

# **HIGH HEDGES (SCOTLAND) ACT 2013**

## **GUIDANCE TO LOCAL AUTHORITIES**

**2014**

## Ministerial Foreword



High hedge disputes are a fairly rare occurrence, but when they happen, they can spiral out of control and be a source of great concern for those involved. Unlike boundary fences or walls that require planning permission if they exceed two metres in height, there is no such restriction on planting trees or shrubs to form a hedge, despite the potential for their height to exceed two metres. It is, therefore, not surprising that problems can arise with hedges if they are planted in unsuitable locations or suffer from a lack of maintenance.

In 2009 a Scottish Government consultation asked whether disputes such as those over high hedges were a matter for Government intervention, or best left for individuals to resolve privately. Of those who responded to that question, 95% favoured Government intervention. The Scottish Government supported Mark McDonald MSP to bring a High Hedges Bill before Parliament and officials and Mr McDonald consulted with a broad range of individuals and organisations with an interest in hedges as the Bill passed through the Scottish Parliament. The High Hedges (Scotland) Act 2013 was given Royal Assent on 2 May 2013 and I congratulate Mark McDonald for all of his work to enable this to happen.

The objective of the Act is to provide a solution to the problem of high hedges which interfere with the reasonable enjoyment of domestic property and where the issue has not been able to be resolved amicably between neighbours. It does so by giving home owners and occupiers a right to apply to a local authority for a high hedge notice and empowers local authorities to make and enforce decisions in relation to high hedges in their local area.

In dealing with applications, local authorities should act as independent and impartial adjudicators and should seek to strike a balance between the competing rights of neighbours to enjoy their respective properties and the rights of the community in general. Decisions on what action should be taken are for local authorities to make because individual circumstances will differ and any action needed to resolve the dispute should take account of the facts and circumstances of each individual case.

I hope that this Act will provide a solution to many of the long-standing disputes between neighbours over high hedges, helping to improve people's lives and enjoyment of their property in an amicable way and ensuring that we live in communities where we promote positive behaviour and good neighbour relations.

A handwritten signature in black ink, which appears to read 'Derek Mackay'.

**Derek Mackay MSP**  
Minister for Local Government and Planning

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## 1: INTRODUCTION

This document provides Guidance from the Scottish Government to local authorities on the High Hedges (Scotland) Act 2013<sup>1</sup> (the “Act”). Local authorities have a statutory obligation to have regard to this Guidance when carrying out their functions under the Act and when issuing any guidance of their own on the Act<sup>2</sup>.

The Act aims to provide a solution to the problem of high hedges, where neighbours have not been able to resolve the issue amicably, by providing an effective means of resolving disputes over the effects of high hedges which interfere with the reasonable enjoyment of domestic property. A high hedge is defined by the Act as a hedge that is formed wholly or mainly by a row of two or more trees or shrubs, is over two metres in height and forms a barrier to light<sup>3</sup>.

This guidance is not a statement of the law, which remains as set out in the Act itself. It is intended to support the operation of the legislation by providing supplemental advice to local authorities on fulfilling their obligations under the Act, and thereby make clear to everyone with an interest in this issue, including hedge owners and those affected by high hedges, how it is expected that the Act will operate in practice.

The Guidance is necessarily general in nature, while the impacts of a hedge on a neighbouring property will vary from case to case. The key role given by the Act to local authorities is to act as an independent and impartial third party to identify whether a high hedge has an adverse impact on the reasonable enjoyment of neighbouring domestic property in light of the facts and circumstances of each individual case. The Act permits local authorities to issue their own guidance on the Act<sup>4</sup>, which is likely to be more specific about how that authority will carry out its functions under the Act, though local authorities have a statutory obligation to have regard to this Guidance when issuing their own guidance on the Act.

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<sup>1</sup> [http://www.legislation.gov.uk/asp/2013/6/pdfs/asp\\_20130006\\_en.pdf](http://www.legislation.gov.uk/asp/2013/6/pdfs/asp_20130006_en.pdf)

<sup>2</sup> Section 31 of the Act (Guidance)

<sup>3</sup> Section 1 of the Act (Meaning of “high hedge”)

<sup>4</sup> Section 31(2) of the Act

## **2: APPLICATION FOR A HIGH HEDGE NOTICE**

While the Act provides a means of resolving high hedge disputes, it is intended to be a last resort for the minority of cases where such disputes cannot be resolved between the parties themselves. The Act emphasises this by requiring<sup>5</sup> that potential applicants “must take all reasonable steps to resolve the matters in relation to the high hedge” before making an application. The Act also enables local authorities to issue their own guidance on pre-application requirements<sup>6</sup>.

### **What Should Be Done Before Making an Application?**

First and foremost, a potential applicant must have made efforts to resolve the issue with their neighbour themselves before an application is made. Any application that a local authority receives where there is no evidence of this having been attempted must be rejected. What steps people should have taken before approaching the local authority will vary from case to case depending on the circumstances. However, it is not sufficient for people to simply claim that their neighbour is unapproachable.

#### ***Discussion with neighbour***

Usually the first step that an applicant will make is to discuss the issue with their neighbour in an attempt to resolve the problem amicably. Records should be kept of all attempts to resolve the issue and should be included with an application. An applicant may use several different methods to keep track of attempts, for example a diary of conversations held or a series of receipts of postage. The attempts should show a reasonable effort has been made in a reasonable timescale before applying for a notice, but a set frame of what is reasonable cannot be defined.

For some people, their hedge problems will be long-standing and date back to well before the Act came into operation. During this time they may have made several attempts to settle the matter through negotiation and been repeatedly rebuffed. Nevertheless, it is reasonable for a local authority to expect that a fresh approach should be made to the person living where the hedge is situated, now that the Act is in place, before a formal application is made to the local authority.

#### ***Mediation***

Another potential option for resolving high hedge disputes without recourse to local authority intervention is mediation. Mediation can be carried out in many different ways, from a member of the local community playing the part of the mediator to a professional mediator fulfilling the role. The Scottish Mediation Network provides low cost access to mediators in many parts of the country who can provide a mediation service which may help to deal with the issue.<sup>7</sup> Where a potential applicant contacts a local authority prior to making an application, it is not the responsibility of the officer dealing with the matter to mediate between the potential applicant and the hedge owner.

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<sup>5</sup> Section 3 of the Act (Pre-application requirements)

<sup>6</sup> Sections 3(2) and 31(2)(a) of the Act

<sup>7</sup> <http://www.scottishmediation.org.uk/>

It is important to note that while mediation can be an effective way to resolve disputes, the legislation does not require it for a case to be considered. An application can be made that shows an effort has been made to solve the high hedge issue amicably, without resorting to mediation, and whether or not this evidence proves sufficient is a decision for a local authority to make. If a hedge owner refuses to participate in a mediation process this refusal could be used as evidence of a reasonable attempt by the applicant to resolve the matter, although the cost and availability of mediation should be considered as to whether this is a truly reasonable attempt.

### ***Approaching the local authority***

Making an application to the local authority for a high hedge notice should be a last resort. It is likely that potential applicants may make informal contact with their local authority to discuss a possible application. In these situations, the local authority should establish the nature of the problem and explain that all reasonable steps must be taken to resolve the issue before resorting to a formal application under the Act. The Act enables local authorities to issue their own guidance on the Act<sup>8</sup>. Local authorities should direct potential applicants to such guidance, where it exists, and may also refer them to this Guidance to local authorities (which local authorities are required to have regard to when issuing their own guidance<sup>9</sup>).

### ***Land Where Ownership Not Known***

In the case of vacant land, the applicant should take reasonable steps to identify the owner of the land and should record these in the application before it is submitted to the local authority. Registers of Scotland<sup>10</sup> could be contacted to find out if the land is registered. Companies House<sup>11</sup> may be able to provide information on land owned by a business. In exceptional circumstances, ownerless property, under common law, passes to the Queen's and Lord Treasurer's Remembrancer<sup>12</sup>.

### **Deciding Whether An Application Is Eligible**

The Act provides<sup>13</sup> that an application for a high hedge notice can be made to a local authority by an owner or occupier of domestic property where that person "considers that the height of a high hedge situated on land owned or occupied by another person adversely affects the enjoyment of the domestic property which an occupant of that property could reasonably expect to have".

### ***Dismissal of an application***

A local authority must dismiss an application if it considers that the applicant has not taken all reasonable steps to resolve the situation or if it considers that the

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<sup>8</sup> Section 31(2) of the Act

<sup>9</sup> Section 31(3) of the Act

<sup>10</sup> <http://www.ros.gov.uk/>

<sup>11</sup> <http://www.companieshouse.gov.uk/>

<sup>12</sup> <http://qltr.gov.uk/>

<sup>13</sup> Section 2 of the Act (Application for high hedge notices)



application is frivolous or vexatious<sup>14</sup>. The local authority should inform the applicant as soon as possible if it dismisses the application and give reasons for doing so. Whether an application is frivolous or vexatious will depend upon the particular circumstances of that application and will be considered on a case by case basis. An example might be where someone repeatedly applies (unsuccessfully) to the local authority for a high hedge notice without any significant change in circumstances that would affect the local authority's decision.

Local authorities should however consider whether there has been any change in circumstances before dismissing an application on the grounds that it is frivolous or vexatious. If an initial application is rejected by the local authority but subsequently the situation changes, for example where the applicant extends their house or there have been changes to the high hedge, the applicant is entitled to submit a new application for a high hedge notice, drawing attention to the material change in circumstances.

