (2) provides that the review period begins when section 2 (relating to applications for high hedge notices) comes into force and ends 5 years after that date, or on such earlier date as either the committee or sub-committee may determine.

68. Subsection (3) provides that a report must be made no later than 18 months after the end of the review period and may be in such form and manner as the committee or sub-committee considers appropriate. Subsection (4) provides that the report must be published.

### **Section 32 – Service of documents**

69. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 regarding service of documents will apply to notices sent under the Bill. The application of the 2010 Act enables those documents to be served either by person, by registered post, recorded delivery or by being sent by way of electronic communication (where agreed in writing with the recipient).

70. Section 32 supplements that with additional ways in which notices may be served when the name and address of the recipient is unknown.

### **Section 33 - Interpretation**

71. Section 33 defines terms that are used frequently in the Bill. In particular, “domestic property” means any part of a building occupied or intended to be occupied as a separate dwelling, including a yard, garage or outbuilding belonging to or usually enjoyed with the building, and located in Scotland.

72. “Owner” means a person who has right to the property whether or not that person has completed title. This is someone who is entitled to take entry under a conveyance of the property. It will not be necessary for the person to have completed title by registering it in the property registers before a person is considered an owner. If more than one person comes within the description of an owner then the “owner” is the person who has most recently acquired that right to take entry under a conveyance.

73. “Neighbouring land” means the land on which the hedge is situated. There is no restriction on where the hedge is situated. The hedge does not have to be next door to the domestic property affected by the hedge. In addition, the hedge could be growing on commercial property or on parkland.

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

74. This section provides Scottish Ministers with a power to modify, by regulations, the definition of a “high hedge”, as defined by section 1 by adding or removing a type of tree or shrub from section 1(1)(a); increasing or reducing the height above ground level specified in section 1(1)(b) and (2); and modifying or adding to the effect of a hedge specified in section 1(1)(c). Subsections (2) and (3) specify that those regulations may also make other appropriate changes to this and other Acts and that they are subject to affirmative procedure.

### **Section 35 – Ancillary provision**

75. This section provides Scottish Ministers with the power to make, by order, such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate. It provides that an order under this Bill may modify this, or any other, enactment.

76. Subsections (3) and (4) make it clear that an order made under subsection (1), which adds to, replaces or omits any part of the text of this Bill or another Act is subject to the affirmative procedure. Any other order is subject to the negative procedure.

### **Section 36 – Crown application**

77. Under section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010, the Bill applies to the Crown in Scotland. However, subsection (1) absolves the Crown of any criminal liability, should it be in contravention of the provisions of this Bill.

78. Subsection (3) provides that the powers in sections 18 (power to enter neighbouring land), 19 (supplementary powers) and 22 (power to take action) are exercisable in relation to Crown land, but only if the appropriate authority gives its consent.

### **Section 37 – Commencement**

79. Section 37(1) provides for certain provisions of the Bill to come into force on the day after Royal Assent. Subsection (2) gives power to the Scottish Ministers to appoint a day for the coming into force of the other provisions of the Bill. Subsection (3) provides that a commencement order may include transitory, transitional or saving provision.

