

Planning Committee

10.00am Wednesday 26 March 2014

High Hedges (Scotland) Act 2013 – Implementation of Provisions

Item number	3.1
Report number	
Wards	All

Links

Coalition pledges	None applicable
Council outcomes	CO19
Single Outcome Agreement	SO4

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Executive summary

High Hedges (Scotland) Act 2013 – Implementation of Provisions

Summary

This Act received royal assent on 2 May 2013 and it has now been confirmed that the provisions of the legislation will come into effect on 1 April 2014. Guidance for local authorities on the implementation of the provisions has been released. The provision and management of the high hedges service will be carried out by the Planning and Building Standards service area. Current delegated powers will need to be amended to enable an efficient service to be provided. Documentation and guidance for customers is being prepared and appropriate alterations to the council's web pages will be put in place prior to 1 April.

Recommendations

It is recommended that the Planning Committee:

- 1) notes that the control of high hedges will be located within the Planning and Building Standards service area;
- 2) agrees that appropriate changes to committee remits and the scheme of delegation are sought by way of a formal report to the City of Edinburgh Council at the earliest opportunity;
- 3) notes that appropriate documentation and guidance for the general public will be made available on the Council's web-site prior to 1 April 2014;
- 4) agrees that the scale of fees for a submission under this legislation will be as set out in this report at paragraphs 2.18 to 2.24;
- 5) refers this report to the Transport & Environment Committee for their information; and
- 6) otherwise notes this report.

Measures of success

Monitoring of the delivery of this service area will be contained within the wider performance framework for the Planning service and will reflect any target timescales which may be set by the Scottish Government.

Financial impact

The legislation makes provision for the payment of a fee to cover the local authority's costs and for that authority to recover the costs of any direct action to achieve compliance with a notice. The impact of the legislation should therefore be cost neutral.

Equalities impact

There is no relationship between the matters described in this report and the public sector general equality duty. There is no direct equalities impact arising from this report.

Sustainability impact

The impacts of this report in relation to the three elements of the Climate Change (Scotland) Act 2009 Public Bodies Duties have been considered. Relevant Council sustainable development policies have been taken into account. This implementation of the forthcoming legislation will have no adverse impacts on carbon emissions, the city's resilience to climate change impacts, achieving a sustainable Edinburgh or in respect of social justice, economic wellbeing or good environmental stewardship.

Consultation and engagement

Consultation and community engagement have not been carried out in respect of this report. Such engagement was carried out by the Scottish Government during the process of developing the legislation. In part, the legislation was promulgated in response to community concerns over this issue.

Background reading / external references

Background information can be found on the Scottish Government web-site at the following link:

<http://www.scotland.gov.uk/Topics/Justice/public-safety/17141/highhedges>

This part of their web-site contains links to other background documentation on the issue, including the consultations carried out.

High Hedges (Scotland) Act 2013 – Implementation of Provisions

1. Background

- 1.1 The High Hedges (Scotland) Act 2013 received Royal Assent on 2 May 2013. It provides a solution to the problem of high hedges which interfere with the reasonable enjoyment of domestic property. A high hedge is defined by the Act as one which is wholly or mainly formed by a row of two or more trees or shrubs which is over two metres in height and forms a barrier to light.
- 1.2 The Act aims to provide an effective means of resolving disputes over the effects of a high hedge. Neighbours must attempt to resolve the issue themselves first. Recourse to the council is a last resort and where the neighbours have not been able to resolve the issue amicably. The Act gives home owners and occupiers a right to apply, with payment of a set fee, to a local authority for a high hedge notice. Where it is considered a high hedge is affecting the enjoyment of their property, the Act empowers local authorities to make and enforce decisions in relation to high hedges. It enables a local authority to reject an application if it concludes the applicant has not taken all reasonable steps to resolve the matter before applying, or where the application is frivolous or vexatious. There is no immunity from action with the passage of time as there is in planning enforcement action.
- 1.3 Where a council, having taken all the circumstances into account, finds that a hedge is having an adverse effect it has to decide what, if any, action should be taken. If the local authority considers that action should be taken, it may issue a high hedge notice. A high hedge notice may require a hedge owner to take action to remedy the problem and prevent it recurring.
- 1.4 The Act makes provision for both the applicant and the hedge owner to appeal against a decision to issue a high hedge notice. It provides that an appeal may result in a high hedge notice being confirmed, varied or quashed. An applicant can also appeal against a decision of the local authority not to issue a high hedge notice.
- 1.5 The Act also provides local authorities with the power to undertake the work specified in a high hedge notice if the notice is not complied with by the hedge owner within the time specified. Local authorities can then recover the costs of any such enforcement from the hedge-owner.