### ***Withdrawing an Application***

The applicant may withdraw their application at any time before the local authority makes its decision on a high hedge notice. Discussion and negotiation between the people involved in the dispute can continue while the local authority is considering a formal application. If the people concerned can agree a way forward, the application should be withdrawn.

### ***The scope of the Act***

When a local authority receives a formal application for a high hedge notice, it should ensure that all parts of the application form have been completed and that the appropriate fee, if any, has been received.

The local authority also needs to establish whether an application falls within the scope of the Act. This means that the local authority must confirm that:

- they are the correct local authority to deal with the application;
- the applicant is the owner or occupier of the domestic property specified in the application;
- the hedge specified in the application is on land owned or occupied by another person;
- the hedge specified in the application is a high hedge; and
- the application is accompanied by the appropriate fee.

NB: The local authority does not require to determine whether the reasonable enjoyment of the property specified in the application is being adversely affected by the height of a high hedge until it has determined whether the application is eligible. That process is covered in Chapter 3 of this Guidance (Deciding Whether A High Hedge Notice Should Be Issued).

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<sup>14</sup> Section 5 of the Act (Dismissal of application)

### *Local authority responsibility for dealing with applications*

Applications must be submitted to the local authority in whose area the hedge is situated. Thus, where the hedge is on land within the boundaries of local authority A but the applicant lives in the area of local authority B, the application should be sent to local authority A. The local authority where the hedge is situated should, if they decide the application is eligible, copy the application to every owner and occupier of the property that includes the hedge, regardless of which local authority area the owner or occupier is covered by.

### *Affected property*

An applicant can submit an application for a high hedge notice only if it is domestic property which is adversely affected by a high hedge<sup>15</sup>. The Act defines domestic property<sup>16</sup> as “any part of a building in Scotland which is occupied, or intended to be occupied, as a separate dwelling”, and “a yard, garden, garage or outhouse in Scotland which belongs to such a building or is usually enjoyed with it”. This would therefore include a flat used as a dwelling even if it formed part of a tenement that contained a mix of domestic and commercial uses but would exclude properties that might be in a residential area but wholly occupied for a commercial use, for example, a dental practice or a doctor’s surgery.

### *Location of the hedge*

The Act sets out that the hedge must be on land that is owned by someone other than the applicant. There are no other restrictions on where the hedge is situated. It is the effect of the hedge on a domestic property that is important, rather than where it is located. As part of the application, the applicant should normally provide a map showing all the main features such as the location of the high hedge, the boundaries of gardens and the location of buildings. In some circumstances, a detailed written description of the situation may be sufficient.

Although the Act uses the term “neighbouring land” to describe where the hedge is growing, there is no requirement that the hedge is next door to the applicant’s property. This means that a hedge on “neighbouring land” could be several gardens down the road or across the street – so long as the application can show that it adversely affects the enjoyment of their domestic property.

A hedge does not have to be wholly on a single property for a high hedge notice to be sought. It could extend over several properties. Neither does the high hedge have to be growing in a garden. It could, for example, be on parkland that backs onto a garden or yard, or on commercial premises.

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<sup>15</sup> Section 2(1) of the Act

<sup>16</sup> Section 34 of the Act (Interpretation)

## *Crown land*

The Act applies to Crown land<sup>17</sup>. This means that local authorities are able to investigate and determine applications about high hedges on land owned by the Crown. For example, a hedge on land owned by a Government Department.

### **Meaning of ‘High Hedge’**

The Act defines a high hedge<sup>18</sup> as:

- a hedge that is
  - formed wholly or mainly by a row of two or more trees or shrubs;
  - rises to a height of more than 2 metres above ground level; and
  - forms a barrier to light (unless gaps significantly mitigate its overall effect as a barrier at heights of more than 2 metres above ground level).

It is not necessary for the whole of a hedge to fall within the definition. If parts of a hedge qualify then the hedge will be eligible for an application for a high hedge notice.

### **Hedges**

For trees or shrubs to be considered as a high hedge, they must first be a hedge. A hedge is defined by the Oxford English Dictionary as:

*“A row of bushes or low trees (e.g. a hawthorn, or privet) planted closely to form a boundary between pieces of land or at the sides of a road”<sup>19</sup>*

The Act does not make it illegal to grow leylandii and other vigorous growing plants. Simply growing a hedge itself is not illegal. The Wildlife and Countryside Act 1981 governs where non-native plants can be planted – it states that no non-native plant may be planted in the wild. A Code of Practice<sup>20</sup> of non-native species has been approved by Parliament to further explain the area and exceptions approved by Parliament can be found on the Scottish Government webpages<sup>21</sup>.

The Act concerns hedges and is not designed to impact on woodlands and forests which as a general rule are not planted as hedges. For example, well-spaced tree lines are not generally considered as a hedge, even if canopies coalesce. However, in some cases woodland and forest edges that border a property may take the form and have the effect of a high hedge. It is for local authorities to decide what the correct action is in each situation depending on the facts and circumstances of the case.

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<sup>17</sup> Section 37 of the Act (Crown application)

<sup>18</sup> Section 1 of the Act (Meaning of “high hedge”)

<sup>19</sup> "hedge, n." OED Online. Oxford University Press

<sup>20</sup> <http://www.scotland.gov.uk/Publications/2012/08/7367>

<sup>21</sup> <http://www.scotland.gov.uk/Topics/Environment/Wildlife-Habitats/InvasiveSpecies>

### ***Line of two or more trees or shrubs***

An application cannot be made under the Act regarding single trees or shrubs, whatever their size. Two or more trees or shrubs do not have to form a precisely straight line; as long as they are roughly in line they may be considered.

A tree or shrub that has multiple stems, all growing from the same trunk or root plate, remains a single tree or shrub and so falls outside the scope of the Act. This is the position even though the multiple stems might result in a considerable spread.

### ***More than 2 metres above ground level***

Applications cannot be made in respect of hedges less than 2 metres in height. The 2 metres should be measured from the ground where the hedge is growing - that will usually be on the hedge owner's side. Even if the property affected is on a lower (or higher) level than the land where the hedge is situated, the 2 metres should still be measured from the ground where the hedge is growing. For these purposes, ground level means the natural level of the ground where the hedge is situated. Normally, therefore, any measurements should be taken from the ground at the base of the trunks or stems of the trees or shrubs in the hedge. An exception might be where the hedge has been planted on a mound, or in a bed, or other container that is raised above the ground.

Applicants should not be required to provide a precise measurement of a hedge in order to make an application about a high hedge. The legislation does not give the applicant the power to enter a neighbour's land to take any measurements. It should be sufficient for them to estimate the height of the hedge when determining if the hedge falls under the scope of the Act.

When a local authority is considering a high hedge application, it will need to consider the height of the hedge on the applicant's side to assess the impact on their property. It will also need to confirm that the height of the hedge is more than 2-metres from ground level, which is likely to necessitate measurements on the hedge owner's side.

### ***Barrier to light***

The Act applies to hedges that, despite any gaps that occur above the 2 metre mark, act as a barrier to light. This issue is about the physical appearance of the trees and shrubs in question and whether or not they form what we might commonly consider to be a hedge. Whether a particular hedge meets this criterion is a matter of judgement depending on its composition, form, growth habit, and past management and, critically, what it looks like above 2 metres. The key question is whether, even though there might be gaps in the foliage or between the trees or shrubs, the hedge is obstructing light.

The trees or shrubs in the hedge may have been closely planted and become so entangled that they appear as a solid green wall. In such circumstances, the matter may be straightforward and the hedge is evidently capable of blocking light. Other cases may be more difficult to judge. The trees or shrubs may be more widely

spaced so their branches are not touching. Branches may have fallen off or been removed so the canopy is lifted or the growth might be straggly and foliage sparse. Such cases must be assessed individually on their particular merits. If individual trees or shrubs are so widely spaced, or the gaps in the foliage are so extensive, that it is possible to see what lies behind them then the hedge may fall outside the Act, but this decision must be based on the circumstances of each case.

In some cases, the extent to which a hedge forms a barrier to light may appear evident from photographs or other evidence accompanying the application. In other cases, a local authority may wish to undertake a site visit before reaching a conclusion. Guidance on site visits is provided in Chapter 3 (Deciding Whether A High Hedge Notice Should Be Issued).

This Guidance does not specify parameters for light levels and local authorities are free to use any methods that exist if they deem the method reasonable and suitable for their needs. An example of such a method is the Hedge Height and Light Loss (March 2004)<sup>22</sup> guidelines that were developed by the Building Research Establishment. These guidelines were created to provide an optional method of decision making for local authorities in England and Wales under the Anti-Social Behaviour Act 2003. However, the method set out in the 2004 guidelines was designed to operate only with regards to evergreen hedges, while the High Hedges (Scotland) Act 2013 covers hedges of all types and that method cannot be applied in all cases. Regardless of the methods adopted, the final decision as to whether or not a hedge is a barrier to light is a matter of judgement to be made by the local authority in accordance with the circumstances of each case.

### **Application fee**

An application for a high hedge notice must be accompanied by the appropriate fee and it is recommended that the schedules of fees that a local authority chooses to charge should be published to make clear to applicants the financial implications of making an application.

The Act gives local authorities the discretion to charge a fee for administering a high hedge application<sup>23</sup> but does not specify fees. Instead it provides local authorities with discretion to set different fees to take account of different circumstances and to refund fees. Examples of circumstances that may be taken into account include, but are not limited to, applicants who are low earners or pensioners, where multiple applicants apply in respect of a single hedge or where applications are made at the same time in respect of more than one hedge affecting an applicant's property. Fees might also take account of the situation of the house or high hedge.

### **Setting fees**

The Act requires that fees charged by local authorities for an application for a high hedge notice should aim to cover the reasonable costs that a local authority incurs

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<sup>22</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/9408/hedgeheight.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/9408/hedgeheight.pdf)

<sup>23</sup> Section 4 of the Act (Fee for application)

from considering the application<sup>24</sup>. The legislation is intended to be cost neutral for local authorities and not a source of excess revenue.

### ***Refund of fees***

The Act gives local authorities the discretion to refund fees in circumstances, and to the extent, decided by the local authority. Information on “the circumstances in which, and the extent to which”, it will normally refund fees must be published by local authorities<sup>25</sup>.

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<sup>24</sup> Section 4(3) of the Act

<sup>25</sup> Section 4(5) of the Act

### 3: DECIDING WHETHER A HIGH HEDGE NOTICE SHOULD BE ISSUED

Having satisfied itself that the application falls within the scope of the Act's provisions and is therefore eligible, the local authority should normally send a letter of acknowledgement to the applicant giving the name and contact details of the officer dealing with the case. The letter should also explain briefly the procedure that the local authority will follow. In particular, it should make clear that comments will be sought from the owner and occupier of the land where the hedge is situated and that those representations will be shared with the applicant. Applicants should also be made aware that their application will be shared with the owner(s) of the hedge. This transparency should encourage those involved to stick to the issue in question and not raise any other issues that they may be disputing with their neighbour. All parties should be encouraged to restrict their correspondence to the facts of the case in hand and not try and draw in any other sources of disagreement, nor should parties use offensive or abusive language in their correspondence.

#### Inviting representations from hedge owners

The local authority should write to everyone who owns and occupies the land where the hedge is situated, notifying them formally that it is considering an application for a high hedge notice regarding their hedge<sup>26</sup>. A copy of the application should be included<sup>27</sup> in the same form as it was submitted to the local authority, although the applicant's personal email address, phone number and signature should be removed. The approach from the local authority should not come as a surprise to the hedge owner given previous attempts having been made to resolve the issue by the applicant. The Act makes special provision for cases where there is difficulty in establishing ownership of land<sup>28</sup>.

The letter should explain the procedure that the local authority will follow to make a decision on an application for a high hedge notice, including that the local authority may visit the site. In particular, it should<sup>29</sup>:

- invite the owner and occupier of the land where the hedge is situated to comment on the points raised by the applicant and to provide any additional information that they wish the local authority to consider
- inform them that they have 28 days to exercise their right to make such representations
- make clear that the local authority is obliged to send copies of the representations to the applicant
- notify them of the local authority's powers of entry to the land where the hedge is situated and the criminal penalties for preventing or obstructing such entry.

If the local authority receives any representations from hedge owner(s) within the 28 day period then it is required to give the applicant a copy of those representations and take them into account in making decisions on the application for a high hedge

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<sup>26</sup> Section 6 of the Act (Consideration of application)

<sup>27</sup> Section 6(2)(a) of the Act

<sup>28</sup> Section 33 of the Act (Service of documents)

<sup>29</sup> Sections 6(2)(b) and 6(3) of the Act

notice<sup>30</sup>. If the high hedge is situated within a National Park, then the local authority is required to consult the National Park Authority and take into account any representations made before making a decision on whether 'initial action' should be taken<sup>31</sup>. The local authority may take into account other representations (including any received outwith the 28 day period) but is not required to do so by the Act.

At the end of the 28 day period<sup>32</sup> the local authority is required to decide whether the height of the high hedge adversely affects the reasonable enjoyment of the applicant's domestic property<sup>33</sup>. If it is decided that there is an adverse effect then the local authority is required to decide whether the owner should take 'initial action' to remedy the adverse effect and prevent its reoccurrence<sup>34</sup>. Where a local authority decides that 'initial action' should be taken, it must specify a reasonable period of time for that action to be taken and decide whether further action should be taken in the future to prevent further recurrence of the adverse effect<sup>35</sup>.

While the Act does not impose specific time limits on decisions, the Scottish Government expects that local authorities will process high hedge applications in a timely manner. The likely variation in the facts and circumstances of individual cases means that it will be for individual local authorities to decide on appropriate timescales in each instance.

### ***Other interested parties***

Most cases are unlikely to raise wider neighbourhood issues and so there is no requirement to publicise high hedge applications. However, in some cases the local authority may also seek views from the occupiers of properties other than the applicants that may be affected by the hedge and hence potentially affected by the local authority's decision on the application. For example, properties that lie between the applicant's property and the land with the hedge, other occupiers within a tenement block, or where a single hedge borders several adjoining properties. Similarly, local authorities may wish to consult specialist organisations or individuals whose expertise and knowledge input will help inform the local authority's decision on the application. In inviting such representations, the local authority should make clear that it will send a copy of any comments from interested parties to the applicant and the hedge owner.

### **Site Visits**

After the application and exchange of representations has been completed, the local authority should normally arrange to visit the site. This enables the officer dealing with the case to see the hedge and surroundings at first hand so the written information and evidence already provided can be considered properly. The purpose of the visit is not to facilitate mediation or negotiation between the people in dispute, and so there should be no discussion of the merits of the application.

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<sup>30</sup> Section 6(4) of the Act

<sup>31</sup> Section 6(8) of the Act

<sup>32</sup> Section 6(5) of the Act

<sup>33</sup> Section 6(5)(a) of the Act

<sup>34</sup> Section 6(5)(b) of the Act

<sup>35</sup> Section 6(6) of the Act



It may be necessary for the applicant and the person who occupies the land where the hedge is situated to be in attendance so the officer can gain access to the site and view the hedge from both sides. A local authority should, wherever possible, try to obtain the agreement of the owner or occupier of the land where the hedge is situated to enter the land to view the hedge. During the site visit, the local authority will need to gather all relevant information, for example the height and extent of the hedge, its position within the property and, in general terms, its species composition, so the hedge can be accurately described in any high hedge notice. It may also be useful for local authority officers to take photographs of the hedge. In some cases, a local authority will decide to undertake a site visit to determine whether a hedge forms a barrier to light (see Chapter 2 'Application For A High Hedge Notice').

In situations where the voluntary approach does not work and the local authority cannot obtain the information in any other way (for example, from the applicant's property), the local authority has the power to enter the land where the hedge is growing in order to carry out its functions<sup>36</sup>. It may take onto the land any materials and equipment necessary to carry out its functions and can also take away samples from the hedge where appropriate<sup>37</sup>.

Where such access is required, the local authority must give at least 14 days' notice<sup>38</sup> of the intended entry to all owners and occupiers of the land and should be prepared to produce, if asked, evidence of authority to enter the land in question<sup>39</sup>.

It is an offence, punishable by a level 3 fine - i.e. a fine of up to £1,000<sup>40</sup>, to intentionally prevent or obstruct entry by an authorised person to the land where a high hedge is growing<sup>41</sup>. In extreme cases, a sheriff or justice of the peace may issue a warrant authorising entry to the land and if necessary the use of reasonable force to do so<sup>42</sup>.

### **Adverse effect on enjoyment of property**

A local authority must decide "whether the height of the high hedge adversely affects the enjoyment of the domestic property which an occupant of that property could reasonably expect to have"<sup>43</sup>. If so, the local authority must then decide "whether action to remedy the adverse effect or to prevent the recurrence of the adverse effect (or both) should be taken by the owner(s) in relation to the high hedge"<sup>44</sup> (any such action is referred to as 'initial action').

In reaching its decision as to whether action should be taken, a local authority should consider all relevant factors and assess each case on its particular merits. It will normally be a question of balancing the severity of the impact of the hedge on the

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<sup>36</sup> Section 18 of the Act (Power to enter neighbouring land)

<sup>37</sup> Section 19 of the Act (Supplementary powers)

<sup>38</sup> Section 19(2) of the Act

<sup>39</sup> Section 19(4) of the Act

<sup>40</sup> <http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/17305/8036/8043>

<sup>41</sup> Section 21 of the Act (Offence)

<sup>42</sup> Section 20 of the Act (Warrant authorising entry)

<sup>43</sup> Section 6(5)(a) of the Act

<sup>44</sup> Section 6(5)(b) of the Act

applicant's property, on the one hand, against its amenity value, to the hedge owner on the other.

The local authority must also consider if there are any other considerations which should be taken into account in making a decision on whether such action should or should not be taken, having regard in particular to:

- the results of any consultation with interested bodies and the National Park Authority
- whether the high hedge is of cultural or historical significance;
- the impact on the character and amenity of both the immediate locality and the wider area
- any other legal or environmental restrictions that might apply.

In general, if a local authority considers that a hedge has little adverse effect it may decide not to issue a high hedge notice. On the other hand, the greater the impact of the hedge on the applicant's enjoyment of their property, the stronger the mitigating factors would need to be to justify a high hedge notice not being issued. Even if a local authority finds that a hedge is adversely affecting the applicant's property, it may decide that, given the other factors it has considered in its decision, no action should be taken in respect of the high hedge.