2. Main report

- 2.1 Following on from the passing of the Act, the Scottish Government set up a working group to assist in the preparation of guidance for local authorities in the implementation of the provisions of the act. The City of Edinburgh Council was represented on this working group by officers from the Planning and Building Standards service.

- 2.2 By the autumn of last year, the guidance was at an advanced stage, but some issues had arisen and that guidance was not finalised until recently. This has resulted in there being little time for preparations to be made for the implementation date of 1 April 2014.
- 2.3 One of the issues which arose and contributed to the delay centres on the BRE guidance for assessing whether or not the high hedge in question creates a barrier to light. This guidance was designed to deal with situations where the hedge was comprised of coniferous species. However, the guidance in Scotland differs from that in England and Wales in that the high hedge may also be comprised of deciduous species which drop their leaves in winter. As a consequence, the calculations relating to the impact on light to neighbouring properties is different and the advice for Scottish local authorities has been adjusted to deal with this issue.
- 2.4 However, with the passing of the Act, there was an increase in the number of queries from members of the public about the issue and so in September 2013, an interim statement was drafted and which has been used as the basis for a response to queries received by the various offices of the council. This statement is set out below.
- 2.5 *"The High Hedges (Scotland) Act 2013 has been passed by the Scottish Parliament and received Royal Assent on 2 May 2013. The act is designed to provide a solution to the problem of high hedges which interfere with the reasonable enjoyment of domestic property. However, the Act has not yet taken effect. This means that, at the present moment, the City of Edinburgh Council cannot use these new powers to take action in respect of high hedges.*
- 2.6 *The latest information from the Scottish Government on this matter is that the act will not take effect until the spring of next year, probably on 1 April 2014. At the moment, the government is drawing up guidance for local authorities on how the act will operate. Once this information is released by the Scottish Government, this authority will be able to advise customers on how the issue will be handled by this authority."*
- 2.7 A decision has been taken to locate the delivery of the high hedges service within Services for Communities. This decision has been taken having regard to the advice from the Scottish Government and which is set out in the following paragraphs.
- 2.8 *"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.*
- 2.9 *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.”

- 2.10 In this regard, it should be noted that if someone believes that the local authority did not make the decision in the right way, they can refer to the local authority's own complaints procedure before taking a complaint forward. If a person is still not happy with the response, they can take their complaint to the Scottish Public Services Ombudsman. In the event that a person is still not satisfied they may then apply to the Court of Session to challenge the lawfulness of the decision by judicial review.”
- 2.11 However, the implications of the advice are that the high hedges service could not be wholly managed by the same people responsible for the maintenance of council green spaces because of the potential conflict of interest which would arise. On the basis that having two regimes, one for high hedges in the council's ownership and one for the remainder, would be inefficient and confusing for customers who would have to ascertain first of all who owned the hedge, it has been resolved that the service be located within the Planning and Buildings Standards service area where there are already natural heritage and arboricultural officers who deal with trees which are afforded statutory protection and related matters.
- 2.12 However, if and when a case reached the stage where the local authority was obliged to take direct action to ensure that the works specified in a notice are carried out, such work could be done by appropriately qualified council officers within the grounds maintenance service and the costs of the work recovered as noted in the introduction.

Scheme of Delegation

- 2.13 An important consideration is the extent to which this activity should be the subject of delegated powers. The draft guidance issued earlier offered the following comments, which are not contained in the final version of the guidance, which simply leaves it authorities to decide on their own procedures as long as these are consistent with the guidance.
- 2.14 *“Responsibility for all functions relating to high hedges (other than appeals) rests with the local authority. Most applications are likely to deal with private matters that are of concern only to the people involved and so local authorities might delegate the decision-making to specific officers. A committee or subcommittee of the local authority might wish to decide those cases that raise wider neighbourhood issues and are locally sensitive. These decisions will depend on the policies of individual local authorities.”*
- 2.15 The Planning and Building Standards service already has significant delegated powers and the addition of powers to determine high hedges issues, with the proviso that controversial or otherwise significant cases would be dealt with by the Development Management Sub-Committee, would be consistent with those existing powers.
- 2.16 Advice from Legal, Risk and Compliance, Corporate Governance, recommends that specific provision for the exercise of such powers in relation to high hedges should be made within the scheme of delegation rather than relying on the general powers afforded to the Director. Such an approach eliminates the possibility of ambiguity and reduces the potential for legal challenges.
- 2.17 However, at a recent workshop organised by the Improvement Service it has become clear that a number of authorities have amended their committee remits

and schemes of delegation to make specific reference to this issue. In most cases authorities intend to deal with the issue in their planning services, but the legislation is not planning legislation and so is generally not covered by existing remits etc. Urgent consideration needs to be given to this issue by this authority and it is recommended that an early report to the City of Edinburgh Council is made. In this regard, it should be noted that although the legislation takes effect from 1 April, 2014, the procedures set out in the legislation include a 28 day notification period so that decisions are unlikely to require to be made until later in May, after the next meeting of the City of Edinburgh Council.