### **Reasonable enjoyment of property**

The Act applies to high hedges that are acting as a barrier to light that affects the enjoyment of domestic property that an occupant could reasonably expect to have.

The reference to the enjoyment of the property which an occupant could reasonably expect to have is also significant as it affects the way that applications must be determined by local authorities. It requires the local authority to assess the impact of the hedge on the enjoyment that a person might reasonably expect to have from their home and garden, thereby introducing a degree of objectivity to the decision making process. This "enjoyment" may differ from the applicant's expectations.

For example, the applicant might attach particular importance and weight to the loss of sunlight at a particular time of year. The local authority will, however, have regard to what is a reasonable amount of sunlight for people to get in their property at this time of year. It may also take into account whether the effect lasts for a limited time.

The local authority is also required to consider what is reasonable in the circumstances of the application. This means the local authority must:

- take account of all relevant factors including the opinions of the hedge owner and the applicant and any wider considerations. The local authority will not look solely at the applicant's concerns;
- look at each case on its particular merits. A problem that leads to the issue of a high hedge notice in one application might not necessarily produce the same outcome in another case due to the circumstances of the case.

Where a local authority decides that a high hedge does have an adverse impact, the Act requires them to take account of "the effect of the hedge on the amenity of the

area”, and “whether the hedge is of cultural or historical significance” in coming to a decision on whether any ‘initial action’ should be taken<sup>45</sup>.

## **Other Factors**

A range of factors may be considered relevant by local authorities when considering all the circumstances of the case. This list is illustrative of the factors which may be considered relevant, but is not exhaustive:

### *Ancient and Long Established Hedgerows*

The Act requires that, when making a decision as to whether or not ‘initial action’ has to be taken with regards to a high hedge, local authorities must have regards to all circumstances of the case and, in particular, the effect on the local amenity and whether or not the high hedge is of cultural or historical significance. These considerations should ensure that ancient and long established hedgerows can be treated appropriately in making decisions on high hedges.

### *Damage to plants*

It could be difficult to isolate the effects of the height of the hedge when assessing the possible cause of problems of poor plant growth. In general, it is not reasonable to expect to grow particular plants in specific locations or situations. Whether a hedge interferes with a vegetable patch, the growing of competition plants, or annual bedding plants, the type of plant involved will not normally be a primary consideration. More weight may be given to these problems if, for example, the height of the hedge affects the growth of plants across a substantial portion of the garden, and thereby affecting overall enjoyment of the property.

### *Effect of gaps*

The effect of any gaps in a hedge should, where relevant, be taken into account. The extent of any gaps and their position in the hedge could be material. In some cases, the depth of the hedge might mean that gaps have little appreciable effect. In others, especially where the canopy is raised, the impact could be significant.

### *Farm hedges*

Hedgerows are a characteristic feature of the landscape and many form field boundaries which are valuable for wildlife, attractive in the landscape, and are an important part of our culture and heritage. If a problem hedge is on farm land which may be subject to Cross-Compliance requirements (aimed at protecting nesting birds and securing a supply of food for a range of wildlife), the local authority should discuss the matter with countryside management staff at Scottish Natural Heritage before deciding the contents of a high hedge notice, particularly in relation to the timescale within which the work should be completed.<sup>46</sup>

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<sup>45</sup> Section 6(7) of the Act

<sup>46</sup> Please contact Jane MacKintosh, Grassland Adviser, Scottish Natural Heritage, Silvan House, 231 Corstorphine Road, Edinburgh, EH12 7AT, [jane.mackintosh@snh.gov.uk](mailto:jane.mackintosh@snh.gov.uk)

### *Obstruction of light: domestic premises*

In the British Standard *Lighting for buildings: Code of practice for daylighting* (BS 8206-2: 2008)<sup>47</sup>, the standard for what is a reasonable amount of daylight and sunlight for people to get in their houses is set out. It works on the basis that properties should receive sufficient natural light during daylight hours to enable normal domestic tasks to be carried out without eyestrain. It is suggested that this provides a guideline for that can be expected by the applicant.

The BRE used this guidance in the Hedge Height and Light Loss<sup>48</sup> (March 2004) document as a method to calculate the height of an *evergreen* hedge. The extent to which this will be useful in any given circumstances is a matter for the local authority. The guidelines are intended for use in analysing the effect on the main rooms of a house (including living rooms, dining rooms, kitchens and bedrooms) and apply whether a hedge is opposite or to one side of the window, or at an angle to it. They also suggest suitable adjustments if the land is sloped or if the hedge is set back from the boundary.

### *Obstruction of light: gardens*

The British Standard *Lighting for buildings: Code of practice for daylighting*<sup>49</sup> does not apply to gardens and cannot be relied on for this consideration. The BRE, in their guidance on Hedge Height and Light Loss<sup>50</sup>, based their approach on the daylight and sunlight received in the garden as a percentage of that on unobstructed ground, over the whole year. Allowance is made for existing obstructions, such as the house and boundary fences, which could increase the relative impact of a hedge. Suitable adjustments are suggested to take account of sloping sites or where the hedge is set back from the boundary – although the guidance applies only to evergreen hedges.

### *Obstruction of light: passive solar properties*

Special consideration might need to be given to properties that have been specifically designed to harness passive solar energy, rather than those which happen to have large windows. Passive solar properties would normally be characterised by a main window wall facing within 30 degrees of due south, significantly larger windows on the south facing wall compared to the north facing one, provision of thermal mass to store heat, and heating controls to make sure the solar energy is utilised. Loss of solar radiation to solar panels for water, space heating, or the generation of electricity might also be taken into account. Normally these panels will be roof mounted.

### *Overhanging branches*

The Act deals only with applications that relate to the height of a hedge and does not deal with overhanging branches or the width of the hedge. Common law already

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<sup>47</sup> <http://shop.bsigroup.com/ProductDetail/?pid=00000000030157088>

<sup>48</sup> <https://www.gov.uk/government/publications/hedge-height-and-light-loss>

<sup>49</sup> <http://shop.bsigroup.com/ProductDetail/?pid=00000000030157088>

<sup>50</sup> <https://www.gov.uk/government/publications/hedge-height-and-light-loss>

provides the right to cut back overhanging branches (but not to reduce the height without the owner's permission), provided that the cuttings are offered to the owner, although this would not be necessary if the owner gave consent for the overhanging branches to be cut. Overhanging branches or the width of a hedge may be a relevant consideration for what is required by a high hedge order.

### *Privacy*

On a level site a height of 2 metres will usually provide privacy from a neighbouring ground floor window. A higher hedge height might be justified in special cases, for example where one property can be seen into more easily than the other and would be decided upon the facts of an individual case.

### *Protected trees*

When considering a high hedge application, a local authority will consider the cultural and historical significance of any trees that form part of the high hedge. It may be that the trees are protected, either by a tree preservation order (TPO) or because they are in a conservation area. Equally, this test may aid a local authority in identifying any trees forming part of a high hedge that should have the protection of a TPO but currently do not have. Circular 1/2011: Tree Preservation Orders<sup>51</sup> provides an overview of the TPO procedures and requirements relating to trees in conservation areas. The Planning Authority must normally give consent before any work can be carried out on protected trees. However, in the case of a high hedge notice neither a TPO nor being part of a conservation area prevents the works being carried out<sup>52</sup>. They are, though, one of the factors that a local authority must consider when making its decision.

### *Shelter*

A hedge can be an effective windbreak and will usually provide good shelter from the wind for a distance of 8 to 10 times its height. A 2 metre high hedge should provide good shelter for a distance of 16 - 20 metres. The size of the garden that is protected by the hedge might, therefore, be one factor in considering what is reasonable in any particular case. Other topographical features and local climatic conditions may also be relevant, for example, a higher hedge height may be justified where the garden is in an exposed position in an area where high winds occur frequently. It might not be reasonable to expect to use a hedge to provide full protection from the wind if it would have a disproportionate effect on neighbouring properties, for example if the hedge owner's garden is much larger than the applicant's.

### *Veteran or Notable Trees*

When undertaking a site visit to assess the high hedge, local authority officers should be aware of the effects that action might have on veteran or notable trees which form part of the hedge. A 'veteran tree' is usually in the second or mature stage of its life and has important wildlife and habitat features including hollowing or

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<sup>51</sup> <http://www.scotland.gov.uk/Resource/Doc/340230/0112643.pdf>

<sup>52</sup> Section 11 of the Act (Tree preservation orders) and the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Amendment Regulations 2014

associated decay fungi, holes, wounds, and large dead branches. It will generally include old trees but also younger, middle aged trees where premature aging characteristics are present.

A tree of local importance, or of personal significance to the individual recorder, is called a 'notable tree'. This includes specimen trees or those considered to be potential, next generation veteran trees. Further advice on these can be obtained from the Woodland Trust Scotland website.<sup>53</sup>

*Other factors that local authorities may take into account, where relevant:*

- whether the hedge is part of or within the boundaries of a listed building, inventory garden or designed landscape, or other site of archaeological or historic importance and the effect that any removal may have on the said site;
- whether the hedge is situated in a National Scenic Area, or forms an important link with other landscape features;
- whether the hedge is within a designated nature conservation site such as an Site of Special Scientific Interest;
- whether any protected birds, animals or plants are present in the hedge and how they would be affected by any works, having regard not only to relevant legislation but also to local Biodiversity Action Plan policies;
- legislative restrictions protecting wildlife e.g. it is against the law to kill, injure or disturb nesting wild birds;
- the potentially seasonal nature of the work. For example, hedge cutting should be avoided during the bird nesting season if birds are nesting in the hedge.

### **Recording the deliberations and decision**

The Act requires local authorities to inform interested parties of their decision and the reasons for making it. Local authorities should therefore keep a clear record of how they reach their decisions. Local authorities may wish to prepare a report that could be appended to the decision letter. This report would help to provide assurance to the main parties that their representations and any other information that was provided have been fully considered and demonstrate how the application was assessed. Such a report could include the following:

- a description of the hedge and its surroundings;
- relevant policies or other legislation that might apply (e.g. tree preservation order, conservation area, local Biodiversity Action Plan);
- case for the applicant;
- case for the owner or occupier of the land where the hedge is situated;
- representations received from anyone else and the results of any consultations carried out;
- appraisal of the evidence; and
- conclusion and recommendation.

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<sup>53</sup> <http://www.woodlandtrust.org.uk/en/news-media/scotland/Pages/Scotland.aspx>

## **Notifying the relevant parties of the decision**

The local authority must notify the applicant and every owner and every occupier of the land where the high hedge is situated (including the National Park Authority, where the hedge is in a National Park) of its decision and the reasons for the decision as soon as is reasonably practicable<sup>54</sup>. If it decides to issue a high hedge notice the notice must also be copied to all these parties.

The local authority should also explain the rights of appeal against its decision<sup>55</sup> and may wish to refer interested parties to this Guidance on appeals. The reasons for the decision should be clear, precise and as full as possible to help the main parties assess the merits of an appeal. A copy of the local authority's decision letter should normally be sent to any other interested parties who have been involved in the case.

### ***Uncommon cases***

Applications may not always involve one application, one hedge, and one hedge owner. Some applications might result in more than one decision letter or high hedge notice being issued.

#### *Multiple applications, single hedge, one owner*

A hedge that bounds a large garden could affect several smaller neighbouring properties. A local authority must consider separately and individually the impact of the hedge on each property that an application has been made for. Where it decides it is the appropriate outcome, separate decision letters and high hedge notices should also be issued.

Where multiple applications are submitted at the same time, a local authority may link the applications as they are processed so the relationship between them, and the practical implications for the hedge owner, can be considered (and may make special provision for such cases when setting fees). Any high hedge notices issued should specify the section of hedge and the action that should be taken to deal with the effects of the hedge on the property that is the subject of the particular application.

#### *One applicant, single hedge, multiple owners*

In the reverse of the above example, multiple people may own a hedge that forms a barrier to light affecting a single property.

In these circumstances, every owner and occupier of the properties where the hedge is situated would have an interest in the application. The local authority should, therefore, seek comments from every owner of the hedge and take these into account in determining the application. The fact that the hedge is in multiple-ownership is, in itself, unlikely to be relevant to the consideration of the impact of the

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<sup>54</sup> Sections 7 (Notice of decision where no action to be taken) and 8 (High hedge notices) of the Act

<sup>55</sup> Sections 12 to 17 of the Act

hedge on the affected property but the local authority may wish to satisfy itself that the applicant has attempted to negotiate a solution with every owner of the hedge.

Where it decides it is the appropriate outcome, the local authority may issue either a single decision letter and high hedge notice and send copies to every owner and occupier of the properties where the hedge is situated, as well as to the applicant, or issue separate letters and notices to each owner. In such circumstances, it is important that the high hedge notice makes clear to each hedge owner what they need to do in order to comply with the requirements of the notice.

#### *One application, multiple hedges, one owner*

A single application may cover more than one hedge that affects the applicant's property. A local authority, in determining the application, should consider the effect of each hedge individually as well as their cumulative impact.

A single decision letter would be sent to the applicant and the owner and occupier of the land where the hedge is situated but separate high hedge notices may need to be issued in respect of each hedge or part of hedge that meets the legal definition and is affecting the applicant's property.

#### *One application, multiple hedges, multiple owners*

A single application may cover more than one hedge with more than one owner where they affect a single property. Every owner and occupier of the properties where the hedges are situated should be invited to comment on the application, and should be notified of the outcome. A single decision letter could be sent to the applicant and every owner and every occupier of the land where the hedges are situated but separate high hedge notices would need to be issued in respect of each hedge or part of hedge that meets the legal definition and is affecting the applicant's property, making clear what action each individual owner needs to take to meet the requirements of the notice.

#### ***Change in the ownership of the neighbouring land***

If ownership of the neighbouring land on which the hedge is situated changes while the application is being considered, the application still proceeds. However, the local authority might consider suggesting that some breathing space is allowed to the parties concerned as an opportunity to settle the dispute amicably. Where this attempt fails, the local authority should ensure that the new owner has all the relevant papers and is given a chance to submit representations.

#### ***Local authority as high hedge owner***

There are no special procedures laid down for dealing with applications in which a local authority is directly involved. However, it is hoped that in cases where a problem hedge is owned by a local authority, attempts made to resolve the problem amicably would result in a solution before an applicant felt the need to make a formal application.



If an application is made where the local authority is the hedge owner, it should be processed in the normal way. It is important that the process for deciding such applications is seen to be fair and impartial. A local authority should consider potential conflicts of interest when setting up their procedures for dealing with high hedge applications. Each local authority should consider this issue separately to create a system that functions within its own governance requirements. Where an official who has been involved in earlier negotiations regarding the hedge is a part of the decision making process they should declare this conflict of interest and remove themselves from the consideration of the application.

## 4: HIGH HEDGE NOTICES

Once the local authority has decided that action needs to be taken regarding a high hedge, it must issue a high hedge notice<sup>56</sup>. This notice gives effect to the local authority's decision and details the action to be taken to restore a suitable balance between the amenity enjoyed by the applicant and the hedge owner, having regard also to the needs of the wider community.

A high hedge notice will specify the 'initial action' and any 'preventative action' required by the owner of the hedge. The notice will detail what action is required to alleviate the problem (most likely to reduce the height of the hedge) and any maintenance required to prevent recurrence of the problem. A high hedge notice remains in existence for as long as the hedge remains on the land<sup>57</sup> or a local authority has withdrawn it<sup>58</sup>.

A high hedge notice should normally be a separate document, issued with the local authority's decision letter. The local authority must provide a copy of a high hedge notice to the applicant and every owner and occupier of neighbouring land and notify them of the reasons for its decision<sup>59</sup>. Where the high hedge lies with a National Park, a copy of the high hedge notice must be sent to the National Park authority<sup>60</sup>.

### Contents of a high hedge notice

A high hedge notice must<sup>61</sup>:

- identify the high hedge to which it relates and where it is situated;
- identify the domestic property in relation to which it has been decided that an adverse effect exists;
- state the date on which the notice will take effect, which must be at least 28 days after the date on which the notice is given<sup>62</sup>;
- state the 'initial action'<sup>63</sup> that is to be taken by the hedge owner and the compliance period<sup>64</sup> for that action;
- state any 'preventative action'<sup>65</sup> that is to be taken by the hedge owner to prevent the recurrence of the adverse effect at times following the compliance period for the 'initial action';
- inform the recipient of the right to appeal<sup>66</sup>;
- inform the recipient of the local authority's power to enforce the initial or preventative action if the high hedge notice is not complied with<sup>67</sup> and recover the costs of doing so<sup>68</sup>; and

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<sup>56</sup> Section 8 of the Act (High hedge notice)

<sup>57</sup> Section 9 of the Act (Effect of high hedge notice)

<sup>58</sup> Section 10 of the Act (High hedge notice: withdrawal and variation)

<sup>59</sup> Section 8(4) of the Act

<sup>60</sup> Section 8(6) of the Act

<sup>61</sup> Section 8(2) of the Act

<sup>62</sup> Section 8(3) of the Act

<sup>63</sup> Section 6(5)(b) of the Act

<sup>64</sup> Section 6(6)(a) of the Act

<sup>65</sup> Section 6(6)(b) of the Act

<sup>66</sup> Section 12(2)(a) of the Act

- inform the recipient that it is an offence to obstruct a person authorised to take such enforcement action<sup>69</sup>.

Most high hedge notices will contain both 'initial action' and 'preventative action'; the on-going maintenance requirements will be included so there should be no need for an applicant to make repeated applications about the same hedge.

### ***Description of the hedge***

The hedge should be described in sufficient detail so that there is no doubt what the notice relates to. The position of the hedge within the property should be specified and, wherever possible, should be shown on a map or plan attached to the notice. A general description of species in the hedge should also be included to help differentiate if a replacement hedge has been planted.

### ***Date on which the notice will take effect***

This marks the start of the compliance period, during which 'initial action' must be taken. It must be set at least 28 days after the date on which the high hedge notice is issued by the local authority. This allows time for the hedge owner to make the necessary arrangements to undertake the action required.

### ***Initial action***

The initial action covers the one-off works that must be carried out to the hedge within the specified compliance period to alleviate the problems. These can include:

- action to remedy the adverse effect,
- action to prevent the problems recurring,
- a mixture of both.