Fees

- 2.18 As far as fees for such submissions are concerned, the guidance sets out the following:
- 2.19 *“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 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 from considering the application. 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.”

- 2.20 At the Improvement Service workshop the results of a survey of authorities which had already set their fees indicated a range from £192 (the same as a householder application fee) to £560. The average fee was £398. In England and Wales, the average fee is in the range £350-400. A number of other authorities propose to use the standard planning application fee for a change of use application of £392 but it is not clear what the justification for this would be.
- 2.21 Against this background, Planning has carried out an assessment of the hours likely to be taken in average cases, remembering that all parties in such cases have a right of appeal – both the applicants and the hedge owners. In those circumstances, it is recommended that the basic fee is £300. This would cover the average basic cost of administering the system on the basis of the likely officer time taken to record, visit, investigate, negotiate and report on a case and

deal with any subsequent appeal. Costs in respect of any later enforcement action can be recovered separately.

- 2.22 However, it is appropriate that where multiple applicants apply in respect of the same hedge, that only one fee should be charged as long as a joint submission is made. In the case of planning applications, there is no fee for persons with a disability and it is considered that this would be appropriate also in respect of a high hedges submission where the hedge in question is seriously affecting the disabled person's enjoyment of their home and garden. It is also suggested that the Head of Service has discretion to waive any fee in appropriate circumstances where there is evidence that significant hardship would be involved. The Scottish Government guidance allows authorities to waive fees where they consider that it would be appropriate to do so – reference is made to pensioners and people on benefits etc.
- 2.23 In the case of situations where there are multiple owners, the matter will be more complex and a higher fee is justified. This would be £400 and would apply where there were more than 6 owners involved. Furthermore, where the proper consideration of the submission requires, for example, some form of wildlife assessment, the cost of such should be met by the applicant.
- 2.24 As far as refunds are concerned, it is considered that there would be very few situations where such a course of action would be appropriate. However, in those cases where the neighbour/hedge owner carries out the work within a short period of an application being made (14 days are suggested) such that no further action is necessary, the fee should be refunded to the applicant(s). In addition, it is suggested that where the local authority is the owner of the hedge and a resolution cannot be achieved and where after a formal application has been made, it is found that action is justified, the fee should be refunded to the applicant. Otherwise, where the authority dismisses the application either because the applicant has not made reasonable attempts to resolve the situation or because the application is frivolous or vexatious, the fee would also be refunded.

Operational Issues

- 2.25 It is difficult to be certain as to the amount of work likely to be involved in processing such applications. A management review of the fee structure, exceptions and refunds etc. will be carried out after 6 months of operation. If any significant difference in costings is identified, the issue will be reported to Committee for consideration.
- 2.26 It is anticipated that the work involved in the delivery of this new service can be contained within the existing staff resource, partly by increasing the working hours of one part-time member of staff. This situation will remain open to review in light of experience. Experience in England and Wales suggests that there is likely to be a surge of applications initially but once the backlog of cases is dealt with, numbers of applications will drop off rapidly thereafter.
- 2.27 It should be noted that the guidance produced by the Scottish Government only contains templates for an application form and a High Hedge notice. Other templates for reports, correspondence, acknowledgement letters and decision notices will require to be drawn up by individual authorities.
- 2.28 In all these matters, the intention of the Scottish Government is that the local authority should act as an impartial and independent adjudicator. Its role is to

consider the evidence from all parties in the dispute and make a balanced judgement, taking into account all relevant factors.

- 2.29 In deciding what information should be published online in respect of such applications, normal data protection guidance would apply. This authority in general publishes as much information as possible in order that its processes and procedures are as open and transparent as possible. Further consideration will be given as to what particular information will be published but the intention would be to include any valid application and the report of handling.

3. Recommendations

It is recommended that the Planning Committee:

- 1) notes that the control of high hedges will be located within the Planning and Building Standards service area;
- 2) agrees that appropriate changes to committee remit and the scheme of delegation are sought by way of a formal report to the City of Edinburgh Council at the earliest opportunity;
- 3) notes that appropriate documentation and guidance for the general public will be made available on the Council's web-site prior to 1 April 2014;
- 4) agrees that the scale of fees for a submission under this legislation will be as set out in this report at paragraphs 2.18 to 2.24;
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Director of Services for Communities

Links

Coalition pledges	None directly applicable
Council outcomes	CO 19 Attractive Places and Well Maintained – Edinburgh remains an attractive city through the development of high quality buildings and places and the delivery of high standards and maintenance of infrastructure and public realm
Single Outcome Agreement	SO4 Edinburgh's communities are safer and have improved physical and social fabric.
Appendices	None