These actions allow local authorities to specify that a hedge must be cut below what is necessary to remedy its adverse effect if this will help to prevent the problems recurring. The Act does not prevent the complete removal of the high hedge if that is considered to be the most appropriate remedy to deal with the adverse effect.

Where the local authority has not decided that removal is necessary, but the action required to address the adverse effect of the hedge results in an unsightly feature, the owner may consider removing the hedge themselves. In these cases, the local authority should remind the hedge owner to ensure compliance with any other legislation or conservation area requirement.

### ***Compliance period***

The high hedge notice must set a time limit for carrying out the 'initial action'. This is known as the compliance period and starts from the date when the notice takes

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<sup>67</sup> Section 22 of the Act (Power to take action)

<sup>68</sup> Section 25 of the Act (Recovery of expenses from owner of land)

<sup>69</sup> Section 24 of the Act (Local authority action: offence)

effect. Even though there may be pressure from the applicant for early action, the compliance period needs to reflect what can reasonably be achieved bearing in mind other legal requirements.

In setting the compliance period, local authorities should take account of the extent of the work involved and other factors such as whether specialist equipment or professional help will be needed. The compliance period should also take account of any special circumstances that limit when action can occur, such as the need to protect nesting birds.

### ***Preventative action***

'Preventative action' covers continuing works beyond the compliance period to ensure that the hedge does not cause issues in the future. The 'initial action' specified in the notice - the one-off works to the hedge - is likely to provide only short-term relief from its adverse effects and a high hedge notice will normally need to include longer-term action to prevent problems recurring.

### ***Duration of a High Hedge Notice***

The high hedge notice remains in force until it is formally withdrawn. It would have no practical effect, however, if the hedge was removed or there was some other change in circumstances. An example would be if the property affected by the hedge ceased to be used for domestic purposes.

### ***Specifying the action***

Both the 'initial action' and 'preventative action' need to be carefully specified in the high hedge notice so it is clear what must be done to comply. Concentrating on the end result rather than the method to be used may prove to be the most effective way of achieving this. In determining the extent of any works to be specified in the high hedge notice, local authorities may wish to adopt a three stage approach.

#### *Step 1: taking care of the problem*

First, decide what action is necessary to remedy the adverse effect of the height of the hedge on the applicant's reasonable enjoyment of their property ('initial action'). A proportionate response to the application is required in making a decision on the impact on a person's "reasonable enjoyment". This means striking a balance between any harm caused by the hedge and its possible amenity value to the hedge owner and the wider community. The same principles apply when determining what initial action might be appropriate in a particular case.

The local authority should consider what 'initial action' is needed to provide relief for the applicant from the adverse impact found to be caused by the high hedge. This work will depend on the severity of the problems it is causing and whether it is simply a matter of reducing the height of the hedge or whether other remedies would be more effective. It is possible that reducing the height of selected trees forming the hedge, to open up gaps or removing lower branches (known as crown lifting) may be effective. In some cases, an appropriate remedy might include reducing the width of

the hedge as well as its height. Action may need to be taken along the whole length of the hedge, or work to a shorter section may provide the necessary relief. In particular, it might be necessary to require action in relation to only part of a long hedge, where it borders other properties besides that of the applicant.

The local authority will also need to consider whether there are likely to be any side effects from the proposed works on the growth of the hedge, which have the potential to harm the applicant's amenity and so might require additional action. For example, reducing the height of some species might result in them putting on more lateral growth – i.e. bushing out. In addition, the work is likely to have an impact on other parties to the application and the local authority will have to consider the hedge-owner and other residents, especially in relation to the character and amenity of the area. General factors such as the impact of the works on the appearance of the hedge should be considered only insofar as they may be relevant to the particular case. For example, such matters might be material where it is important to preserve the contribution that the hedge makes to the wider amenity of the area or to retain its function as a screen or shelter. Otherwise, they might more appropriately be dealt with through good practice advice. Legal restrictions must also be considered such as conservation areas, tree preservation orders and covenants.

#### *Step 2: allowing for re-growth*

Having established what action is required to remedy the adverse effect of the hedge, a local authority should consider whether any further 'initial action' should be taken to prevent problems recurring, particularly where the hedge comprises fast growing varieties. If appropriate, a local authority may require a hedge to be reduced below 2 metres in height to create a buffer zone or growing margin. Such a margin might allow the hedge to grow between annual (or more frequent) trimming and still not cause significant problems, for example with a fast growing species.

#### *Step 3: on-going maintenance*

The local authority should determine whether long-term maintenance of the hedge is needed in order to stave off future problems ('preventative action'). The management regime imposed will depend on the nature of the initial action. However, it will most often take the form of continuing maintenance of the hedge at its new height or shape, by regular trimming.

### **Safety and good arboricultural practice**

Local authorities should seek to encourage safe working on and around trees and should consider attaching to high hedge notices practical advice on how the hedge might be cut safely and maintained so that it remains attractive. Even with what might be considered as smaller trees, there are risks of crushing or falling injuries, particularly where work at height or with chainsaws is involved. The Arboriculture and Forestry Advisory Group set up by the Health and Safety Commission has published a number of tree safety guides<sup>70</sup>. If specialist equipment or professional help is likely to be needed, local authorities may wish to refer to (and refer hedge

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<sup>70</sup> <http://www.hse.gov.uk/pubns/forindex.htm>

owners to) the Arboricultural Association's list of approved contractors<sup>71</sup>. Local authorities should also have regard to sources of expert advice, such as BS 3998: 'Recommendations for Tree Work'<sup>72</sup>. Any safety or other advice provided by the local authority, beyond the 'initial' and 'preventative' action required by the notice would be for information only and not enforceable by the local authority.

### **Varying or withdrawing a high hedge notice**

The Act enables a local authority to vary or withdraw a high hedge notice<sup>73</sup>. Before varying or withdrawing a notice, the authority must have regard to the impact of any proposed variation or withdrawal on the reasonable enjoyment of the property adversely affected by the high hedge. It must also have regard to all the circumstances of the case, including any cultural or historical significance of the high hedge and its effect on the amenity of the area.

Depending on the circumstances of the case, a local authority might also need to seek arboricultural, horticultural, ecological, landscape or conservation advice or consult specialist bodies before deciding to vary or withdraw a high hedge notice.

Where it decides to vary or withdraw a high hedge notice, a local authority must notify every owner and occupier of both the domestic property affected by the high hedge and the land where the high hedge is located, inform them of the reasons for the decision and their right to appeal, and provide them with a copy of any varied high hedge notice.

A party can approach a local authority at any time outlining a change in circumstances and request that the local authority consider varying or withdrawing a high hedge notice. In some cases, varying an existing high hedge notice may be more appropriate than requiring a fresh application.

#### *Change in Circumstances*

Over time, circumstances might change to the extent that keeping to the requirements of the high hedge notice adversely affects the reasonable enjoyment of the property of the applicant or that of the owner or occupier of the land where the hedge is situated. Development on either the affected property or the land where the hedge is situated which means that the hedge is no longer an adequate screen or does not sufficiently safeguard privacy may be considered such change. A further example of possible change would be change of use or increased activity on either the affected property or the land where the hedge is situated which the hedge does not adequately screen out.

#### *Correcting errors*

If the local authority makes a mistake in the notice, it may vary it and issue a revised notice once the error comes to its attention. A revised notice will require consequential changes to the operative date and, possibly, the compliance period.

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<sup>71</sup> [www.trees.org.uk](http://www.trees.org.uk)

<sup>72</sup> <http://www.trees.org.uk/aa/news/BS3998-2010-What-s-new-28.html>

<sup>73</sup> Section 10 of the Act (High hedge notice: withdrawal and variation)

### *Main Parties Agree a Different Solution*

It is possible that the applicant and the owner or occupier of the land where the hedge is situated - or their successors - might agree different one-off works ('initial action') or different longer-term maintenance ('preventative action') to that specified in the high hedge notice. If these works go further than the requirements of the notice (e.g. keeping the hedge trimmed to a lower height than that specified), there is no need to formalise the arrangement. It is open, at any time, to the owner or occupier of the site with the hedge to do more than the notice requires unless other legal restrictions apply.

If the agreed solution is less exacting than the high hedge notice requires (e.g. allowing a higher screen), then the hedge owner would need to apply to the local authority for the notice to be varied to reflect this agreement. The aim of the Act is to resolve high hedge disputes and encourage communication and negotiation between the people concerned and a local authority should facilitate implementation of an agreed solution where that is compatible with their other obligations and the circumstances of the case.

### *Case outside the scope of the Act*

Changes in the particular circumstances of a case might arise with the effect of taking it outside the scope of the Act, with the result that the high hedge notice can no longer be enforced. For example, if the affected property is no longer classed as domestic.

## 5: COMPLYING WITH A HIGH HEDGE NOTICE

High hedge notices should include a clear statement that the owner or occupier of the land where the hedge is situated is expected to carry out the works specified in the high hedge notice. Whether it is the owner or occupier will depend on who is legally responsible for managing the hedge according to the contractual arrangements between them. The letter informing the main parties of the decision on the application might also explain that the notice does not give the applicant any rights to step in and take the necessary action themselves

### What Happens if a High Hedge Notice is not Complied With?

#### *Informal action*

A local authority might wish to encourage the hedge owner or occupier to comply with the high hedge notice by sending them a letter formally warning them of the consequences of their continuing failure to act. Where investigations show that the owner or occupier was unaware of the existence of a high hedge notice, the local authority should provide them with a copy and should normally give them more time to comply.

#### *Local authority enforcement*

The high hedge notice should make clear that the local authority can – if required - enter the land to carry out any works required<sup>74</sup> and recover any expenses reasonably incurred<sup>75</sup>, if the owner or occupier of the land fails to comply with its requirements. Unlike the hedge owner, the local authority cannot exceed the requirements set out in the high hedge notice.

It is for local authorities to consider whether to use these powers to carry out the works specified in the high hedge notice and, if so, when to employ them. There is no requirement or obligation on local authorities to intervene. As a result, there should not be a general expectation that local authorities will step in immediately after a breach of a high hedge notice occurs.

Where the local authority decides to intervene, its action should be planned, organised, and implemented with the utmost care. The local authority may take onto the land such persons, materials, and equipment as required as well as doing anything else reasonably required to fulfil the purpose for which entry is required. Among the practical matters that local authorities would need to consider when preparing to intervene are:

- what exactly needs to be done in order to enforce the requirements of the high hedge notice;
- what equipment will be needed;
- the physical characteristics and constraints of the site;

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<sup>74</sup> Section 22 of the Act (Power to take action)

<sup>75</sup> Section 25 of the Act (Recovery of expenses from owner of land)



- the risks to operatives carrying out the work and how to ensure compliance with relevant health and safety regulations;
- how long the work is likely to take and what is the best time of day to do it; and
- who has the necessary skills - the local authority's own staff or a private contractor.

### ***Entry to land***

A local authority is required to give 14 days' notice<sup>76</sup> of its intention to go in and do the necessary work. The Act empowers entry to a residence only where there is no other practicable means of access to the high hedge<sup>77</sup>. Besides giving prior notice of their intentions, officers exercising these powers must, if asked, produce evidence of their authority to enter the land in question<sup>78</sup>. Where the land is unoccupied, they must leave it as effectively secured as they found it<sup>79</sup>.

### ***Criminal Offence***

It is good practice for a local authority to warn those concerned that they could face criminal prosecution if they attempt to obstruct officers in carrying out their duties.

Anyone who wilfully obstructs an officer, or other person authorised by the local authority, from entering the site in question and taking the necessary action is guilty of an offence punishable on summary conviction by a fine not exceeding level 3 on the standard scale<sup>80</sup> (currently up to £1,000)<sup>81</sup>.

### ***Warrants authorising entry***

Should entry to the land on which the high hedge is situated be refused, or where such refusal is reasonably expected by the local authority, or where the land is unoccupied, the local authority may apply to the court for a warrant<sup>82</sup> authorising entry to the land. Warrants may authorise the use of reasonable force, if necessary, to enter the land and authorise entry to buildings, which may include the owner or occupiers house, if there is no other reasonable way to access the high hedge. If there are concerns that a breach of the peace may occur, the local authority should consider whether the cooperation of the local police should be sought.

### ***Recovery of enforcement expenses***

The Act provides that a local authority can recover from the hedge owner any expenses reasonably incurred in enforcing a high hedge notice, including administrative expenses and interest<sup>83</sup>.

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<sup>76</sup> Section 22(2) of the Act

<sup>77</sup> Section 22(3) of the Act

<sup>78</sup> Section 22(4) of the Act

<sup>79</sup> Section 22(5) of the Act.

<sup>80</sup> Section 24 of the Act (Local authority action: offence)

<sup>81</sup> <http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/17305/8036/8043>

<sup>82</sup> Section 23 of the Act (Warrant authorising entry by local authority)

<sup>83</sup> Section 25 of the Act (Recovery of expenses from owner of land)

### ***Notice of liability for expenses***

To ensure recovery of expenses the local authority can register a notice of liability for expenses with Registers of Scotland. By registering the notice, local authorities notify prospective owners of the property of the outstanding debt and thus ensure that the debt is settled on sale of the property.

If a notice for liability of expenses<sup>84</sup> is registered by the local authority in the Land Register or General Register for Sasines at least 14 days before a new owner acquires the right to the land, the new owner will be liable for expenses owed. If the debt is not settled the new owner will be responsible for paying the expense<sup>85</sup> but will have the right to recover the sum from the original owner<sup>86</sup>. When the local authority recovers the expenses it is due, it should register a notice of discharge with Registers of Scotland<sup>87</sup>.

### **Enforcement procedures**

It is for each local authority to determine its policy and approach to enforcing high hedge notices. Most enforcement activity is likely to be reactive, mainly responding to neighbours' complaints of alleged failure to comply with the requirements of a high hedge notice. Local authorities should consider establishing a set of priorities to help manage cases effectively. The degree of harm caused by the alleged failure might be one criterion that could be used. For example, failing to carry out the initial one-off works, necessary to remedy the adverse effect of the hedge, within the time allowed might be considered more serious than allowing the hedge to grow just above the specified height between annual trims.

The general steps to be taken in evaluating and determining enforcement action should be:

- acknowledge the complaint of the alleged failure to comply with the requirements of a high hedge notice;
- investigate the current facts and the case history;
- prepare a situation report including any legal advice on issues raised by the investigation;
- submit to the relevant decision-maker within the local authority a considered recommendation on the enforcement action to be taken;
- record and implement this decision;
- report the outcome to the person who brought the matter to the local authority's attention;
- monitor the practical effect of implementing the decision; and
- review the need for possible further enforcement action.

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<sup>84</sup> Section 26 of the Act (Notice of liability for expense of local authority action)

<sup>85</sup> Section 27 of the Act (Recovery of expenses from new owner of land)

<sup>86</sup> Section 28 of the Act (Continuing liability of former owner)

<sup>87</sup> Section 29 of the Act (Notice of discharge)

## ***Documenting the case***

Throughout the enforcement process it is essential to maintain a complete, accurate, and up to date record of all investigations carried out and an assessment of the results. This record is important even in those cases where the initial decision is not to take formal enforcement action. If it is necessary to return to the case in the future, officers dealing with the case will be able quickly to establish the relevant facts and history. The case record should contain the following information:

- the alleged contravention of a high hedge notice, as notified to the local authority;
- the date of this first notification;
- the identity of the person making the claim;
- the address of the land where the hedge is situated;
- the identity of the owner and any separate occupier of the land in question;
- brief description of the hedge, including any relevant photographs;
- the alleged contravention, as established by the local authority's officers following initial investigations;
- summary of the factual evidence;
- summary of the case history;
- summary of recommendations on enforcement action; and
- details of implementation of the local authority's decision.

The decision of the local authority will vary according to the circumstances but might include:

- date that the owner and occupier of the land where the hedge is situated are notified of the local authority's decision;
- summary of required steps;
- time limit set for compliance;
- result of the action taken by the local authority;
- exercise of default powers;
- recovery of costs; and
- summary of any subsequent monitoring of the situation.

## 6: APPEALS

### Right of appeal

An appeal regarding a high hedge can be made against a decision or high hedge notice issued by a local authority in response to a formal application about that high hedge.

The Act provides that appeals may be made to Scottish Ministers<sup>88</sup> and that appeals may be determined by persons appointed by Scottish Ministers<sup>89</sup>. The Government have decided that the administration of appeals will be dealt with by the Directorate for Planning and Environmental Appeals (DPEA). In practice, it is expected that appeals will be decided by a reporter from DPEA.

A person may appeal if they made the application about the high hedge to the council in the first place (known as the 'high hedge neighbour' in the appeal process) or if they are the owner or occupier of the land where the high hedge is located (known as the high hedge owner/occupier in the appeal process). Where property has changed hands, successive owners to these people may also appeal.

There is no right of appeal against a local authority's decision to dismiss an application for a high hedge notice, either because reasonable steps have not been taken to resolve matters or because the application is frivolous or vexatious.

### Types of appeal

#### 1. *Against a high hedge notice*

Where a local authority has issued a high hedge notice requiring the size of a high hedge to be reduced, someone can appeal if<sup>90</sup>:

- they are the owner or occupier of the domestic property identified in the high hedge notice (the 'high hedge neighbour'), and
  - think the required works do not go far enough.
- they are the owner or occupier of the land where the hedge is located, as identified in the notice (the 'high hedge owner/occupier'), and:
  - think that no notice should have been issued, or
  - think that the required works go too far, or
  - think that the council hasn't given them enough time to complete the required works.

*A high hedge notice is suspended while an appeal is being determined<sup>91</sup>.*

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<sup>88</sup> Section 12 of the Act (Appeals)

<sup>89</sup> Section 15 of the Act (Person appointed to determine appeal)

<sup>90</sup> Section 12(2) of the Act

<sup>91</sup> Section 13 of the Act (Effect of appeal)

## 2. *If no high hedge notice issued*

Where a council decides not to issue a high hedge notice, someone can appeal if<sup>92</sup>:

- they applied to the local authority for a notice regarding the high hedge (the 'high hedge neighbour'), and
  - think the local authority is wrong to decide that the hedge is not adversely affecting them, or
  - think that the local authority, having agreed that the hedge does have an adverse effect, should have issued a high hedge notice to require action to be taken in respect of the hedge.

## 3. *If a high hedge notice is withdrawn*

Where a local authority has decided to withdraw a high hedge notice, someone can appeal if:

- they are the owner or occupier of the domestic property identified in the high hedge notice (the 'high hedge neighbour'), and
  - did not agree to the notice being withdrawn, and
  - the council has not issued a new high hedge notice.

*The local authority's decision to withdraw a high hedge notice is suspended while an appeal is being determined, as is the original high hedge notice*<sup>93</sup>.

## 4. *If a high hedge notice is varied*

Where a local authority varies a high hedge notice by setting aside, adding to or changing some of its requirements, someone can appeal if:

- they are the owner or occupier of the domestic property identified in the high hedge notice (the 'high hedge neighbour'), and
  - did not agree to the changes to the notice, or
  - think that the works to the hedge as required in the revised notice do not go far enough, or
  - have some other substantive complaint about the high hedge notice.
- they are the owner or occupier of the land where the hedge is located, as identified in the notice (the 'high hedge owner/occupier'), and:
  - did not agree to the changes to the notice, and
  - think the works required to the hedge, after they have been revised, go too far, or
  - have some other substantive complaint about the high hedge notice.

*The local authority's decision to vary a high hedge notice is suspended while an appeal is being determined, as is the original high hedge notice*<sup>94</sup>.

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<sup>92</sup> Section 12(1) of the Act

<sup>93</sup> Section 13(3) of the Act

<sup>94</sup> Section 13(3) of the Act

## How to appeal

The appeal must be made by completing a high hedges appeal form, obtainable from the DPEA website<sup>95</sup>, by phoning 01324 696400 or by writing to DPEA, Unit 4, Callendar Business Park, Falkirk, FK1 1XR. The appeal form must be accompanied by a copy of the council's decision and, where they have issued one, a copy of the high hedge notice.

The appeal must be made within 28 days beginning with the date when the local authority notified parties of its decision<sup>96</sup>.

Those making an appeal must give a full explanation of the reasons why they disagree with the local authority's decision. It is not sufficient to state that they do not agree with or accept the decision. The local authority's notification will contain the reasons for their decision. Someone considering whether or not to appeal may want to ask the local authority to clarify the reasoning behind their decision before deciding whether to proceed.

The appeal form and the explanation it contains will be treated as the statement of case in the appeal and it may not be possible to add to the explanation later. However, the reporter dealing with the appeal may require further information.

Those making an appeal can withdraw it at any time prior to the issue of the decision on the appeal by advising DPEA in writing. If an appeal is withdrawn, a suspended high hedge notice will take effect from the date of withdrawal<sup>97</sup>.

There is no charge for making an appeal, but those making one will have to bear their own costs (including those of any professional advisor, if they decide to employ one to help with their appeal).

## Parties involved in an appeal

The following people or bodies will be involved in the appeal procedure, whether or not they made the appeal. They are known as "the parties" and are:

- the local authority which made the decision about the high hedge;
- the person who complained to the council about the high hedge or the person now living in that property if the occupier has changed (the 'high hedge neighbour'); and
- the owner and/or occupier of the land where the hedge is situated (the 'high hedge owner/occupier').

All the parties play an equal part in the appeal and see all relevant papers. The reporter dealing with the appeal cannot consider any document unless it has been seen by everyone else involved in the appeal. Other people who may have made comments to the local authority about the case, such as other neighbours or amenity

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<sup>95</sup> <http://www.dpea.scotland.gov.uk/>

<sup>96</sup> Section 12(4) of the Act

<sup>97</sup> Section 13(1) of the Act

bodies, have no direct role in the appeal. However, the local authority will forward these comments to DPEA so that the reporter can take them into account when making the appeal decision.

It is possible for more than one appeal to be made against the same decision. For example, the 'high hedge neighbour' might appeal against a high hedge notice because they think it doesn't go far enough. On the other hand, the 'high hedge owner/occupier' may appeal against the same notice because they think the hedge should not be reduced at all.

It is important for the 'high hedge owner/occupier' and the 'high hedge neighbour' to communicate after the appeal has been lodged. This is because they may reach agreement on an alternative solution to that specified in the high hedge notice served by the local authority. If they do so, they may submit a joint application to the council to waive or relax the requirements of the notice and withdraw the appeal.

### **What happens to an appeal**

When an appeal is received, DPEA will copy the appeal form and any supporting documents to the council against whose decision the appeal is being made.

The vast majority of appeals will be dealt with through a written procedure. When notifying the local authority that an appeal has been received, DPEA will require the council to submit all relevant papers from their case file. These include copies of the original complaint or request to the council, all the information and comments they received on it, any reports prepared by officers dealing with the matter and the council's decision letter.

DPEA will also notify the other party to the appeal (the 'high hedge owner/occupier' if the appeal is made by the 'high hedge neighbour' or the 'high hedge neighbour' if the appeal is made by the 'high hedge owner/occupier'). The local authority and the other party may make comments on the appeal within 21 days of receiving notice of it. If they do so, the person making the appeal will be given another 14 days to respond.

Exceptionally, the reporter dealing with the appeal may ask for further information. This will usually be by asking for more written material. Very occasionally the reporter may decide to hold a hearing, which is a structured discussion, led by the reporter, about the issues in the appeal. Very rarely, the reporter may decide that an inquiry session is necessary, where evidence is led and tested by cross examination by opposing parties. In these circumstances the reporter will follow the procedures set out in the Town and Country Planning (Appeals) (Scotland) Regulations 2013 (see guidance note 8<sup>98</sup>).

The reporter dealing with the appeal will usually visit the site of the hedge and the property affected by it. During a site visit the reporter will usually be accompanied by the appeal parties (a council representative, the 'high hedge owner/occupier' and the

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<sup>98</sup><http://www.scotland.gov.uk/Topics/Built-Environment/planning/Appeals/howwework/guidanceforreporters/reportersguidancenote8>

'high hedge neighbour'). DPEA expects parties to co-operate to ensure that the reporter is able to make a full inspection of the site so that the submissions made by all parties can be taken into account fully. Parties attending the site visit are not able to discuss the main issues in the appeal with the reporter, but the reporter may ask for clarification of factual information. The Act provides a right of entry for those determining an appeal under the Act<sup>99</sup> and empowers them to take onto the land such other persons and equipment as may be reasonably required<sup>100</sup>.

DPEA will give at least 14 days' notice to the local authority, the 'high hedge owner/occupier' and the 'high hedge neighbour' of an accompanied site visit, inviting them to attend<sup>101</sup>.

In reaching the appeal decision, the reporter will weigh up all the information gathered from the paperwork and at the site visit. In doing so, s/he will have regard to the advice on dealing with applications in this guidance. The decision notice will give the decision on the appeal and the reasons for it. DPEA aims to issue a decision notice on an appeal within 12 weeks of its receipt, although longer will be required if further procedures are necessary.

The reporter may allow or dismiss an appeal, either in total or in part. Depending on the circumstances of the appeal, the end result could be that<sup>102</sup>:

- the high hedge notice is quashed;
- the works to the hedge set out in the high hedge notice are changed in some way;
- a high hedge notice is issued (this can happen only in cases where the council decided not to issue a notice in the first place); or
- the works to the hedge set out in the original high hedge notice stay as they are.

Whatever the appeal decision, the reporter might amend the date when the high hedge notice comes into force. The time allowed for carrying out the works to the hedge set out in the notice would start again from this date.

DPEA will notify the local authority, the high hedge owner/occupier and the high hedge neighbour of the reporter's decision as soon as possible after it is made. Decisions will also be posted on the DPEA website.

If the reporter revises a high hedge notice or issues a new one, the local authority is responsible for making sure that the owner or occupier of the land where the hedge is located complies with the terms of the notice.

It is envisaged that the appeal decision will bring closure to the matter. There is no right of appeal to the Court of Session against a reporter's decision, although parties may seek a judicial review on a point of law. Legal advice on the procedures

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<sup>99</sup> Section 18(2) of the Act

<sup>100</sup> Section 19 of the Act (Supplementary powers)

<sup>101</sup> Section 19(2) of the Act

<sup>102</sup> Section 14 of the Act (Determination of appeal)



involved and the likely costs, particularly if unsuccessful, should be obtained when considering a judicial review.

## **Data protection**

The Government is committed to an open, transparent and accessible process for reaching decisions on high hedge and other appeals. The information submitted to Scottish Ministers in the vast majority of cases is published to the internet. DPEA's case file publication protocol<sup>103</sup> gives more information on the publication policies for particular case types. In general it means that DPEA will publish forms, correspondence, any associated documentation (including maps and drawings) and any correspondence that was previously submitted to the local authority. This includes the content of any letters of objection or support received in relation to the case.

Details of all DPEA casework can be viewed on the DPEA website. DPEA aims to comply with the Data Protection Act 1998 and removes personal e-mail addresses, personal telephone numbers and personal signatures before publication to the internet. Most documents are removed from the internet 12 weeks after the decision is made.

DPEA tries to ensure that anything that is abusive, indecent, unlawful or defamatory is not displayed. However, individuals must take personal responsibility for the comments that they make and submit.

If anyone wants to raise an issue or complain about the handling of their personal data, request access to their personal data or to raise any other issue about DPEA they can contact DPEA<sup>104</sup>.

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<sup>103</sup> <http://www.scotland.gov.uk/Topics/Built-Environment/planning/Appeals/PublicationProtocol>

<sup>104</sup> <http://www.scotland.gov.uk/Topics/Built-Environment/planning/Appeals/ourrole/contactus>